

SEP 21 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SHARON LEE ELLSWORTH and EDWARD FLOYD ELLSWORTH

Upon the Petition of )

SHARON LEE ELLSWORTH, )

Filed September 21, 1978

Appellant, )

And Concerning )

EDWARD FLOYD ELLSWORTH, )

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3-61442

Appellee. )

Appeal from Polk District Court - Harry Perkins, Jr., Judge.

Mother appeals from order modifying dissolution decree so as to change custody of minor child from mother to father. Affirmed by operation of law pursuant to § 684.36(1), The Code.

Rebecca Ann Belcher, of Des Moines, for appellant.

Joyce M. Nixon, of Stamatelos & Smith, West Des Moines, for appellee.

Heard by Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

## PER CURIAM

Appellant, Sharon Lee Ellsworth, who was the petitioner in the original marriage dissolution proceeding in this cause, appeals from a trial court order changing custody of the minor child of the parties from Sharon to her former husband Edward Floyd Ellsworth. The original decree of dissolution between the parties was entered on December 19, 1974 and granted custody of Charles, the only minor child of the parties, to Sharon. In November of 1977, Edward applied to the trial court for a modification of said decree so as to grant custody of Charles to him. This application was heard on December 20, 1977. Evidence was taken, and on December 22, 1977, the trial court granted the requested change of custody. The trial court's order implementing the change of custody has been stayed pending this appeal.

Pursuant to rule 4, Rules of Appellate Procedure, our review of the ultimate determination involved is de novo. In making such determination we are mindful that the party seeking a change in custody must establish that conditions since the original decree have materially and substantially changed and that as a result of such change the moving party is able to minister more effectively to the well being of the children than the original custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976); Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974).

In applying these principles in the present case, we conclude that the record supports the trial court's finding that since the original decree conditions surrounding the environment in which Sharon resides with Charles has changed in a manner demonstrated to be detrimental to Charles's welfare. The child is being exposed not only to an environment involving sexual immorality but also one where basic dishonesty is apparently not uncommon. The choice is uncertain and unsatisfactory largely due to a lack of evidence relating to Edward's ability to provide a better home for Charles. But, considering the alternatives, and giving deference to the trial court's superior position from which to judge credibility of the witnesses, we will not disturb the decision. See Zaerr v. Zaerr, *supra* at 478.

The judges of this court being equally divided on the issue the trial court is affirmed by operation of law pursuant to § 684.36(1), The Code.

AFFIRMED.

Donielson, Acting C.J., and Snell, J., concur; Oxberger, J., and Carter, J., dissent.

CARTER, J. (dissenting)

I dissent. I find the record fails to reflect sufficient proof of Edward's ability to minister more effectively than Sharon to Charles's well being. Many of the claims of misconduct against Sharon are strained and the subject of proof too weak to be credited. Most of these claims are not related by the evidence to the welfare of Charles, a requirement in modification cases. In re Marriage of Brown, 242 N.W.2d 2, 4 (Iowa 1976).

There is much evidence that Charles's physical and emotional well being is satisfactory under Sharon's care. There is little or no evidence of Edward's abilities to provide for the child's needs on either a short term or long term basis. Charles has expressed a preference to remain in Sharon's custody.

Based upon the evidence introduced and also the lack of evidence introduced I must conclude that Edward has failed to establish that custody should be changed. See, e.g., In re Marriage of Morton, 244 N.W.2d 819 (Iowa 1976). I would reverse the trial court.

Oxberger, J., joins in this dissent.