

FILED

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IN THE COURT OF APPEALS OF IOWA SUPREME COURT

IN RE THE MARRIAGE OF DORIS E. KAESSER and MERLE L. KAESSER

Upon the Petition of)

DORIS E. KAESSER,)

Filed June 24, 1977

Appellee,)

And Concerning)

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3-60058

MERLE L. KAESSER,)

Appellant.)

Appeal from Black Hawk District Court - Carroll E. Engelkes,
Judge.

Appeal from an order sustaining in part and denying in part
a petition to modify the child custody provisions of a dissolution
decree. Modified and affirmed.

Samuel T. Beatty of Mosier, Thomas, Beatty, Dutton, Braun
& Staack, of Waterloo, for appellee.

D. Quinn Martin of Gallagher, Martin, Keith & Langlas, of
Waterloo, for appellant.

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

PER CURIAM

Respondent, Merle Kaesser, appeals the trial court's adjudication of his petition to modify the child custody provision of a prior decree dissolving his marriage to the petitioner, Doris Kaesser.

The original dissolution decree was entered on August 14, 1973. With respect to the two minor children of the parties, custody of Bruce, then age 14, was given to Merle and custody of Rodney, then age 11, was given to Doris. On July 14, 1975, this arrangement was modified by the trial court on Doris' application so as to give her custody of both boys.

In May of 1976 Bruce returned to live with Merle and in July of 1976 Merle petitioned the trial court to again modify the decree so as to give him custody of both boys. This petition was granted with respect to Bruce but was denied with respect to Rodney.

I. Principles governing appeals of this type are well established. Our review is de novo. In re Marriage of Gutermuth, 246 N.W.2d 272 (Iowa 1976); Baker v. Baker, 243 N.W.2d 234, 235 (Iowa 1976); Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). We give weight to the fact findings of trial court, but will not abdicate our duty to review de novo and determine the issues presented upon the facts disclosed of record. Rule 344(f)(7), Rules of Civil Procedure; Schoonover v. Schoonover, 228 N.W.2d 31, 33 (Iowa 1975).

Of course, our first and governing consideration is the best interests of the children, rule 344(f)(15), R.C.P.; Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974). The question for us, as it was for trial court, is whether Merle, as noncustodial parent, established by a preponderance of evidence that conditions since the prior custody orders have so materially and substantially changed that the children's best interests make it expedient to

award custody of both boys to him. *Zaerr v. Zaerr*, supra, 222 N.W.2d at 477.

A change of circumstances within the intent of this rule is measured against certain criteria. The changed circumstances must be such as were not within the contemplation of the court when the former decree was entered. *Black v. Black*, 203 N.W.2d 121, 124 (Iowa 1972); *Pucci v. Pucci*, 259 Iowa 427, 433, 143 N.W.2d 353, 357 (Iowa 1966). The change must be substantial and material, not trivial. *Zaerr v. Zaerr*, supra, 222 N.W.2d at 477. The change must be more or less permanent or continuous, not temporary. *Pucci v. Pucci*, supra, 259 Iowa at 433, 143 N.W.2d at 357; *Black v. Black*, supra, 203 N.W.2d at 124. Finally, the change must relate to the welfare of the children. *Brown v. Brown*, 261 Iowa 591, 594, 155 N.W.2d 426, 427 (1968).

II. Application of the foregoing principles leads us to the conclusion that the trial court should have modified the prior custody orders as to Rodney as well as Bruce. Rodney's custody is now the only issue before us because Bruce has attained the age of majority. The most significant factor in our decision to change Rodney's custody is the extent to which the record reveals the extreme tension and hostility which has developed between Rodney and Doris' husband by remarriage.

We see no reason to detail the evidence bearing upon this situation. It is obvious that a very unwholesome situation exists. Of equal importance is the fact that there is no reason to believe that this situation will ever improve. While we believe much of the fault stems from Rodney's attitude it is partly due to the fact that he and his stepfather have no common interests. Doris' present husband quite candidly admitted at the latest modification hearing that he believed Rodney to be "extremely miserable" as a result of the existing custodial arrangement.

The situation resulting from Doris' remarriage and its effects upon Rodney, are unfortunate. But, as a result of this situation, and because the record shows Merle to be a competent parent, we hold the circumstances now render expedient the transfer of Rodney's custody to Merle. See *In re Marriage of Junkins*, 240 N.W.2d 667 (Iowa 1976).

We are also influenced by the uncontroverted fact that Rodney's strong personal preference is to be with his father. This is not controlling (Rodney is now 15), and is ordinarily to be given less weight in a modification proceeding than in an original action. But we believe the situation presented is such that Rodney's best opportunity to enjoy a home atmosphere free from insufferable strife is to be with his father in accordance with his wishes.

We accordingly modify the order of trial court so as to provide that custody of Rodney as well as Bruce be placed with Merle. Doris shall be afforded reasonable rights of visitation with Rodney. Merle's obligation to pay child support shall terminate upon issuance of the procedendo in this cause. As so modified the trial court's decree is affirmed. Costs are taxed 25% to Doris; 75% to Merle.