FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHRISTINE ANN ZABECKI AND DAVID TADEUSZ ZABECKI

441

UPON THE PETITION OF CHRISTINE ANN ZABECKI,	)	**Filed January 29, 1986**
Petitioner-Appellee,	)	5-520
AND CONCERNING DAVID TADEUSZ ZABECKI,	)	84-1948
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Scott County, Max R. Werling, Judge.

Respondent-husband appeals from the trial court's ruling on his application for modification of the decree dissolving the parties' marriage. He asserts that the trial court should have given him sole custody of the parties' child. **REVERSED.**

Paul L. Macek, Davenport, for respondent-appellant.

Michael S. Bennett, Davenport, for petitioner-appellee.

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

This appeal is from a request to modify the custody order of the court and change custody of the young boy involved from his mother to his father. The court denied the modification request. We reverse.

The marriage of petitioner Christine Zabecki and respondent David Zabecki was dissolved in May 1984. A joint custody arrangement was set up, with Christine having physical care of the parties' child, Konrad, born September 1973. David was directed to pay child support of $120 per week.

In September 1984 David applied for modification of the decree and asked that physical custody of Konrad be placed with him, citing as substantial changes David's imminent move to Germany to work for three years, Konrad's dislike of his mother's boyfriend and the man's children, a preference by Konrad that he live with his father, and disagreements between the parties regarding Konrad's schooling and recreational activities. The court denied the request.

Our review of the court's decision is de novo. Iowa R. App. P. 4. In order to warrant a modification of a custody order, David must show by a preponderance of the evidence that circumstances of the parties have substantially changed in a manner that affects the child's best interests. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The change that has occurred must not have been within the contemplation of the court. Id.

The trial court noted the mother had been insensitive to the father's interests and to the order for joint legal custody in her actions regarding Konrad's schooling and other activities. The parents had agreed that Konrad should be placed in a particular school noted for its advanced programs. Two weeks after the decree was filed, Christine made the decision to remove Konrad from the school without warning him or consulting with David. She also removed him

from several of his activities, including swimming competiton. This also occurred without prior discussion with Konrad or David.

David says this involves a substantial change in circumstances because the parties stipulated which school Konrad would attend. However, the stipulation states that Christine is to "encourage" Konrad to attend the school. Considering the nonmandatory language used, we believe that a potential change in schools was within the contemplation of the parties and the court.

The trial court, while condemning certain of the mother's actions, determined custody should be left with the mother. Its reasoning was explained in part by the court's conclusion that the father would run Konrad's life "on a precise scale in a very Prussian manner with an almost minute-by-minute detailed schedule of what Konrad should be doing now." In the same ruling the court found Konrad "is said to be a lad who needs a great deal of support around him." In regard to Konrad's desire to live with his father, the court commented:

> Konrad wants to live with his father. There is no question about that in the mind of the Court. There is, however, a very great question in the mind of the Court as to what the motivating reason is for Konrad's expressed desire. The illegal versus legal activities of his parents which Konrad made reference to in the Court's presence was not a specific enough reason for this Court to regard it as having any great degree of reliability. The Court is left to wonder if Konrad might not be feeling the need to gain favor with his father by expressing a desire to live with him. It is possible that, without realizing it, Konrad subconsciously sees that he cannot measure up to his father's expectations and demands of him by way of performance and hopes to substitute a siding with his father as an accomplishable avenue of gaining his love and affection. We hasten to point out that the record offers no evidence to support this theory, and it is merely a question that came to the mind of the Court as the Court observed Konrad and his interaction with his father and with his mother in these proceedings.

While we agree with the court that the change in schooling does not warrant modification, we find considerable support for a change in custody from the other evidence presented.

David will be moving to Germany for three years under his employer's directive. He says the schools there are superior and will afford an opportunity for Konrad to learn the German language. A witness testified on behalf of the father of his own childhood stay in Germany for three years, and reviewed the benefits which a child could receive from the cultural and educational experiences.

Konrad has stated he would like to live with his father for several reasons. He has expressed a desire to gain the advantages of living in Germany, and could visit his mother even while living there. He also stated he feels his father is more honest than his mother and spends more time with him. Finally, hostility has developed between himself and the mother's boyfriend and his children. Konrad has indicated he does not like the way this man disciplines his children. Several witnesses have confirmed Konrad's reports that the man beats, kicks, and screams at his children when disciplining them. On one occasion, several witnesses report seeing this man beating one of the children about the head. Konrad has been in several fist fights with these children and does not get along with them well either. Konrad states this is disturbing to him, as well as his mother's relationship with this man and that the man has spent the night with Konrad's mother at their house. This testimony by Konrad is uncontradicted. The father confirmed the statements made by Konrad, and although the mother testified, she was not asked about the fist fights or other troubles between her son and her boyfriend and his children. She indicated the relationship with this man would continue, although she had no intention of marrying him.

Neither the court, nor the parties could have anticipated the hostility between Konrad and this man and his children. In a case involving the same circumstances, the court found tension between the child, and the step-father and step-father's children was a substantial change in circumstances, and in In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976) the court stated:

> Marty had not developed a close relationship with his stepfather (his mother's husband). It could not honestly be said the relationship was hostile but it was quite obviously strained and in sharp contrast with the easygoing friendship developed between Marty and his stepmother (his father's wife).
>
> Tension between Marty and his stepfather does not appear to have resulted from fault on the part of either but rather from a difference in temperaments and interests. The record discloses Marty to be a bright, 15 year old student with excellent scholastic achievements. His stepfather's interests tend more toward the outdoors. Marty resented his stepfather's disciplinary efforts toward his two younger brothers.
>
> The difficult and controlling question for the trial court was whether the differences between Marty and his stepfather were real or whether the tensions developed only as a normal reaction to the discipline necessary for a teenager.

Id. Those are the same circumstances involved here. The only difference is that the relationship between the boyfriend, his children and Konrad involves more hostility than can be described as "tension."

The court there also gave weight to the child's preference. Id. It noted that children's preference is given less weight in a modification action than an original custody award. Id. This is because of the fear a child might play one parent against the other. Id. at 669. The court did not find that to be the case in Junkins, and we do not find that to be the case here. A review of all the evidence presented indicates Konrad loves both his parents and wishes to be close to both of them; however, he wants to live with his father for well thought-out and solid reasons.

The mother argues the trip to Germany is temporary only and not permanent. However, we find the transfer combined with Konrad's desires and hostility between himself, the boyfriend, and the boyfriend's children to be ongoing and not temporary. We also find them to be substantial changes in circumstances not within the contemplation of the court. The evidence shows both parents love Konrad. We find that David has proven by a preponderance of the evidence that he has the patience, time, and interest to spend with Konrad, and will provide a more stable and happy home life. We hold he has shown he has superior parenting abilities as required to warrant modification. See, Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972). We reverse the trial court and order physical custody be placed with David, with visitation to be liberally given to the mother, at times agreed upon by the parties.

While David requests a change to award him "sole custody" we do not change the original award of joint legal custody.

We do not decide what amount of child support Christine should pay. David did not request child support and the issue was not tried in the trial court.

REVERSED.