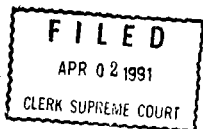


IN THE COURT OF APPEALS OF IOWA

No. 1-048 / 90-1403



IN RE THE MARRIAGE OF KATHERINE ANN PARKER AND DOUGLAS A. PARKER

Upon the Petition of

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KATHERINE ANN PARKER, n/k/a KATHERINE ANN WARNER,

Appellant,

And Concerning

DOUGLAS A. PARKER,

Appellee.

Appeal from the Iowa District Court for Johnson County,
Kristin L. Hibbs, Judge.

Mother appeals modification placing her son in the
physical custody of his father. **AFFIRMED.**

Michael W. Kennedy of Barker, Cruise, Kennedy, Houghton
& Foster, Iowa City, for appellant.

Margaret T. Lainson of Meardon, Sueppel, Downer &
Hayes, Iowa City, for appellee.

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

HABIB, J.

Katherine Parker (now known as Katherine Warner) and Douglas Parker were divorced in Texas in January 1980. Katherine was awarded physical care of the parties' two minor children: Douglas A. Parker, Jr., born June 1, 1975; and Brandon Robert Parker, born September 3, 1978.

After the divorce Katherine moved to Utah where she met and married Claude Warner, a physician. During their marriage Katherine and Claude have had four children. The Warners now live in Iowa City where Claude is pursuing medical studies. Katherine does not work outside the home, but takes care of her six children.

Doug Sr. now lives in Tucson, Arizona, with his current wife, their daughter, and his stepson. He filed this modification action seeking to obtain physical care of Doug Jr. This was primarily because Doug Jr. was doing so poorly in school. Doug Jr. failed three of his classes in his last semester of eighth grade. However, his scores on the Iowa Test of Basic Skills show him to have above average ability. Doug Jr. suffers from chronic asthma and various allergies which are treated by the drug theophylline. Doug Sr. believes that this drug may be affecting Doug Jr.'s ability to do his school work.

The district court modified the decree to place physical care of Doug Jr. with his father. The court found there had been a substantial change of circumstances. In this respect, the court found that Doug's educational

difficulties were a substantial change. The trial judge further determined that Katherine had a "sink or swim" attitude toward Doug's education, and this was not in his best interests. Katherine now appeals.

Katherine claims that the court should not have transferred custody of Doug Jr. to his father. She states that Doug Jr. has never done very well in school and that she has been continuously involved in his education. Katherine asserts that Doug Jr. should not be separated from his siblings or from his church. Katherine asks for attorney fees incurred before the district court and on appeal.

Our review in cases such as these 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 are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

The first and governing consideration of any child custody matter -- be it the original determination or a modification action -- is the best interest of the child. In Re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The trial court determined after hearing the evidence that it would be in Doug Jr.'s best interest to move to Arizona

and live with his father. After a thorough review of the evidence, we agree and accordingly affirm.

The burden in showing a change in circumstances lies with the parent alleging the change in circumstances. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

To change the 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 child's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the child's well being. Id.; see also In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa App. 1985).

The trial judge found and we agree that a significant change in circumstances has occurred since the Parkers' divorce in 1980. The educational difficulties Doug Jr. has experienced could not have been anticipated at the time the divorce decree was entered. Further, these difficulties appear to be permanent and, for the most part, commenced when Doug Jr. began living with his mother and her husband. We agree with the trial court that Doug Jr.'s academic problems constitute a change in circumstances.

Custody decisions are always difficult and this case is no exception. We are faced with two parents who love Doug Jr. very much. They appear to be concerned with what would be best for him. However the record indicates that perhaps Katherine and her husband are unable to help Doug Jr. realize his academic potential. We are also troubled, as was the trial court, with the attitude displayed by Katherine during trial. Most particularly we are concerned with her comment that "she would rather have Doug Jr. stay in Iowa City and fail rather than go to Arizona and succeed." Katherine indicated that as long as Doug Jr. was happy, he could eventually get his GED and that would be fine with her. While we do not find these comments to be sufficient to support our decision entirely, they do merit some attention and concern by this court.

There is sufficient additional evidence which convinces us that Doug Sr. should have physical custody of Doug. We find Doug Sr.'s claim that Katherine is not following professionally-recommended procedures persuasive. Testimony reveals that although the Warners sought professional counseling to help Doug Jr. achieve scholastically, they failed to follow through with many of the suggestions provided.

The report regarding Doug Jr.'s failure to achieve was compiled in May of 1989 at the end of his seventh grade year. One recommendation suggested tutoring would be helpful. However, Katherine declined to obtain a tutor

because she felt since school is a group learning situation, one-on-one assistance would not be helpful. She made this determination despite the fact that a qualified counselor had made the recommendation after evaluating Doug Jr. In addition, Katherine took Doug Jr. to see a social worker, however, she declined to follow up with a second visit.

Doug Sr. is clearly very concerned with his eldest son's failure to achieve academically. He suggested to Katherine and her husband that it might be beneficial for Doug Jr. to spend a year with him in Arizona to see if it made any difference and Katherine refused. Appellant spends a great deal of time arguing the merits of the drug theophylline which Doug Jr. takes for his asthma. While this certainly is important, we do not find it to be determinative in this modification action. We do note from the evidence presented by both sides that there is a variety of theories regarding this drug in the medical community.

We agree with the appellee that the crucial issue is whether a change in environment and tactics could help Doug Jr. overcome his serious academic difficulties. Keeping the law regarding modifications in mind, we find that it would be in Doug Jr.'s best interest to live in Arizona with his father. This young man needs help if he is to overcome his academic deficiencies. His test scores show him to be a bright individual. Doug Sr. believes he can

provide guidance his ex-wife has been unable to furnish. We agree with the trial court that Doug Jr. deserves the opportunity to succeed, and we believe his father should be given the opportunity to help in this effort. It would be manifestly wrong to do otherwise.

Katherine also contends Doug Sr. should be required to pay attorney fees incurred before the district court and on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). After reviewing the record, it is the opinion of this court that each party should be responsible for his or her own attorney fees.

AFFIRMED.