

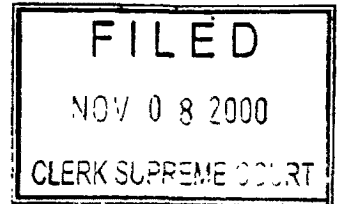
IN THE COURT OF APPEALS OF IOWA

No. 0-595 / 99-1373
Filed November 8, 2000

**IN RE THE MARRIAGE OF FRANK V. EISENTRAGER
AND RENEE JO EISENTRAGER**

**Upon the Petition of
FRANK V. EISENTRAGER,
Petitioner-Appellant,**

**And Concerning
RENEE JO EISENTRAGER, n/k/a RENEE JO BULTMAN
Respondent-Appellee.**



Appeal from the Iowa District Court for Franklin County, John S. Mackey,
Judge.

Frank Eisentrager appeals from the denial of his modification application.

AFFIRMED.

Van M. Plumb, West Des Moines, for appellant.

Larry W. Johnson of Walters & Johnson, Iowa Falls, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Frank and Renee Eisentrager divorced in 1992. Pursuant to a stipulation, Renee assumed primary care of the parties' sons Joshua and Jeremy, born in 1985 and 1986 respectively. She subsequently married Shawn and had two children with him.

In 1998, Frank applied to modify the primary care arrangement, based in part on the children's relationship with Shawn. The district court denied the application and Frank appealed. We affirm.

I. Standard of Review

A custody modification proceeding is tried in equity and reviewed de novo. *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa App. 1998). Because the district court was present to listen and observe the witnesses, we give weight to its findings, although we are not bound by them. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

The party seeking a modification must show by a preponderance of the evidence there has been a substantial change in circumstances since the entry of the decree not contemplated by the decretal court. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). "The change must be more or less permanent and relate to the welfare of the children." *Id.* (citing *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996)). This is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). It is not sufficient to establish both parents are equally competent to minister to the child. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). The applicant must

demonstrate a superior ability to minister to the child's needs. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa App. 1994).

II. Primary Care

Frank cites fifteen facts he contends warrant a change in the primary care arrangement. These facts may be subsumed under one of the following arguments: (A) the environment in Renee and Shawn's home and Shawn's unsupportive behavior have caused Jeremy to experience physical and emotional difficulties; (B) Renee did not inform Frank of counseling Jeremy underwent to address these difficulties and did not follow through with counseling; (C) the children would prefer to live with Frank; and (D) Renee has obstructed visitation. We will address each argument in turn.

A. Home Environment. Jeremy has cerebral palsy, an eye disability, comprehension disability and borderline attention-deficit hyperactivity disorder. In addition, he has had problems with bed wetting. Frank contends most of these problems result from the unsupportive home in which he lives and particularly his step-father Shawn's behavior. He asserts many of these problems resolve themselves when Jeremy visits him.

We have stated remarriage itself does not constitute a substantial change in circumstances warranting a modification of the primary care arrangement. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). However, when the circumstances surrounding remarriage adversely affect the child, we may find a substantial change. *Id.* We are not convinced the environment generated by Renee and her new husband Shawn amounts to a substantial change in circumstances.

The record does reflect Shawn had difficulty communicating with Jeremy in 1992 and 1993 and resorted to humiliating him on more than one occasion. However, as the district court concluded, "the record does not indicate that such treatment continued but, rather, stability has been achieved." We agree with this conclusion.

Progress notes from Jeremy's therapy sessions reveal that while Jeremy struggled with disruptive and defiant behavior immediately following the divorce and well into 1993, his behavior had improved substantially by early 1994. By May of that year, a clinical social worker placed his case on inactive status after noting less aggressive behavior and improved grades at school. The case was closed in October 1994. Although Jeremy's grades deteriorated again in fifth grade and he remained hyperactive, subsequent health care records did not show a recurrence of the severely disruptive behavior that triggered therapy in 1993, behavior that the therapist attributed in part to conflict between Renee and Frank.

Additionally, Frank conceded none of Jeremy's school reports attributed his problems to conflicts with Shawn or Renee. He further conceded the therapy reports he had seen did not suggest the boys were in any danger at Renee and Shawn's home.

Finally, the record reflects that, during weekend visitations, Jeremy spent a significant amount of time at his grandparents' home rather than at Frank's, raising doubts as to whether Jeremy's improved weekend behavior could be attributed solely to Frank. For these reasons, we conclude neither Jeremy's

home environment nor Shawn's behavior warrant a change in the primary care arrangement.

B. Counseling. Frank next contends Renee did not inform him Jeremy was undergoing counseling and did not follow through with the sessions. He maintains both these facts warrant a change in the primary care arrangement. We disagree.

We do not condone Renee's failure to advise Frank of the counseling sessions. *Cf. In re Marriage of Phipps*, 379 N.W.2d 26, 28 (Iowa App. 1985) (noting parties failed to communicate about physical and emotional well-being of children, to detriment of children). However, we cannot conclude this omission was malicious. Renee testified she did not inform Frank of the sessions because when she had broached the subject of counseling with Frank years earlier, Frank told her the Eisentragers did not need counseling.

As for Renee's failure to follow through with counseling, she testified she did not do so in part because Jeremy's problems had become manageable within the two or three years before the modification action was filed. The balance of the record supports her testimony. Accordingly, we conclude these failures are not bases for modification of the primary care arrangement.

C. Children's Preference. Frank maintains primary care should be modified because both boys want to live with him. We may consider the wishes of children who are of sufficient age, intelligence and discretion to exercise enlightened judgment, although these wishes are not controlling and will be examined with other relevant factors. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa App. 1991). We accord a child's preference less weight in a

modification as opposed to an initial custody proceeding. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998).

Jeremy testified he wished to live with his father because his step-father made fun of him, threatened to have him placed in foster care if he did not take his medication, and took his earnings from lawn-mowing. He also asserted his mother threw "stuff" at him. Joshua stated he wished to live with his father because Frank did not have any little kids to baby-sit and would not leave him home alone as his mother did.

The district court concluded the boys' preferences were "outweighed by other factors, including Renee's and Shawn's discipline which reflect their genuine concern for Joshua's and Jeremy's well being." We agree with the court that the boys' preferences appear to be based in part on the fact their father disciplined them less and allowed them to participate in more enjoyable activities. We additionally note that, by Jeremy's own admission, Shawn's conduct had improved by the time of trial. Further, the type of discipline Joshua described receiving at the hands of his mother appeared age appropriate and non-abusive. For these reasons, we decline to change the primary care arrangement on the basis of the boys' wishes.

D. Visitation. Frank contends Renee has obstructed visitation, warranting a change in the primary care arrangement. Renee concedes she denied visitation on one occasion but maintains Frank was otherwise allowed to exercise visitation. We have stated if a custodial parent jeopardizes the visitation rights of a non-custodial parent, such conduct could provide an adequate ground for a change of custody. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa

1993). This is not such a case. The record reflects Frank exercised visitation every other weekend and had the option of visiting the children mid-week, although he rarely took advantage of that option. There is no evidence to suggest Renee systematically denied or obstructed visitation. Accordingly, we reject this ground for modification of the primary care arrangement.

We affirm the district court order denying Frank's modification application.

AFFIRMED.