

IN THE COURT OF APPEALS OF IOWA

No. 1-526 / 91-304

FILED

FEB 25 1992

SUPREME COURT

IN RE THE MARRIAGE OF EVERET HUEN AND ELAINE HUEN

Upon the Petition of

EVERET HUEN,

Appellant,

And Concerning

ELAINE HUEN,

Appellee.

Appeal from the Iowa District Court for Hardin County,
Carl D. Baker, Judge.

Petitioner challenges the district court's ruling which
refused to modify the parties' dissolution decree to award
custody of the parties' youngest son to him. **AFFIRMED.**

Ray Sullins, Des Moines, for appellant.

Carl R. Letz, Eldora, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett,
JJ.

OXBERGER, C.J.

On December 29, 1986, the district court dissolved the marriage between Everett and Elaine Huen. The parties have three children: Marilyn, born September 28, 1971; Charleton, born April 17, 1974; and Clinton, born December 6, 1977. The parties' decree provided that they would share joint custody of their children, with Elaine responsible for the children's primary physical care. The decree contained a stipulation concerning Everett's visitation rights.

Following their dissolution, Everett and Elaine continued to quarrel over visitation. In 1987 Everett filed his first action to modify the decree, seeking custody of Charleton who had moved in with Everett. Even though the district court entered an order granting Elaine temporary custody of Charleton, Charleton continued to live with Everett. Following a dispute with Elaine regarding pornography and an affair Marilyn had with Elaine's forty-four-year-old brother-in-law, Marilyn came to live with Everett in 1989.

On October 13, 1989, Everett filed the current petition to modify the parties' decree. The custody of Marilyn is no longer an issue because she has passed age eighteen and has entered college. The current dispute concerns the parties' youngest son, Clinton. After considering the evidence, the district court believed Everett failed to

carry his burden to show a substantial change of circumstances that would justify a custody change. Nor had Everet shown an ability to administer more effectively to Clinton's well-being. We agree.

SCOPE OF REVIEW: To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

The tragedy of this case was best stated by the trial court:

While nations often go to war over disputed territory, Everet and Elaine have made the children the prize in their continuing vituperative war of attrition.

A child's preference in custody determinations is given weight, although less weight may be given in modification proceedings. In re Marriage of Zabecki, 389 N.W.2d 156, 399,400 (Iowa 1986). In the present case, Clinton is a thirteen year old boy who desires to live with his mother. He has indicated his willingness to visit his father. He prefers to remain with his mother to be closer to his school and friends. We find nothing in the record to justify a modification in the custody of Clinton. Courts may grant many remedies, but no power on earth can force forgiveness, nor love and affection upon the hearts of those who prefer hatred and spite in their human affairs. We affirm the trial court.

Each party will pay his or her own attorney's fees. Costs are taxed to the appellant.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs without opinion.