FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF PAMELA SUSAN ROTH AND GERALD JOSEPH ROTH

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Upon the Petition of)
PAMELA SUSAN ROTH,)
Petitioner-Appellant,)
And Concerning)
GERALD JOSEPH ROTH,) 9-193 / 88-1636
Respondent-Appellee.)

Appeal from the Iowa District Court for Dubuque County (DM 5483), James C. Bauch, Judge.

Petitioner appeals the modification order which placed physical custody of their minor child with the respondent. **AFFIRMED AS MODIFIED.**

Robert L. Sudmeier, Dubuque, for petitioner-appellant.

Chad C. Leitch and Michael J. Gau, Dubuque, for respondent-appellee.

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

SCHLEGEL, J.

Pamela Susan Roth, petitioner, appeals the modification order which placed physical custody of the minor child of Pamela and Gerald Joseph Roth, respondent, in Gerald.

The parties' marriage was dissolved in 1986. One child, Susan K. Roth, born April 13, 1981, was the only child of the marriage. The decree provided for joint legal custody. Neither party was awarded primary physical care of the child. Instead, the decree contained a complicated process to cause the child to spend two-thirds of her time with Pamela and one-third of her time with Gerald during the school year, and approximately one-half of her time with each parent during the summer time. Pamela was awarded the family home, where she and Susan resided. Both parents continued to reside and work in Dubuque. Both parents showed a genuine interest in Susan and her progress at school and her activities. Both parents acknowledge that the other is a good and loving parent.

This matter came before the court as a result of a petition for modification filed by Pamela. In that petition, Pamela claimed that since the decree of dissolution there has been a change of circumstances that requires a modification of the custodial and support provisions of the decree. She claimed that she had become engaged to be married to one Steven M. Wallace, a resident of the State of Massachusetts, and will be moving to

Wilbraham, Massachusetts on or about August 1, 1988. She asked that the custody and physical care of Susan be awarded to Pamela and that Gerald be required to pay child support. Trial was held, and the court found that a change of circumstances had, in fact, occurred, and that the best interests of Susan required that she be placed in the physical custody of her father. Pamela was ordered to pay child support in the amount of $250 per month, commencing January 1, 1989.

Pamela contends that the court should have granted her the modification she sought because she met her burden to prove that circumstances had changed and that a modification would be in the child's best interests. She also contends that she was entitled to move the child's residence to Massachusetts even without any such modification. She finally contends the district court was wrong in granting Gerald physical care because Gerald had not met his burden to prove a change of circumstances warranting such a modification.

Gerald, in his answer to Pamela's petition for modification, prayed that the decree be modified, that he be granted physical custody of Susan, and that a fair and reasonable child support be ordered paid by Susan.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of the 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. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The heavy burden on a party seeking to modify custody stems from the principle that once custody of children is fixed it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Although we have a case of two excellent parents who take a real interest in their child, this case is nearly a textbook of reasons why we should discourage a situation that may be known as "split custody." So far as the decree of dissolution is concerned, neither party has primary physical custody of Susan. This little girl is in the unhappy position where neither of her parents, so we are led to believe, is in a position to make a decision for her in case of a deadlock between the parents. The Supreme Court of Iowa has ruled that the parent with primary physical care or custody of the child may make the decision where the child will live, unless the nonphysical custodian can carry the burden of proof that a move would be contrary to the best interests of the child. Marriage of Frederici, 338 N.W.2d at 160.

This case is also complicated by the fact that, although Pamela plans to move to Massachusetts and marry, she has testified--believeably, it would seem--that if she is not permitted to take Susan with her, she will not move and will remain in Dubuque. We do not accept the role being thrust upon us by Pamela. Without her marriage and removal to Massachusetts, we do not find her engagement, and conditional intent to marry, to be a substantial change in circumstances. Were the record silent beyond that alleged change, we would dismiss Pamela's petition for modification.

We believe the evidence, aside from the move to Massachusetts, which will not occur if Pamela is not permitted to move Susan with her, shows there has been a substantial and material change in circumstances which makes it necessary to consider modification of the decree of dissolution. Susan's needs have changed substantially. It appears from the record in this case the best interests of Susan require that one of her parents be designated her primary physical custodian. The evidence shows that, in spite of the good intentions of both parents in sharing physical custody of Susan, there have been disruptive influences upon her to the extent that counseling has been necessary to help her cope with her insecurities. The primary physical care of Susan has been provided by Pamela. While Gerald has been heavily involved in the care

of Susan, the most nurturing parent has been Pamela. It has been she who, being concerned with the welfare of the child, has sought counseling to overcome Susan's feelings of being bounced around "like a Ping-Pong ball." It is Pamela who has been the more concerned with Susan's perception of Gerald than has been the case with Gerald. Finally, although it is certainly not controlling in this case, Susan's desire to spend more time with her mother and to move to Massachusetts with her appears to be genuine.

At the time of the decree, both parents believed that a split custody arrangement would provide the least disruptive situation for Susan. It was with this well-motivated thinking that the parents made arrangement for shared care of the child. It is apparent now, however, that this arrangement has been a disruptive influence on Susan's life, and that she needs the stability of having one parent as primary custodian. With continued extensive visitation, she will have the benefits of a close and loving relationship with both parents.

The record fails to justify the modification made by the district court. From the record it is not possible to find that Gerald has carried his burden to show that he would be not just as good a parent, but a superior parent to Pamela or that a change in circumstances has occurred to justify a modification making him the primary physical caretaker of Susan. At best, the record would only justify

a dismissal of the petition for modification filed by Pamela were we to fail to modify the decree to recognize that Pamela is the primary caretaker.

We modify the decree and declare Pamela to be Susan's primary caretaker. Having arrived at that conclusion, we further find that Pamela should be permitted to move Susan to Massachusetts, should that be her desire. In the event of such a move, the following visitation schedule shall be in effect, until changed by further action, if any:

> Gerald shall have visitation of Susan for a period of up to five days during any time that he shall be present within 25 miles of the place of Susan's residence.
>
> Pamela shall arrange for Susan's transportation to Dubuque, or any other place in Iowa where Gerald resides, for one week visitation with Gerald during the Christmas break from school and one week during the Easter or spring break from school. Pamela shall be required to pay the cost of transportation both ways on those occasions. The times of those visitations shall be determined by Gerald and Pamela so that they do not interfere with Susan's activities at school.

The visitation during the Christmas holidays shall be arranged so that in alternate years Christmas day shall be spent with alternate parents.

Two weeks following the end of the school year (in the spring of each year) Gerald shall have visitation with Susan for a period of six consecutive weeks. The cost of transportation for such visitation shall be borne by Gerald and he shall return Susan to Pamela's home not later than the Sunday following the end of the sixth week.

At any time Pamela shall return to Iowa, she shall notify Gerald, and shall provide an opportunity for visitation by him for not less than one-half the time she shall be in Iowa.

In the event Pamela shall not move to Massachusetts, these visitation provisions shall not apply, and Gerald shall have all reasonable visitation to be determined by the parties.

Gerald shall pay child support in the amount of $300 per month until Susan shall reach the age of 18 years, or until she shall reach the age of 22 years, should she become a full-time student as prescribed by Iowa Code section 598.1(2).

The parties shall each pay one-half of the costs of this appeal, and they shall pay their own attorneys.

AFFIRMED AS MODIFIED.