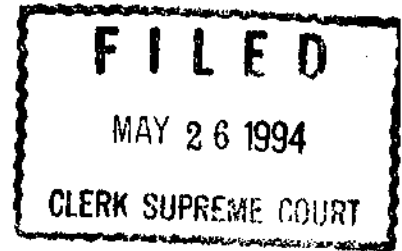


IN THE COURT OF APPEALS OF IOWA

No. 4-159 / 93-1035



IN RE THE MARRIAGE OF LARRY J. MELCHER AND
PATRICIA D. MELCHER

Upon the Petition of
LARRY J. MELCHER,

Petitioner-Appellee,

And Concerning
PATRICIA D. MELCHER n/k/a PATRICIA D. ERICKSON,

Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie
County, Leo F. Connolly, Judge.

Patricia appeals from an order modifying the physical
custody provisions of the parties' dissolution decree.

AFFIRMED.

Timothy O'Grady, Council Bluffs, for appellant.

Mark J. Eveloff and Robert L. O'Brien, Council Bluffs,
for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

PER CURIAM

This is an appeal from an order modifying a dissolution decree to transfer physical care of two children. The district court modified the dissolution decree of petitioner-appellee Larry J. Melcher and respondent-appellant Patricia D. Melcher to make Larry the physical custodian of Teri, born August 17, 1977, and Michelle, born June 9, 1980. The sole issue in this appeal is whether Larry met his burden of establishing he was the superior custodian. We affirm.

The marriage of Larry and Patricia was dissolved in 1989. At the time, Larry was made physical custodian of the oldest child, Tami, born in September 1974. Tami is now an adult and her custody is not an issue. Physical care of Teri and Michelle was given to Patricia.

This petition for modification of Teri's and Michelle's physical care was filed following allegations by Tami of improper sexual conduct by Patricia's current husband, Kenneth. The case was tried and the trial court found Larry had met his burden, and the best interest of the children was to have Larry designated the primary custodian. Patricia filed a 179(b) motion seeking an enlargement of the factual findings of the trial court. The motion was overruled. Patricia appeals contending the trial court should have made specific factual findings and there is no evidence corroborating charges by the children that Patricia's current husband, Kenneth, acted

inappropriately; consequently, Larry had not met the necessary burden.

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 children'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 children's well being. Id., see also In re Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa App. 1985). 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).

Patricia first contends the trial court should have enlarged its findings in response to the motion under 179(b). We review de novo, Iowa R. App. P. 4, and make our own findings. See Iowa R. App. P. 14(f)(7).

The primary evidence supporting modification was Tami's testimony to an occasion where her mother was not home and Kenneth told Tami to lay in his bed and he subsequently came in, undressed Tami, and raped her. Tami said she told Patricia about the incident and her mother did not believe her. Tami testified she has worried her sisters would face a similar problem and their mother would not protect them.

Kenneth denied the intercourse. He did testify to an incident where Tami crawled in bed with him and kissed his neck.

Patricia denied Tami told her about the intercourse and also testified Tami had denied it happened.

Teri testified Kenneth hit her. Kenneth told of pulling Teri's phone off the wall and cutting the cord and slapping her but said it only happened once.

If Tami's testimony is believed, it supports a finding Kenneth raped Tami and her mother failed to act, and there is concern Kenneth may pose a similar threat to the younger girls.

Patricia contends Tami should not be believed and Tami has lacked credibility in the past and there is no other evidence corroborating her testimony.

The question is who is to be believed, Kenneth or Tami. The trial court, while not making a specific finding of credibility, obviously elected to believe Tami. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, because the trial court has had the unique opportunity to hear and observe the witnesses first hand. See In re Marriage of Miller, 390 N.W.2d 596, 600 (Iowa 1986).

There is evidence of lack of supervision by Patricia and of fear the girls have about being in her home. Larry has remarried and has a two-year-old child. Larry has met his burden.

Larry requests attorney fees on appeal. We award Larry attorney fees of \$500.

Costs on appeal are taxed to Patricia. She shall pay her own attorney fees.

AFFIRMED.