IN THE COURT OF APPEALS OF IOWA

No. 1-218 / 00-1746
Filed May 23, 2001

FILED
MAY 23 2001
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARK ALAN BOX AND CHRISTY KAY BOX

Upon the Petition of
MARK ALAN BOX,
Petitioner-Appellee,

And Concerning
CHRISTY KAY BOX, n/k/a
CHRISTY KAY ZIPPERIAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Christy Box appeals from a district court order denying her modification petition. She contends the district court erred in refusing to modify the parties' dissolution decree by awarding her primary physical care of the parties' children.

AFFIRMED.

Beth Walker of Walker, Knopf & Billingsley, Newton, for appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Frese, Marshalltown, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Appellant Christy Kay Zipperian and Appellee Mark Alan Box were divorced in June of 1993. Their two children, Nathan, born in 1986, and Nichol, born in 1987, were placed in their joint custody. Mark was named the primary care parent. Christy sought to modify the original decree and have primary care of the two children transferred to her. In October of 2000 the district court denied her application, and this appeal follows. Christy challenges the district court's denial of her petition for modification. We affirm.

To change the custodial provision of a dissolution decree Christy 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). She must prove she has the ability to minister more effectively to the children's well being. *In re Marriage of Spears*, 529 N.W.2d 301, 302 (Iowa Ct. App. 1994); *see* also *In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa Ct. App. 1985). The burden to modify a dissolution decree is a heavy burden. *See Frederici*, 338 N.W.2d at 161. Christy must show the ability to offer superior care. *See Spears*, 529 N.W.2d at 302, 303.

Christy was made a joint custodian in the dissolution decree. She consequently is benefited in seeking physical care by the inference she has met the joint custody tests set forth in the case of *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). *See In re Marriage of Leyda*, 355 N.W.2d 862,

864 (Iowa 1984). However, in seeking a change in physical care, she carries a burden similar to that imposed on a parent seeking a change of custody. *Id.*

Christy contends the decree should be modified because the children wish to live with her and that Mark has failed to support her relationship with them. Mark contends the district court should be affirmed. He advances that the children are healthy and happy, that Christy has failed to pay ordered child support, and that she has engaged in manipulative conduct in seeking to influence the children's preference for place of residence.

Primary care was contested at the time the dissolution was granted. Then Christy was living in Montana and Mark in Iowa. Mark continues to live in Iowa and Christy in Montana. At the time of the decree Christy was pregnant with a child that was not Mark's. She currently is in a third marriage and a child of her current husband lives in their home. Mark has remarried and the children live with him and his new wife.

Christy contends Mark was unreasonable in failing to allow her to visit with the children when she made an unplanned trip to Iowa in December of 1999. She also contends that he will not accept her telephone calls.

The district court found as do we that Mark's withholding visitation in December of 1999 has an unfavorable impact on him. *See In re Marriage of Udelhoffen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862; 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991); *In re Marriage of Gratias*, 406 N.W.2d 815, 817-18 (Iowa Ct. App. 1987). However, Christy's visitation with the children

during the summer of 2000 was satisfactory. Furthermore, there is evidence that Christy has been less than reasonable in providing for exchanges of custody.

In the spirit of cooperation a custodial parent generally should be willing to accept telephone calls from the noncustodial parent. Christy has engaged in a course of conduct where she records all telephone calls, and when the children were in her care she directed them to record telephone calls with Mark. These tapes presented at trial show that the children were made a part of the taping. Christy's bears some responsibility for Mark's refusal to accept her telephone calls. We note the district court indicated it too could understand why Christy's taping made Mark reluctant to accept her calls. We consider Christy's past conduct and find, despite her declarations to the contrary, she has failed to show that if the children were in her care she would foster their relationship with Mark.

In support of her petition Christy also relied on testimony from the children that they wanted to live with her. Mark contends this testimony should not be given substantial weight because Christy has sought to manipulate the children in stating a preference to live with her. The district court found, and we agree, that Christy has consistently talked to the children about living with her in Montana since the initial custody decision in 1993. Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994). Both custodial and noncustodial parents have an obligation to support the custodial and visitation orders and not engage the children in their conflicts. *See id.* at 215. The fact that Christy

sought to encourage the children to assist her in obtaining a change of physical care weighs heavily against her claim for modification.

We do consider the children's testimony. A child's preference is given some weight, but it is given less weight in a modification than in an original custodial determination. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873, (Iowa Ct. App. 1998); *see also In re Marriage of Behn*, 416 N.W.2d 100, 101-02 (Iowa Ct. App. 1987).

Having recognized that Christy failed to cooperate with the spirit of the initial dissolution decree and has engaged in an attempt to undermine Mark's custody, we give the children's preference less weight than we would under other circumstances.

We further are disturbed that though Christy was ordered to pay only $150 a month in child support, she has failed to pay any of it. There is no showing she is not able to pay the modest amount ordered. She claims her income is $12,000 a year and her current husband makes $60,000. While her current husband has no obligation to support her children, with his level of income he is able to adequately contribute to the expense of their household. Mark deserves substantial credit for meeting the children's needs without financial help from Christy. While not providing any support to the children while they were in Mark's care, Mark was contacted by the state of Montana in 1996 while the children were having an eight-week visit with their mother. Montana sought from Mark a payment of $4,700 for aid the state apparently gave to Christy.

We find, as did the district court, that the children are healthy and happy. We, like the district court, are concerned that Nathan, fourteen years old at the

time of the hearing, is doing poorly in school. While Christy complains about this fact, nowhere in her brief does she suggest that she has a remedy for correcting this deficiency. If both parents are found to be competent to minister to the children, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa Ct. App. 1992). Both parents can provide for the basic needs of the children. Both parents should be able to support each other in their respective relationships with the children, but in this case that has not happened. There is no evidence that Christy can supply a superior home for these children. The question is not which home is better, but whether Christy has demonstrated she can offer the children superior care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). While cooperation is lacking on both sides, Mark has not engaged in such offensive behavior with relation to Christy's visitation to demand a change of custodial care. We consider the children's testimony that they want to live with their mother, but this alone under this record is not sufficient to support a modification. We affirm. Court costs are taxed to Christy. We award no appellate attorney fees.

AFFIRMED.