IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHARLENE MARIE BRODERSEN
AND RANDALL LOUIS BRODERSEN

Upon the Petition of)
CHARLENE MARIE BRODERSEN,)
Petitioner-Appellee,)
And Concerning)
RANDALL LOUIS BRODERSEN,)
Respondent-Appellant.)

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Appeal from Scott District Court - Margaret S. Briles, Judge.

Respondent-father appeals the trial court's denial of his petition for modification of the child custody provisions of the parties' dissolution decree alleging a change of circumstance has occurred due to the mother's open cohabitation with her boyfriend. AFFIRMED.

Edward N. Wehr of Wehr & DeLange, Davenport, for respondent-appellant.

Stephen L. Schalk of Schalk & Bradfield, Davenport, for petitioner-appellee.

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

PER CURIAM

Respondent, Randall Louis Broderson, appeals the trial court's denial of his petition for modification of the child custody provisions of the parties' dissolution decree. Randall contends there were material and substantial changes of circumstance, not contemplated by the trial court since the entry of the decree. Randall also claims he was denied a fair and impartial hearing on his petition for modification by improper conduct of the trial court. Randall requests either custody of the minor child or a new hearing on his petition.

Respondent, Randall Broderson, and appellee, Charlene Marie Broderson, were married in 1972. A single child, Chad, was born to the couple in September of 1975. Chad was five years old at the time of the modification hearing. The parties' marriage was dissolved on October 8, 1979. Custody of Chad was awarded to Charlene. Randall filed his petition for modification of the dissolution decree on May 13, 1980, requesting custody of Chad be transferred from Charlene to Randall.

Since the entry of the decree until July of 1980, Charlene lived in Davenport. At that time she moved to Geneseo, Illinois, and is now living there with her boyfriend, Buster Sullivan. Charlene works at a Target store and has a varying work schedule. Testimony indicates that Chad is a normal, healthy and well-adjusted child.

Randall is a salesman for Franklin Life Insurance Company and has worked there for eight years. Randall's schedule requires him to work some evenings. Randall and his second wife, Marian, live in Marian's home.

We do not believe that the respondent "has established by a preponderance of the evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award their custody to him. . . . This heavy burden stems from the principle that once custody of children 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).

Respondent has requested a new trial due to the trial judge's conduct. He has cited no evidence he was prevented from introducing due to the conduct of the trial judge. Since we decide this matter **de novo**, we find insufficient reason to grant a new trial.

Nevertheless, we are concerned about the trial court's manner of conducting this trial. On many occasions the court took over the interrogation of witnesses. Counsel was questioned as to his trial purposes in a manner bordering on antagonism. We are

satisfied that Randall's counsel was not dissuaded from properly representing his client and exhibited the necessary "special brand of courage." See State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976) (Reynoldson, C.J.). But such conduct even in the trial of an equity case to the court is inappropriate.

AFFIRMED.

All judges concur except Snell and Donielson, JJ., who dissent.

SNELL, J., (dissenting)

I respectfully dissent.

After the dissolution, Charlene moved into Buster Sullivan's house where she is openly cohabiting with him without any plans for marriage. In addition to the moral detriment reflecting to her son, she has no legal rights of residence affording any semblance of stability. "Moral misconduct is a circumstance to be given serious consideration in determining the fitness of a parent to have custody of minor children . . ." Heggen v. Heggen, 226 N.W.2d 13, 16 (Iowa 1975). These matters were not present or contemplated at the time of the original decree and constitute a material change of conditions.

Given this totally different custodial situation than prevailed at the time of dissolution, a review of the custody award was mandated. On this issue Randall amply proved that the child's best interests make it expedient to award custody of the child to him. Alex v. Alex, 161 N.W.2d 192, 194 (Iowa 1968) quoted with approval Black v. Black, 203 N.W.2d 121, 124 (Iowa 1972), and in Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1969) the court stated: "The applicant for a custodial change of a divorce decree has the burden not only to prove by a preponderance of the evidence that subsequent conditions have materially changed, but also to show that a change in custody will be conducive to the welfare of the child." Randall is remarried and has in fact cared for Chad a great amount of time since the dissolution. As to the child's best welfare, the court hearing the modification evidence commented "if this thing were to happen all over again, I wouldn't have awarded her the kid for anything in the world, but that's not the point." I believe that is the point.

Donielson, J., joins this dissent.