

FILED

MAR 20 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MICHAEL L. PIETZ AND KRISS A. PIETZ

101

Upon the Petition of)

MICHAEL L. PIETZ,)

Petitioner-Appellant,)

Filed March 20, 1984

And Concerning)

KRISS A. PIETZ, n/k/a)

KRISS A. SANKEY,)

4-72
83-1007

Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County - Thomas H. Nelson, Judge.

Petitioner husband appeals from the trial court's order modifying the child custody and visitation provisions of the parties' dissolution decree. REVERSED.

Curtis J. Klatt of Dunakey & Klatt, Waterloo, for petitioner-appellant.

David R. Zellhoefer of Zellhoefer, Randall, Anfinson & Luce, Waterloo, for respondent-appellee.

Joseph M. Moothart of Mershon, Snow & Knock, Cedar Falls, for the children.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

Petitioner husband appeals from the trial court's order modifying the child custody and visitation provisions of the parties' dissolution decree. He claims respondent wife should not have been given sole custody and that he was not given sufficient visitation. Our review is de novo. Iowa R. App. P. 4. We reverse.

The 1981 decree dissolving the marriage of Michael and Kriss Pietz incorporated the parties' stipulation regarding custody of their child, Tara, born in 1979. Under the stipulation, the parties were to have joint custody of Tara, with Michael having physical care. Kriss was to have visitation during every other two-month period until Tara started school. At that point, Kriss would have visitation during the summer and every other Christmas.

At the time the decree was entered, Kriss was living in Wisconsin, near her mother and three sisters. She has continued to live there and has remarried. She has had a malignant cyst removed from her fallopian tubes and can no longer have children. Michael is engaged to be remarried; his fiancée has a five-year-old son.

The trial court found that the problems caused by shifting Tara from parent to parent and Kriss' remarriage and inability to have more children were substantial changes in circumstances which warranted a modification of the decree. The trial court eliminated the joint custody arrangement and awarded Kriss sole custody of Tara, based on its findings that (1) Michael had a problem with alcohol which he would not acknowledge, and (2) Kriss and her new husband spent more time with Tara than did Michael. The trial court provided that Michael was to have reasonable visitation, which was to include one month in the summer. Michael brought this appeal.

The supreme court recently summarized the principles regarding the modification of a child custody decree as follows:

Before a change in custody may be made, the party seeking modification must establish by a preponderance of evidence "that conditions since the court decree have so materially

and substantially changed that the children's best interests make it expedient to award their custody to him." The changed circumstances must not have been within the contemplation of the court when the decree was entered. The change must be more or less permanent, not temporary, and must relate to the welfare of the children. (citations omitted).

In re Marriage of Bolin, 336 N.W.2d 441, 443 (Iowa 1983). Under these familiar standards, we conclude that Kriss did not sustain her burden of proving the need for modification of the custody decree.

The trial court first found that Kriss' remarriage and subsequent inability to have more children constituted a substantial change in circumstances. As to her remarriage, it is clear that that does not in itself justify modification. In re Marriage of Wagner, 272 N.W.2d 418, 421 (Iowa 1978). Even if it did, Michael's impending remarriage would balance out the situation. While we sympathize with Kriss in her inability to conceive and bear another child, we fail to see how that circumstance is at all relevant to Tara's welfare and who is better able to care for her. The court also concluded that modification is warranted because of the harm to Tara resulting from the alternating two-month visitation periods. While Tara undoubtedly becomes mildly upset at the prospect of having to move back and forth as would any young child in such a situation, the record clearly reflects that she is a very well-adjusted and mature child for her age and has not suffered unduly from the present arrangement. In any event, this problem will certainly be less serious once she starts school. At that time, she is to be in Michael's custody for the nine-month school year and with Kriss during the summer.

What apparently bothered the trial court most of all was Michael's beer consumption. We cannot agree with the court's conclusion that Michael has "a problem with alcohol" primarily because he denies such a problem. There is absolutely nothing in the record demonstrating that his beer consumption has affected his ability to take good and proper care of Tara and Kriss does not contend that Tara suffers from it. Perhaps even more relevant to this modification

proceeding is the fact that there has been no showing that Michael's drinking habits have changed since the decree was entered. If this was an appeal from the original dissolution decree, Michael's beer drinking might be relevant to a determination of his fitness to have custody. Since this is a modification application, however, Kriss must show that Michael's drinking has become a substantially more serious problem since the entry of the decree and that his ability to care for Tara has been harmed thereby. Kriss did not establish either of these points.

Kriss does not contest Michael's ability or willingness to care for Tara or the fact that he loves his child very much. Nor has she demonstrated, under the relevant legal criteria, why she should now have sole custody of Tara. Her reason for bringing this application was revealed in the following exchange at the hearing thereon:

Q. Kriss, would it be a fair statement to say that the reason we are here today in front of this Court, Judge Nelson, is that you now realize, after two years, that in one year or a little over one year Tara is going to be spending, if we are operating under the original Decree, nine months with Mike, more or less, and three months with you, more or less, and that hurts to think about it, that you don't want that to happen; that you want Tara nine months and let Mike take Tara three months; isn't that correct? Isn't that the reason we are here, that you made a mistake in signing that Decree because now the time is almost upon you when you will have Tara only three months a year rather than six? Isn't that the reason we are here today? A. No, not the whole reason.

Q. Is that part of the reason? A. Yes.

Q. And the other part, then, would be the one minute to thirty minute crying spells? A. No.

Q. Well, what is the other part of it, then, Kriss? A. I want to see my daughter more than two months at a time. (emphasis added)

While Kriss is to be commended for her obvious concern and love for Tara, she has not shown how circumstances have changed since the decree such as would justify a modification of custody.

We therefore reverse the trial court's order modifying the custody decree

and imposing on Michael the child support obligation. We commend the parties on their cooperation up to this point in allowing visitation and in jointly reaching decisions relating to Tara's welfare. We strongly encourage them to continue to do so, specifically with respect to Michael allowing Kriss reasonable visitation in addition to the summer months and alternate Christmas holidays as provided in the decree once Tara starts school.

REVERSED.