FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHLIEN MARIE ZWIEFEL AND KERMIT DARL ZWIEFEL

Upon the Petition of)
KATHLIEN MARIE ZWIEFEL,)
Appellant,)
And Concerning) 248 / 3-60312
KERMIT DARL ZWIEFEL,)
Appellee.)

Appeal from Kossuth District Court - James H. Andreasen, Judge.

Petitioner mother appeals trial court modification of 1965 divorce decree to transfer custody of 15 year old son to his father. - Affirmed.

Joseph E. Lynch & Martin W. Peterson, of Lynch and Peterson, of Algona for Appellant.

Eldon J. Winkel, of Winkel, Nitchals and Winkel, of Algona for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Kathlien Marie Zwiefel appeals the 1976 modification of the 1965 divorce decree transferring custody of her son, Kendal, age 15 at the time of the hearing, to his father, Kermit Dale Zwiefel. The parties were married in 1961, and a child, Kendal Carl, was born on October 21, 1961. A divorce was granted in 1965. The decree awarded custody of Kendal to the mother and visitation to the father who was also required to pay $30 per month in child support.

After Kermit's remarriage in 1969 he made only two additional support payments and generally had little contact with Kendal. In 1972, Kathlien and Kendal moved to Florida, where she currently resides, works, and attends school. During 1973 and 1974, Kathlien permitted Kendal to return to Minnesota for approximately one month to visit his father.

Although Kendal appeared to be progressing well in school in Florida, when he was 13, Kathlien began to notice some behavioral problems and started Kendal in a program of mental health counseling. Apparently, a more serious problem developed in 1975, when Kendal had been accused by another youth of stealing a bicycle. Although charges filed were subsequently dismissed, the testimony indicates that Kendal threatened to kill another youth. After his counselor and mother were informed of this threat, it was decided to admit him to a mental hospital as a full-time patient.

The record indicates that prior to his hospitalization, Kendal had lost interest in school and was skipping several of his classes. While in the hospital, Kendal contacted his father in Minnesota by phone and asked that he be allowed to be with his father. On June 11, 1976, after 5 1/2 months, Kendal was discharged from the hospital, and on June 29, he flew to Minnesota where he met his father who had provided the airline ticket.

Since that time, Kendal has been living with Kermit, Kermit's second wife, and their two children on a 284 acre farm. The record reflects that Kendal has adjusted relatively well to this new family environment, has made new friends and enjoys helping his father on the farm. Furthermore, Kendal has expressed a strong desire to remain in this environment, rather than return to Florida which had been

the site of much unpleasantness in his life. We do wish to note, however, that we do not attribute this unfortunate period in Kendal's life to his mother.

Our review in this matter is de novo. Rule 4, Rules of Appellate Procedure. In a proceeding regarding change of custody, the parent seeking to take actual custody from the other has the burden of demonstrating some superior claim based upon his or her ability to minister, not equally, but more effectively to the child's well-being. In re Powers, 226 N.W.2d 810, 811 (Iowa 1975). The best interests of the child remain in this case as it does in all cases involving the question of custody, the governing consideration. Id. at 812; Rule 14(f)(15), R. App. P.

The party seeking the modification must demonstrate "the most cogent of reasons." Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970). Furthermore, although the preferences of the child are not controlling, they are entitled to some weight. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975); In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976).

Another key principle guiding our analysis is that we give weight to the findings of the trial court, but are not bound by them. Rule 14(f)(7), R. App. P. We decide that the instant case is a particularly appropriate one for such deference, especially in light of the nature of the testimony, and the thorough and perceptive analysis by the trial court in its Order and Decree of Modification. Furthermore, this record reflects that the trial court demonstrated a special sensitivity to the problems existing in this case, and we are convinced that the court gave appropriate consideration to the many delicate factors in its decision.

After a careful review of the record as a whole, we are convinced that the trial court correctly concluded that Kermit had met his burden of proof of establishing that he can more effectively serve Kendal's interests than Kathlien.

Therefore, the judgment of the district court is affirmed.

All judges concur, except Oxberger, J., who dissents.

OXBERGER, J. (dissenting)

I dissent. I sympathize with the dilema of a court faced with the necessity of rendering a custody decision for a 15-year-old boy who faces the court and declares he will not under any circumstances live with his mother. I also realize that many 15-year-old children are sophisticated and self-sufficient. However, this 15-year-old in the words of the court-appointed psychologist is a:

> ". . . defensive, denying youngster, but he did reveal himself to be somewhat emotionally immature for his age and feeling somewhat unwanted in his growing up years. He is likely to get into some difficulty with society because of a need for excitement and stimulation and a tendency to act impulsively."

We need not rely upon the predictions of the psychologist alone. Indeed Kendal has already demonstrated that he is a threat to society. He was committed to a mental health institute following his threats to kill an individual when he was angered by accusations that he had stolen a bicycle. Kermit arranged for Kendal to come to Minnesota, without Kathlien's knowledge or consent, just after his release from the institution. Kendal since his arrival in Minnesota has received no further counseling.

It is tempting to blame Kathlien for Kendal's emotional troubles since they started when he lived with her. However, I believe the blame lies with Kermit for his years of neglect. When Kendal was six Kermit stopped paying child support. Since that time the mother Kathlien has been the sole support for Kendal. Now, nearly ten years later, Kermit seeks to reenter Kendal's life and remove him from the mother who provided for all his needs for the past ten years. I have no doubt that Kendal's feeling of being "unwanted" stems from the failure of his father to be a parent.

The most tragic aspect of the majority's decision to place Kendal with his father is the lack of acknowledgment by Kermit of Kendal's problem. The record clearly indicates Kermit recognizes no need for Kendal to continue to receive psychiatric counseling.

The supreme court in In re Marriage of Pakrzwinski, 221 N.W.2d 283, 284 (Iowa 1974) said the party seeking to change custody must show he has the superior ability to provide for the long range best interest of the child.

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I am convinced that Kathlien continues to indicate the greater capacity to respond to the long range best interest of Kendal. It is she who has insisted Kendal's problems must be worked through; and that they must be worked through by him. The decree at the time of dissolution allowed Kermit summer visitations. I see no reason for altering its provisions. Kermit should contain his efforts at rehabilitation as a parent to the visitation rights accorded him by the decree. Kendal needs continued parenting from Kathlien just as surely as he needs continued contact with Kermit. I find no basis for a disruption of Kathlien's custody of Kendal.