FILED
JUN 30 1978
CLERK SUPREME COURT

200

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DENNIS B. ROSENER & NANCY-JOY E. ROSENER

Upon the Petition of)
DENNIS B. ROSENER,)
Appellee,) Filed June 30, 1978
And Concerning)
NANCY-JOY E. ROSENER,) 568 / 3-61340
Appellant.)

Appeal from Cass District Court - Harold L. Martin, Judge.

Respondent mother appeals trial court's modification of a prior dissolution decree which split custody of the children in accordance with the parties' de facto custodial arrangements. - Affirmed with remand for determination of child support arrearages.

Roderic Pearson, of Peters, Campbell & Pearson, Council Bluffs, for Appellant.

Richard G. Howard, Atlantic, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Respondent Nancy-Joy E. Rosener Olson appeals the modification of custody provisions of a 1975 dissolution decree which had granted petitioner Dennis B. Rosener custody of all three children. The modification placed custody of the youngest child in Nancy and confirmed custody of the two older children in Dennis. Nancy seeks to reunite all three children in her custody. Affirmed.

The trial court's modification was in accordance with the de facto custodial arrangements established by the parties both prior to and subsequent to the entry of the 1975 decree. The trial court found Kellie in Nancy's care and control, and Bill and Cherie in Dennis' care and control, had each flourished in their respective environments. Finding the children receiving proper care, the trial court refused to disturb the existing custodial arrangement. We think In re Marriage of Pokrzywinski, 221 N.W.2d 283 (Iowa 1974) makes it clear such a refusal must be affirmed unless the record indicates cogent and compelling reasons to disrupt the children's lives. We find no such justification in this record.

The trial court ruled adversely to Nancy on her contention that Dennis procured her acquiescence in 1975 to custody "on paper" in him by extrinsic fraud. Whatever the circumstances and private agreements which resulted in the splitting of custody, we must agree with the trial court that the record fails to clearly and convincingly establish a private agreement that all three children would be reunited in Nancy's care and control once she could provide for them. The lack of the requisite clear and convincing proof that there was such an agreement, fraudulently secured, is fatal to Nancy's fraud claim. Stearns v. Stearns, 187 N.W.2d 733, 735 (Iowa 1971).

We are persuaded, even if Dennis did so agree and later refused to abide by his bargain, that our decision must be guided by In re Marriage of Melton, 256 N.W.2d 200, 206 (Iowa 1977):

> Connie makes a strong case for modification based on the improper way appellee gained custody originally. This argument appeals to a sense of fairness because we surely cannot condone such conduct. While this might be persuasive and controlling if we were adjusting parental rights, the paramount issue is the child's welfare.

We are aware that in Melton the non-custodial mother was represented by counsel

who drafted the stipulation granting custody to the father. In the instant case in 1975 Nancy did not appear, did not retain her own counsel, and allowed a default decree to be entered against herself. Despite these circumstances we are satisfied that the trial court rightly determined its paramount concern was the best interests of the children. Nancy took no direct appeal to challenge the default decree. Almost two years ensued before her application to modify was filed. We are convinced that the trial court rightly decreed custody to reflect the de facto practice of the parties. The children have been separated for a substantial period of time, have become adjusted to their situations, and have received more than adequate care in the respective households. See In re Marriage of Winter, 223 N.W.2d 165, 168 (Iowa 1974). We affirm the custody as modified.

Nancy's request for joint legal custody was not presented to the trial court. We, therefore, can make no determination of the issue on appeal.

The child support provisions of the 1975 decree entitled Nancy to $100 per month per child during any period during the summer vacation months when the children were in her actual care and custody. Under Gilliam v. Gilliam, 258 N.W.2d 155 (Iowa 1977) the trial court possesses no authority to exonerate liability for any or all past due and accrued decretal support payments. We remand for a determination of any child support arrearages for the summer months of 1976 and 1977. At such a hearing the trial court shall also determine the issue of Kellie's support after the expiration of the trial court's Order Fixing Support, entered December 22, 1977 during the pendency of this action. We agree with the trial court determination Nancy is not entitled to a retrospective child support award for the non-summer months during which she retained actual physical custody of Kellie while legal custody was in Dennis.

Affirmed in part and remanded with instructions.