

IN THE IOWA COURT OF APPEALS

FILED

MAY 26 1981

CLERK SUPREME COURT

165

JENETTE E. BOESHART,

)

Petitioner-Appellant,

)

Filed May 26, 1981

vs.

)

GARY PHILLIP BOESHART,

)

1-132
3-65952

Respondent-Appellee.

)

Appeal from Woodbury District Court - James P. Kelley, Judge.

Petitioner-wife appeals from trial court's order modifying child custody provisions of the parties' dissolution decree asserting that the evidence was insufficient to warrant modification. AFFIRMED.

Michael W. Ellwanger of Kindig, Biebe, Rawlings, Nieland & Killinger, Sioux City, Iowa, for petitioner-appellant.

William Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, Iowa, for respondent-appellee.

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

Petitioner-wife, Jenette E. Boeshart, appeals from trial court's order modifying child custody provisions of the parties' dissolution decree. She asserts that the evidence was insufficient to warrant modification. We affirm.

Pursuant to a stipulation that was incorporated in the parties' dissolution decree filed May 5, 1978, petitioner received custody of the parties' two minor children, Scott, born March 20, 1970, and Tammy, born July 6, 1973. Following a conversation with petitioner wherein she indicated she felt unable to handle custody of the children, respondent, Gary Phillip Boeshart, filed an application for modification on August 15, 1978. There was no action on this application until February 28, 1980, when respondent filed an amendment to the application, again asking for custody of the children. Following a hearing on September 25, 1980, trial court issued its ruling modifying the dissolution decree to transfer custody of the children to respondent. Petitioner's appeal followed.

I. Scope of Review. Our review of modification proceedings is *de novo*. Iowa R. App. P. 4. The principles governing such proceedings are well established. The best interests of the children are of first concern. Iowa R. App. P. 14(f)(15); In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The noncustodial parent has the burden of establishing by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the original decree, not within the contemplation of trial court at that time, which makes it expedient to change custody. Id.; Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). Where the custodial parent has properly provided for the children's social, moral, and educational needs, and the children have become attached to their environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the children's well-being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974); In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

II. Modification of Custody. Petitioner contends that trial court erred in modifying the original dissolution decree to change custody of the parties' two minor children to respondent. We disagree.

Without unnecessary repetition of the record, we believe respondent has shown that the condition of petitioner's mental health has deleteriously affected her abilities

as a custodial parent and that these facts were not within trial court's contemplation at the time the original decree was entered. Petitioner has had mental problems, particularly depression, since 1974. She was hospitalized at the Mental Health Institute in Cherokee for several months in 1976 and in 1977. However, her condition appeared to be stabilized when the decree was entered in May, 1978. As noted above, petitioner expressed difficulties with custody in 1978; in the fall of 1979 she was again having problems so she sent the children to live with her sister and brother-in-law in Mason City. At that time she was seeing a psychiatrist three times per week and was hospitalized at his direction from February to April, 1980. With the assistance of a friend, she checked herself out of the hospital in April, 1980. She testified that her mental health has improved immensely since her release from the hospital in April, 1980. Several other witnesses also testified to this remarkable improvement.

Respondent testified to numerous difficulties he had with petitioner regarding visitation during 1978 and 1979. He also was uninformed of the children's move to Mason City until the day after Thanksgiving in 1979. At the end of the school year in 1980, respondent brought the children back to Sioux City where they have lived with him, his second wife, and her two children since that time. Respondent admitted that he had been arrested for OMVUI in both 1977 and 1979, and that he had been hospitalized in a chemical dependency unit for approximately 30 days in 1979. He denied any current problems related to alcohol.

While we are not persuaded by the psychiatrist's testimony that petitioner is or could be dangerous to herself and others close to her, we do believe the record demonstrates that, despite petitioner's improvement since April, 1980, her illness is chronic and recurring. A psychiatric social worker who was treating petitioner at the time of hearing stated that petitioner should have available the kind of support continued treatment would afford her and that stressful situations would exacerbate her condition. We also cannot ignore the fact that petitioner's dramatic improvement has occurred since she has been relieved of the full time custody of the children.

Under these facts, we believe respondent has proven a material and substantial change of circumstances not within trial court's contemplation at the time of the original decree and that he can offer the children a more permanently stable environment necessary for their best interests. Trial court's judgment is therefore affirmed.

AFFIRMED.