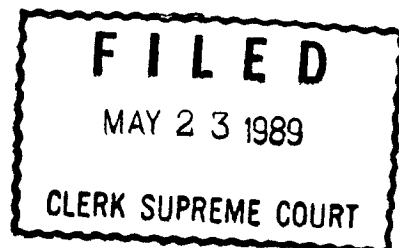


IN THE COURT OF APPEALS OF IOWA
IN THE MARRIAGE OF RANDALL W. LEWIS
AND KATHY K. LEWIS



Upon the Petition of)
RANDALL W. LEWIS,)
Petitioner-Appellant,)
And Concerning)
KATHY K. LEWIS,)
Respondent-Appellee.)

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88-1816

Appeal from the Iowa District Court for Mills County
(No. D-836), J. C. Irvin, Judge.

Husband appeals the district court's denial of
modification of physical care of his children. **AFFIRMED.**

Lloyd R. Bergantzel of Council Bluffs for
petitioner-appellant.

Richard C. Swenson of Glenwood for respondent-appellee.

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

OXBERGER, C.J.

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Randall Lewis appeals the district court's denial of his modification of physical care of his children. Our review is de novo. Iowa R. App. P. 4. We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We affirm the trial court.

Randall and Kathy Lewis were married in 1978 and the marriage was dissolved in 1982. One child was born of the marriage, Adam, a son, born in 1981. In addition during the marriage Randall adopted Kathy's son from a previous marriage, Mike, born in 1974. The present proceeding concerns the custody of both children.

The 1982 dissolution decree placed both children in Kathy's custody. In 1988 Randall filed the present petition to modify the decree asking that the custody of both boys be transferred to him.

The principles by which a modification of custody is determined are well established.

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

principal 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)).

Randall contends that since the dissolution Kathy has led an unstable life marked by frequent changes of residence and employment, changes in school systems, receipt of welfare benefits, and cohabitation with two different men. The most serious of Randall's allegations is that Kathy's most recent live-in boyfriend is presently charged with three counts of possessing cocaine with intent to deliver. He also asserts there is evidence that Kathy assisted in the sale of drugs. Randall also noted Kathy's recent voluntary submission to psychiatric evaluation and counseling.

Kathy's changes in residence and school districts have not been easy on her or the children. We do not find twelve moves and three school districts in six years to be a material and substantial change upon which to modify custody. It is true that Randall has lived on the same farm and had the same occupation for some fifteen years. However, we do not believe that several changes in employment and residence was not foreseen by the trial court which awarded Kathy custody of the children but not the marital home. Kathy was not employed at the time of

the dissolution. It was inevitable that some of this moving would occur as she tried to reestablish her life. Furthermore, at least two of these moves were in part prompted by physical abuse inflicted by Randy on Kathy. Randy was convicted once for assaulting Kathy. We do not feel that the boys have been significantly harmed by her actions. Adam, who is currently in the second grade, has always attended the same school. There has been no change in the children's school district for the past three years.

Randall also alleges as a change in circumstance that Kathy has been on welfare on occasion. We do not use this financial factor as a determination for a modification of a change in custody. Randy testified that the Department of Human Services claims he is delinquent in his child support payments. Randy is required by the decree to pay only \$175 per month per child in support. If Randy would provide more money for his children's support, Kathy would not be required to seek welfare assistance.

Randall also notes that Kathy has cohabited with two different men. The latest of the two was involved with cocaine. Randall asserts that Kathy was also involved. Kathy asserts that she was suspicious about her former boyfriend's drug activity but did not know for certain until charges were filed against him. Kathy testified that she severed her relationship with him when she learned of his drug activity. We do not foresee this relationship, which has ended, to be a permanent change in

circumstances. Further, we applaud Kathy's voluntary submission to psychiatric treatment and view this as a sign of positive steps being taken for the establishment of a more stable life.

Randall has remarried and continues to farm. We note that he would provide a stable home for the boys as well. However, we do not find a material and substantial change in circumstances which would warrant such a modification. Further, there is testimony that neither boy wishes a change in custody. Preferences of minor children while not controlling are relevant and cannot be ignored. In re Marriage of Ellerbrock, 377 N.W.2d 257, 258 (Iowa App. 1985) (citing In re Marriage of Burnham, 283 N.W.2d 269, 276 (Iowa 1979)).

We agree with the trial court's denial of a modification of custody. Accordingly, we affirm.

AFFIRMED.

Habhab, J. concurs; Sackett, J. concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I cannot agree with the majority's decision to leave custody of nine-year-old Adam with his mother. The majority has accurately traced Kathy's instability in living arrangements in the past six years. They also have correctly determined Randy has a stable home.

I do not agree with the majority that Kathy severed her relationship when she learned her boyfriend was a drug dealer and the relationship is over. Kathy lived with this man who now has been arrested on three charges of possession of cocaine with intent to deliver. While she denies any knowledge she knew he was selling drugs, I choose to disbelieve this testimony and find it is contradicted by the testimony of a special agent with the Iowa Department of Narcotics Enforcement who purchased cocaine on three occasions from Kathy's boyfriend. The agent testified on at least two occasions Kathy was present and privy to conversations when purchases took place. He also testified she agreed to take messages from the agent if her boyfriend was not available. Additionally, the agent testified Kathy was a party to an arrangement between the agent and the boyfriend to signal the boyfriend's availability. The agent also testified the children were in the home when at least one drug sale was made.

Because Kathy's testimony on this issue is contradicted by the agent, a witness clearly disinterested in the

outcome of this custody dispute, I am reluctant to give full credence to Kathy's other testimony and cannot be as convinced as the majority she has amended her life. However, like the majority, I commend her for having sought help. Because I find Kathy had active knowledge of her boyfriend's drug sales and allowed them to take place when her children were present in her home, I have serious doubts about her ability to be a stable protective and conscientious parent. In arriving at this conclusion I have also considered her inability to establish any kind of a stable environment for her children. In the past six years she has made thirteen moves.

While Randy is not without fault, I find he has exhibited stability of employment, has an excellent reputation in the farming community, apparently has a stable marriage to a wife who also has exhibited stability in employment. Randy has shown continual interest in the children and has faithfully complied with his support obligation. I find he has shown a superior ability to administer to Adam's needs and would modify the decree to grant him physical care.

I have problems, however, with the transfer of the older child despite my finding Randy's home provides a more stable environment. While I recognize there is strong authority for keeping the children together, I find the other factors here may make such an arrangement

unworkable. There is a six-year difference in the children's age. Randy is the adoptive not the natural father of Mike. While legally there is no difference, we have to recognize in family dynamics there frequently is a difference.

There is no evidence Randy has treated the older child as other than a natural son. He asked for custody of him in the dissolution and when he did not get custody he assumed and has faithfully discharged a support obligation for the child. Although the natural father has not supported Mike, Mike has a relationship with his natural father and his natural father's extended family which has undermined Randy's relationship with the child. Mike is under juvenile court supervision because of a shop lifting charge.

I note also Mike as well as Adam indicated a wish to live with their mother. While I give limited weight to the evidence of these wishes which came in through the testimony of a social worker who said the wishes were made known to him in the mother's presence, I find them when considered with other circumstances to be more relevant to the issue of Adam's custody than Mike's. While I have major concerns about any child living in a home where drug dealing may take place, I do not feel the answer is to transfer custody of Michael to Randy.