

IN THE COURT OF APPEALS OF IOWA

No. 5-629 / 95-544

IN RE THE MARRIAGE OF SALLY JOLENE
PAXTON AND RICKIE WAYNE PAXTON

Upon the Petition of

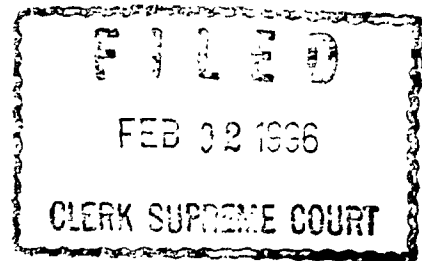
SALLY JOLENE PAXTON n/k/a SALLY JOLENE VANDERSEE,

Petitioner-Appellee,

And Concerning

RICKIE WAYNE PAXTON,

Respondent-Appellant.



Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Rickie Paxton appeals from a district court decree denying his petition for
modification of the decree dissolving his marriage to Sally Paxton (now Sally
Vandersee). **REVERSED AND REMANDED.**

~~Franklin~~ R. York of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

~~Randall~~ A. Nazette of Nazette, Marnier, Good, Wendt & Knoll, Cedar Rapids,
for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

The question in this appeal is whether the trial court correctly refused to modify a Missouri dissolution decree to transfer physical care of Christina Paxton, born March 15, 1980, from her mother, petitioner-appellee Sally Jolene Vandersee, to her father, respondent-appellant Rickie Wayne Paxton. We find on our de novo review physical care should have been changed. We reverse and remand.

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence 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, 838-40 (Iowa App. 1985).

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons.

Frederici, 338 N.W.2d at 158; see also *In re Marriage of Mikelson*, 299 N.W.2d 670,

671 (Iowa 1980).

Since the marriage of Sally and Rickie was dissolved in Mercer County, Missouri, on July 22, 1983, both parties have moved to Iowa.¹ They have also both remarried and each have another child.

Both Sally and Rickie are loving and devoted parents. Yet, they have not been able to put aside the hurt and hostility of the dissolution for the benefit of their daughter. A review of the file convinces us Christina suffers because of her parents' animosity toward each other. We commend Sally and Rickie for currently seeking help to work on their problem of communication. For Christina's sake, they need to work on it harder.

The primary reasons for Rickie's filing the petition to modify were his daughter's expressed wishes to live in his home and the fact she and her mother had difficulty in areas of discipline. He also was concerned about an alcohol-related charge against Christina's stepfather that included a weapons charge. Rickie alleges Sally does not give Christina help with schoolwork and her learning disability, and she has ~~not been~~ supportive in his effort to see Christina has orthodontic work and medication ~~and~~ a problem with acne.

The trial court dismissed Christina's problems with her mother as those of normal adolescence in a period of rebellion and contrariness. The trial court looked

¹ The jurisdiction of the Iowa court to modify the Missouri decree is not challenged.

at Christina's preference to live with her father, but found it was not entitled to significant weight since neither party nor Christina pointed to any particular difficulty outside the normal run of problems. The trial court also found Christina was not happy in either environment and determined chronic unhappiness is a common symptom of adolescence. The trial court found Christina to be a perfectly normal fifteen-year-old.

It is well established deciding custody is more than asking a child where he or she wants to live. We give a child's preference less weight in a modification action, particularly if he or she wants to change homes, than we do in an initial custody proceeding. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 259 (Iowa App. 1985).

Christina's wish to live in her father's home is strong. She has had the wish for some time. She has expressed it to others, including counselors and the Linn County child advocate. Christina wrote:

I try not being the bad one. I don't think that I'm the bad one why does them (sic)? I try doing good thing and not bad. I do try!! I try doing alot (sic) of things but I can't. I feel I feel I don't know what I feel any more!! I don't know what to do?? help!!

It hert (sic) when I went by the phone and it wasn't there. I was going to the bathroom when I seen that it was not there!

My head herts (sic) all the times and my tummy.

It hert (sic) me alot (sic). It's like when I talk they don't here (sic), but when someone.els (sic) talkes (sic) they here (sic). Why? Even after cancelling (sic)?

Christina has problems. Whether her problems are more or less severe than other children her age is not the issue. Her problems are important to her and a

resolution of them is important to her emotional well being. She has been dating a young man four or five years her senior. She has problems with her schoolwork. She wants people to listen to her. She feels her father and his current wife do a better job of that. She has serious disagreements with her mother.

Sally argues the relationship she has with Christina is typical of the relationship of adolescent daughters and their mothers. She advances some of the turbulence attributed to Sally's home does not just affect Christina, but is caused by Christina.

Christina is an eighth grader. We have concerns about Christina's learning difficulties. Her written work is below what one would hope to see from an eighth grader. She and her mother have problems over discipline. Christina has been firm in her desire to live in her father's home.

Christina's father is of the opinion Christina has problems. We find Rickie exhibits a superior understanding of Christina's current difficulties and expresses a wish to work with her on those concerns. We also find Rickie has been more attentive to her acne and orthodontic problems. Sally argues Christina's concerns are typical of adolescence and she seems too willing to dismiss them on that basis.

Christina has a better relationship with her father. She has had substantial contact with him and her stepmother during her growing-up years. She can change homes without changing school districts.

Christina professed love for both parents, but indicated she got along better with her father. Contrary to the trial court's finding, Christina testified she was happy at her father's house but not at her mother's house. She professed unhappiness with the current situation.

The question focuses on the weight we give to Christina's testimony. She is experiencing problems. Girls of her age do have problems. Some have more serious problems. The fact her concerns are not more serious does not justify disregarding her long-term, firm desire to change homes. The fact Christina has not had serious problems and is intent on maintaining a relationship with both parents results in our giving her preference more, not less, weight.

There are rules at both homes and Christina has spent substantial time in both households. She expresses love for both of her parents but clearly told the trial court she wants to live with her father. This wish has been consistent and has been expressed in counseling. Her father has been attentive to her emotional concerns. He has made an effort, despite her mother's lack of cooperation, to have her teeth straightened and to obtain medication for her acne. We have concerns about Christina's stepfather's problems with alcohol and guns.

We find Rickie has shown a superior ability to minister to Christina's care. We modify to transfer physical care to Rickie. We remand to the trial court for the purpose of fixing child support.

REVERSED AND REMANDED.

Habhab, J., concurs; Cady, J., dissents.

CADY, J.

I respectfully dissent. This case presents an extremely difficult issue, compounded by the strong feelings of a struggling adolescent child. I would stand behind in findings of the trial court, who had the opportunity to see and hear the testimony firsthand. I would affirm.