IN THE COURT OF APPEALS OF IOWA

No. 9-667 / 89-724

FILED
FEB 2 2 1990
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KRISTI JEAN KELLEY AND MARK LINDEN KELLEY

Upon the Petition of
KRISTI JEAN KELLEY,

Appellant,

And Concerning
MARK LINDEN KELLEY,

Appellee.

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Appeal from the Iowa District Court for Wapello County, Dan Morrison, Judge.

Appellant appeals a district court ruling dismissing her petition to modify visitation. **AFFIRMED.**

Greg A. Life, Oskaloosa, and Eric J. Palmer, Oskaloosa, for appellant.

Daniel P. Wilson of Drake, Wilson & Jay, Centerville, for appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J.

Kristi Kelley appeals a district court ruling dismissing her petition to modify visitation. We affirm.

The marriage of Kristi Kelley and Mark Kelley was dissolved by decree on September 12, 1983. One child was born of the marriage, Joshua Wayne Kelley, on January 4, 1982. As a result of the decree, Kristi was awarded custody of the parties' son. Mark was awarded visitation of the child on alternating weekends and holidays and from one to two weeks in the summer. Subsequent to this divorce, Kristi married Tim Moore.

On November 13, 1987, Kristi filed a petition for modification of the decree asking that Mark be allowed visitation only under strict supervision or none at all. Kristi claimed that Mark had wrongful sexual contact with the minor child on several occasions and that the child has been harmed and in need of protection. Previously, on October 26, 1987, the juvenile court had dismissed a child in need of assistance action against Mark based on the same allegations.

On January 8, 1988, the district court permitted Mark limited reasonable visitation on the weekends with said visitation to be supervised by someone mutually agreeable to the parties.

On April 14, 1989, the district court entered its ruling on Kristi's petition for modification. The district

court found insufficient evidence of any acts of wrongful sexual contact by Mark. Before visitation was to be restored as set forth in the original decree, however, the district court ordered the parties to participate in counseling. Following this dismissal of her petition to modify, Kristi filed this appeal.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. See also In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa App. 1985).

To justify a modification of visitation rights there must be demonstrated a change of circumstances since the dissolution decree, but such change may be much less extensive than would be necessary to obtain custody. In re Marriage of Lower, 269 N.W.2d 822, 827 (Iowa 1978).

The material change in circumstances alleged by Kristi is that Mark sexually abused their child. Kristi must first prove that Mark has abused his son by a preponderance of the evidence before we can consider whether it is a sufficient change.

The evidence supporting Kristi's contention relates mainly to some "adult" statements made by Joshua. The great weight of the evidence suggests that most of the allegations concerning the alleged abuse are either coincidental or fabricated.

Kristi first attempted to prove her allegations in a CHINA proceeding. The juvenile court found that no sexual abuse occurred. The district court also found that no sexual abuse occurred. The experts at trial testified that some of Joshua's testimony concerning his father appeared to be compelled, most likely by his mother. The expert also stated that the general stress of divorce could cause the bed-wetting and other problems experienced by Joshua. The best evidence Kristi could produce was the statement by a social worker that "probably something did happen." Joshua himself denied that Mark had done most of the things

alleged by Kristi. The only statement by Joshua of anything sexual was that his father had pulled on his privates while his clothes were on and his pants zipped. That this could have been misconstrued by a small child, especially considering what his mother was probably suggesting to him, goes without saying. The record clearly lacks enough evidence to show that Mark committed sexual abuse. We affirm the trial court.

AFFIRMED.