

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA L. KNUEVEN
AND PATRICK L. KNUEVEN

FILED

DEC 22 1988

CLERK SUPREME COURT

Upon the Petition of)

LINDA L. KOENIG, f/k/a)

LINDA L. KNUEVEN,)

Petitioner-Appellant,)

And Concerning)

PATRICK L. KNUEVEN,)

Respondent-Appellee.)

8-470
87-1302

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Appeal from the Iowa District Court for Polk County
(No. DM-CD10-5586), Jerrold W. Jordan, Judge.

The wife appeals from the modification order which transferred custody of the parties' youngest child from the wife to the husband and eliminated the husband's child support obligation. **AFFIRMED.**

Joseph B. Reedy, Council Bluffs, for petitioner-appellant.

John P. Dollar, Des Moines, for respondent-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

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Mother appeals the district court's modification of the custody provisions of the dissolution decree. She contends the district court should not have awarded primary physical care of her son, Kelly, to his father. We affirm.

Review of these matters is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially where the credibility of witnesses is involved; but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties in this case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

The parties' marriage was dissolved on November 10, 1976. Appellant was awarded custody of Kelly. Appellee, Patrick Knueven, filed for modification of this decree on August 25, 1986. He requested that he be given custody of Kelly. After extensive testimony and a trial custodial arrangement, both Patrick and Linda (Kelly's mother) were granted joint custody of the child, with primary physical care awarded to Patrick. He has had custody of Kelly since June of 1987.

When determining custody issues, the best interest of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15); Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa App. 1975). The factors considered in

awarding custody are enumerated in Iowa Code section 598.41(3). A court may modify a dissolution decree when there is a substantial change in circumstances. Iowa Code § 598.21(8) (1987). In determining whether there is a substantial change in circumstances, the court is to consider, inter alia, changes in the physical, emotional, or educational needs of the child and other factors determined to be relevant. Id. The Iowa Supreme Court in In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986), set out the standard applied in a modification proceeding as follows:

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.

Kelly is fifteen years old and is a child with special needs. His motor skills and mental faculties are impaired. For these reasons, he has been enrolled in special education classes almost all his life. Kelly requires extensive orthodontic work. His speech is also impaired and requires therapy. Kelly's gait is problematic, has led to curvature of the spine, and requires orthopedic assistance.

The trial court determined that Kelly could get more adequate assistance for his special needs residing with his

father. We agree. Further, the record reflects that Kelly's difficulties did not manifest themselves until recently. Therefore, they were not in the contemplation of the court at the time of the dissolution and are a substantial change in circumstances. Accordingly, we affirm the district court.

In affirming, we adopt as our own the following part of the trial court's findings:

His father, the respondent, also had Kelly attended for several medical needs. It was discovered that one of the reasons for Kelly's lack of communication skills was a 40 percent loss of hearing in both ears for which the respondent obtained hearing aids and which appear to be very successful in their use for Kelly. He further determined through orthodontic examination that a need existed in Kelly for extensive orthodontic work because of a malocclusion as a result of a small formation of the upper arch of Kelly's teeth. One of Kelly's other problems was his inability to close his mouth and keep it closed in a normal appearance. At times his appearance resulted in chiding by other family members for him to "close his mouth." When Kelly was a child he had a broken nose which had been operated on at that time by a Dr. Schmitt. Respondent returned Kelly to Dr. Schmitt at which time the doctor discovered Kelly had a deviated septum resulting from the original injury some eleven or twelve years ago. Dr. Schmitt in a one day procedure corrected the deviated septum resulting in Kelly's ability to "breathe" through his nose thereby permitting him to attain a more normal physical appearance with his mouth. It also permitted him a better sleeping condition by being able to breathe through his nose. As a result of working with Kelly after three tries he was able to pass the learner's permit examination for an automobile driver's license. The respondent further had Kelly examined by three orthopedic physicians concerning a physical deformity of Kelly's namely having a right leg three-quarters of an inch shorter than the left. Such also resulted from a childhood accident, a broken leg which did not mend and gross equally with the left. There had

previously been indication that such injury could be treated with a shoe lift which was done for a period of time but it appears also possible that surgery would be available to correct the leg shortening.

Kelly has made improvement during the summer. His speech is more clear, he has a better self-esteem, and he initiates conversations and talks about himself instead of others all the time. His social skills have also improved.

The respondent indicated that he has begun orthodontic treatment for Kelly which will extend over a two to three year period at a cost of \$2,400 for which he has made a down payment of \$700. He further has enrolled Kelly in speech therapy at the rate of \$40 per hour and has spent \$1,200 during a concentrated summer school program. Respondent further purchased hearing aids for Kelly at a cost of \$1,500 and has testified that in all has spent or committed \$11,000 for Kelly for this past summer and future medical and special education needs. If Kelly were to attend Urbandale middle school, they have a graduated level of achievement program for persons needing such education.

The question remains regarding the amount of child support Pat or Linda will be required to pay. Support payments are to be determined by considering those factors as listed in Iowa Code section 598.21(4). Patrick will be responsible for all of Kelly's medical, dental, speech therapy, and private tutorial bills as Kelly's needs require, as well as daily support. One child remains at home with Linda. We agree with the trial court that it is more equitable to eliminate the requirement of child support as long as each parent retains custody of one child and the income levels of both households remain so disparate.

Linda requests appellate attorney fees. Attorney fees are not recoverable as a matter of right, but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. In re Marriage of Orgren, 375 N.W.2d 710, 714 (Iowa App. 1985). Because Patrick is in a more secure financial situation than Linda, he is ordered to pay \$750 of her attorney fees and the costs on appeal.

AFFIRMED.