

IN THE COURT OF APPEALS OF IOWA

No. 0-130 / 89-528

FILED

MAY 24 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DEE K. CONOVER AND ALLEN K. CONOVER

31

Upon the Petition of
DEE K. CONOVER, n/k/a DEE K. LUEDTKE,

Appellant,

And Concerning
ALLEN K. CONOVER,

Appellee.

Appeal from the Iowa District Court for Story County,
Louis F. Beisser, Judge.

The petitioner wife appeals a ruling of the district
court denying her request to have custody modified from
respondent husband to her. **AFFIRMED.**

Gary J. Shea of Shea Law Offices, Cedar Rapids, for
appellant.

Lorna A. Gilbert of Davis, Hockenberg, Wine, Brown,
Koehn & Shors, Des Moines, for appellee.

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

SCHLEGEL, J.

32

The mother appeals the trial court's denial of her request for modification of custody. We affirm.

Dee Luedtke, f/k/a Dee Conover, and Allen Conover were granted a dissolution of their marriage on January 2, 1986, following a five-year marriage. One child, Adam, was born of the marriage, and was six years old at the time of the modification trial. Pursuant to the dissolution decree, Dee and Allen were awarded joint custody, with primary care of Adam placed with Allen.

Dee is thirty years old and possesses a bachelor of science degree from Iowa State University. Since the decree of dissolution was granted, Dee has remarried, marrying Kurt Luedtke of Cedar Rapids in November 1987. At the time of the original dissolution decree, Dee was living with her parents, emotionally distressed, and earning a minor income as a telemarketer. Kurt, a licensed respiratory therapist, is the owner and manager of two successful Cedar Rapids nightclubs. Dee now works as an insurance salesperson for Century 21/Metropolitan Life. Kurt and Dee have a combined net worth of approximately \$500,000, with annual income of over \$100,000.

Allen is an auctioneer, working primarily out of his home. Business travel takes Allen out of the home approximately two nights each month. Though Allen's income had decreased sharply in the year before the modification, Allen's income had averaged over \$100,000 per year. Allen

was residing with Jeanne Johnston, who is a full-time secretary and bookkeeper. Allen currently lives in Baxter.

Dee filed the present modification action on April 6, 1988. At trial, Dee offered the testimony of Dr. Keri Kinnaird, a court-appointed licensed child psychiatrist. Dr. Kinnaird testified that while both parents were good in administering to the needs of Adam, Dee was better able to provide Adam with the emotional support he needs. Dr. Kinnaird testified that during her observations Adam appeared to exhibit emotional problems while in Allen's care, and that Allen appeared to deny the existence of any problems. Dr. Kinnaird also observed that Adam expressed his wish to reside with his mother. Dr. Kinnaird also testified that Adam had told her that his father would punish him for expressing his desire to live with his mother.

The district court ruled that Adam should remain with Allen. The court noted that while Dr. Kinnaird stated Dee should have custody, by everyone's account Adam had grown to be a very bright, well-mannered child who displayed a high degree of achievement for his age. The court noted that Adam had achieved great success in showing his prize pigs, and had developed a great deal of knowledge on the subject. The court further noted that Adam appeared to be thriving in the small-town atmosphere of Baxter, and receives the support of nearby relatives, while living in Cedar Rapids would be a complete change of lifestyle. The

court also noted that while it could not condone Allen and Jeanne's living arrangement, it did not appear to have affected Adam. Thus, the district court concluded that while Dee has positively changed her life, she did not demonstrate that she could be a superior parent, and retained custody of Adam with Allen. Dee has appealed.

Dee argues that Dr. Kinnaird's report was completely disregarded by the district court. Dee argues that Adam consistently expresses an interest in living with her, and that she could better address Adam's emotional needs. Dee further argues that she is expecting a child from her marriage to Kurt, and that Adam should not be raised apart from his siblings. Dee argues that she and Kurt are more financially capable than Allen in promoting Adam's future. Dee additionally maintains she and Kurt live in a stable environment, while Allen and Adam have moved at least six times. Dee also believes Allen's tax problems may hinder his ability to care for Adam.

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).

There is a heavy burden upon a party seeking to modify custody. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). 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 children's best interests make it expedient to make the requested change. In re Marriage of Frederici, at 158. 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 (Iowa App. 1985).

The changes that have occurred since the dissolution decree relate mainly to improvement on the part of the mother. Dee has admitted that she had several problems at the time of the decree, but maintains that those problems have been substantially solved. Dee has put forth evidence which shows she has made improvements in her personal and financial life. Together with her present husband, Dee has a substantial income and is therefore easily able to provide for Adam. In addition, several witnesses testified Dee has made substantial progress as a person and a mother. However, this does not constitute a material and

substantial change. The court found at the time of the dissolution, as it does now, that Allen is a good and stable parent. The trial court also found that Adam has thrived in his present living arrangement. The doctor's testimony seems to show that Allen could possibly thrive a little better under Dee's supervision. However, the possibility of a small improvement does not make it expedient to make the requested change, nor are we bound by the doctor's findings. Adam has continued to thrive under the present arrangement; though he does suffer some emotional problems, as would any child in his situation. However, there is insufficient evidence to suggest that allowing a change in custody to his mother would alleviate those problems. In fact, they would most likely be exacerbated.

Dee also places great weight on the child's apparent desire to live with her.. This is an important factor, but there is substantial evidence that the mother has been improperly encouraging the expression of this desire on the part of the child.

There is insufficient evidence in this record to warrant a change in custody. The doctor's testimony did lean toward granting custody to the mother, but she also admitted that both parents were capable of meeting the child's emotional needs. We commend Dee on the improvements made in her life, but remind her that such improvements are not the only factor to be considered in a

modification action. Both parties claim they are the better parent. The end result is that they are relatively equal in ability. This does not warrant a modification. The trial court was correct in denying Dee's request to modify custody.

AFFIRMED.