

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 27 1986

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOANN LOUISE ALLAN AND WILLIAM CONRAD ALLAN ¹

UPON THE PETITION OF
JOANN LOUISE ALLAN,

Petitioner-Appellee,

AND CONCERNING
WILLIAM CONRAD ALLAN,

Respondent-Appellant.

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Filed August 27, 1986

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Appeal from the Iowa District Court for Pottawattamie County (No. 15-276-D), Keith E. Burgett, Judge.

Respondent-husband appeals the trial court's denial of his application for modification of the decree dissolving the parties' marriage. **AFFIRMED.**

G. Elizabeth Otte, Council Bluffs, for appellant.

Martin A. Cannon of Matthews & Cannon, Omaha, Nebraska; Thomas L. Root and Raymond E. Pogge of Pogge, Root & Steege, Council Bluffs, for appellee.

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

OXBERGER, C.J.

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Respondent-husband appeals the trial court's denial of his application for modification of the decree dissolving the parties' marriage. He asserts that the trial court should have transferred custody of the parties' child to him. We affirm.

The decree dissolving the marriage of petitioner JoAnn Louise Allan and respondent William Conrad Allan was entered in 1979. Legal custody of the parties' child Michelle, born in 1977, was awarded to JoAnn, *subject to reasonable visitation* by William (Bill). Bill was required to pay \$150 per month for the support and maintenance of Michelle until she reached the age of eighteen years, died, married or became self-supporting, unless she pursued post high school education.

On or about September 14, 1984, Bill filed an application to modify the decree for dissolution of marriage. In such modification of custody proceedings, the party seeking custody has the burden to show that the circumstances extant at the time the original decree was entered have changed so materially as to warrant transfer of the child to his or her custody. In re Marriage of Link, 205 N.W.2d 751, 752 (Iowa 1973); Hagen v. Hagen, 226 N.W.2d 13, 15 (Iowa 1975).

At trial, the court held that the father had not shown that the circumstances had so changed to justify the alteration of the child's legal custodian. However, the trial court did modify the visitation schedule to allow the noncustodial parent specific visitation rights. These visitation rights were to commence on the second weekend following the conclusion of the regular school terms each year and terminate six weeks later. In addition to the summer vacation, Bill Allan was entitled to Christmas vacation each year commencing December 26 and terminating on January 2. All transportation expenses for the child to and from JoAnn's residence and Bill's residence were to be paid by Bill.

In his application to modify the dissolution decree, Bill asserts that these factors justify awarding him the care, custody, and control of Michelle:

- a. That the Respondent had remarried, thus establishing a stable and permanent home and work situation.
- b. That the Petitioner was currently incarcerated.
- c. That the Petitioner had continuously and without regard for the minor child's welfare, pursued a lifestyle that lacked permanence, stability, family ties and structures.
- d. That the Petitioner had neglected the child's care by intentionally pursuing a course of action which lead to her incarceration.
- e. That the Petitioner had continuously and purposely neglected to inform Respondent of the child's whereabouts and circumstances.

We must decide whether these factors are sufficient to justify our awarding the father custody of Michelle in the context of several well-established principles.

Our review is de novo. Although we are not bound by the trial court findings we give them weight. The status of the [child] should be quickly fixed and, thereafter, little disturbed. . . . No hard and fast rule governs which parent should have custody. It is not a matter of reward or punishment. The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range, best interests of the [child]. [citations omitted]

In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974).

At the time of the dissolution of the marriage, Bill was a part-time student and a child development worker at Glenwood State Hospital School. JoAnn was also a student, obtaining her GED at Iowa Western Community College. Michelle was nearly two years old at that time.

In the summer of 1984, Bill was remarried. Both he and his new wife are employed. That same summer JoAnn took Michelle on a six-week trip through the eastern United States and Canada. When they returned, JoAnn informed Bill that she and Michelle were moving to Washington, D.C. JoAnn wanted to work as a full-time volunteer at a settlement house serving the poor and homeless.

After they moved to Washington, D.C., Michelle was enrolled in a public

school where she was doing well. The trial court determined that she was a bright, well-adjusted young girl. JoAnn also was doing very well and was satisfied with her position in the Community Center. Her work has no predetermined salary; however, her financial needs are minimal since room and board are provided. JoAnn's job allows her to spend a great deal of time with Michelle. The record seems clear that they have developed a very close and loving relationship.

While in Washington, D.C., JoAnn became very active in the peace movement, even to the extent of being involved in protest marches. In December 1984, JoAnn was sentenced to six months in jail as a result of her participation in a protest march at Offutt Air Force Base in Omaha. At that time, JoAnn notified Bill of her situation and asked if he would take temporary custody of the child while she was incarcerated. Bill agreed to this temporary arrangement and Michelle moved in with Bill and his new wife for the full six-month period of JoAnn's incarceration. The parties entered into a written agreement among themselves awarding Bill custody of Michelle with the stipulation that the custody was granted strictly to allow Bill to enroll Michelle in school.

Bill filed an application for modification of the dissolution decree. He argued that the circumstances had changed so drastically since the time of the dissolution decree to justify granting him legal custody of Michelle.

Our paramount concern in every custody proceeding is to insure that the best interests of the child are protected. Bowen, 219 N.W.2d at 687-88. We are not of the opinion that these changed circumstances are sufficient, in light of factors not yet mentioned, to conclude that Michelle's best interests would be insured by giving custody to Bill. The first of these factors is that from the time of the dissolution until he was remarried, Bill defied the trial court's decree ordering him to make child support payments. He seldom, if ever, was current on his monthly payments. Instead, he chose to use his income for his own benefit.

As a result, JoAnn had to support her daughter alone, receiving support only from Welfare. Thus even when Bill knew that JoAnn and Michelle were undergoing some financial difficulties, he put his own interests ahead of his child's and made little contribution toward the support of Michelle.

Secondly, since both Bill and his new wife work, their time with Michelle would be limited. Most of her time outside of school would be spent with babysitters.

Thirdly, Bill did not allow any contact between JoAnn and Michelle while JoAnn was in jail. He did this by confiscating most of JoAnn's letters, denying JoAnn the opportunity to talk to Michelle on the phone, and refusing to allow Michelle to visit her mother at the jail in Omaha.

Fourthly, he misled JoAnn about the nature of the agreement granting Bill custody of Michelle while she was incarcerated. He caused JoAnn to believe that her attorney had forsaken her by assenting to Bill's gaining full legal custody of Michelle. This clearly was not the case because Bill explicitly had custody only to enable Michelle to be enrolled in school; thus, his actions were only intended to cause JoAnn much needless pain and worry.

It is clear that JoAnn and Bill have vastly divergent life-styles, yet we do not agree that JoAnn's way of life makes her an unfit parent. Michelle seems to be very well loved and cared for by her mother, despite their unusual life-style. After balancing both parents' attributes and deficiencies, it is our opinion that it would be in Michelle's best interest to remain in the custody of JoAnn. Therefore, we hold that the circumstances have not made such a drastic shift so as to necessitate our reversal of the trial court decree granting JoAnn Allan custody of Michelle Allan.

Both parties have also requested the recovery of attorneys fees incurred in connection with this appeal. Iowa Code section 598.36(1985) provides that

a court may award attorneys fees to the prevailing party in an action for modification. In the instant case, however, neither party has submitted any information detailing the time or services involved in connection with the underlying action or this appeal. As such, it is impossible for us to devise a fee award. See In re Marriage of Shima, 360 N.W.2d 827, 829 (Iowa 1985). Therefore, we direct each party to pay his individual costs.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., concurs specially.

SACKETT, J.

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The majority has determined custody should not be modified and I concur with their decision. Joann's life-style should be an issue only if it adversely interferes with her ability as a parent. But while I support her right to challenge the establishment and speak out in favor of her conviction, I have difficulty with her decision to disobey existing laws knowing incarceration was a real possibility and having failed to make any provision for the care of her child. However, at this point I do not determine this error in judgment sufficient to modify custody.

The majority seems to focus on William's failure to pay child support during a period Joann was drawing assistance as a major factor in reaching their decision. A parent who has failed to pay child support should be severely criticized and his or her failure to pay support can be construed as a lack of concern for the child. However, the record reflects William has a major concern for this child. The majority opinion conveys to me they are punishing William. Our focus must be on the best interest of the child not the punishment of either parent.