

IN THE COURT OF APPEALS OF IOWA

No. 1-82 / 90-1210

FILED

APR 23 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARY J. FARRAND AND WALTER H. FARRAND

Upon the Petition of

MARY J. FARRAND,

Appellant,

And Concerning

WALTER H. FARRAND,

Appellee.

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Appeal from the Iowa District Court for Webster County,
Ronald H. Schechtman, Judge.

Appellant appeals the district court's modification of
the divorce decree placing the couple's minor child in
joint legal custody and in the father's physical care.

AFFIRMED.

Leonard Holland and Dorothy L. Dakin of the Dakin Law
Office, Boone, for appellant.

Devon Hintz-Miller, Des Moines, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Mary and Walter Farrand were married in July 1976. One child, Nicole, was born to the couple on December 27, 1983. Both Mary and Walter had been married before their marriage to each other. Mary has three adult daughters, Wendy, Dawn, and Diane, from her previous marriage. Walter has four adult children from his previous marriage. Walter adopted Wendy, Dawn, and Diane during his marriage to Mary, but Mary did not adopt any of Walter's children.

Both Mary and Walter have been declared permanently and totally disabled by the Social Security Administration, Walter as a result of blindness and Mary as a result of suffering from multiple sclerosis. Neither parties' disability has been shown to adversely affect their ability to care for Nicole.

A decree entered in February 1989 dissolved the Farrands' marriage. In the decree the court commented on the highly acrimonious nature of the proceedings prior to the dissolution. The court stated the fighting issue between the couple was custody of Nicole. The court awarded Walter sole custody of Nicole finding "[i]t is in Nicole's long range best interest that Walter should have custody, because there is a much higher probability that he will allow Nicole to have a continued relationship with Mary and her side of the family."

Mary filed the present application for modification in September 1989. She claimed Nicole was afraid of Walter, he was not taking proper care of her, and he had failed to abide by the visitation schedule. The court modified the decree to grant the parties joint custody. However, the court found Mary failed to meet her burden to show she could better care for Nicole and refused to change Nicole's physical custody. Mary appeals.

Mary claims the court erred in not giving her physical care of Nicole because Nicole has stronger ties to herself and Dawn and Diane than to Walter. Mary also asserts Walter has acted to undermine her relationship with Nicole. Mary alleges Walter and his children have continuously harassed her. Finally, she points out the court appointed expert, Dr. Marilee Fredericks, testified it would be better for Nicole to live with Mary.

We review this equity action de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

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.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)) (emphasis added).

We determine Mary has failed to carry her "heavy burden" to show she can "minister more effectively to the child[]'s well being." Mary and Walter appear to be roughly equal in their parenting skills. However, Mary apparently functions better as a custodial parent than as a visiting parent. Under the standard established by our supreme court, this is not enough. To find otherwise would penalize Walter for Mary's inabilities at visitation.

This is not an original custody decree. It is a modification proceeding. Mary must show she can do a better parenting job than Walter. The fact Mary functions better as a custodial parent than as a visiting parent does not adequately overcome the presumption in favor of the present custodial parent.

The trial court in the present case rendered a thorough and exhaustive ruling. We affirm the trial court for the reasons stated in its decision.

AFFIRMED.

Sackett, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent.

I would grant custody of Nicole to Mary for reasons cited by Dr. Marilee Fredericks. She said that the current custody situation is harmful to Nicole's emotional development and that she is at considerable risk of "reducing her emotional flexibility and her capacity to develop a single intergrated self definition."

The majority states:

Mary and Walter appear to be roughly equal in their parenting skills. However, Mary apparently functions better as a custodial parent than as a visiting parent. Under the standard established by our supreme court, this is not enough. To find otherwise would penalize Walter for Mary's inabilities at visitation. . . . The fact Mary functions better as a custodial parent than as a visiting parent does not adequately overcome the presumption in favor of the present custodial parent.

Dr. Fredericks made it quite clear in her testimony that her recommendation of a change in custody of Nicole to her mother was not based solely on her inability to exercise as a visiting parent.

I would ignore the issue of the unfairness to Walter of changing custody because of Mary's inadequacies as a visiting parent. The danger to Nicole does not lie in reward or punishment of her parents.

The danger to Nicole is the current custodial arrangement with her father is harmful to Nicole's emotional development.