

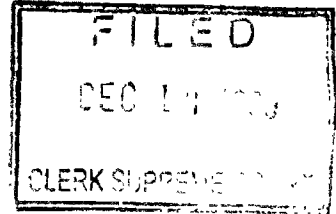
IN THE COURT OF APPEALS OF IOWA

No. 0-675 / 00-674
Filed December 13, 2000

**IN RE THE MARRIAGE OF KATHY J. SEAVEY
AND JACK D. SEAVEY**

**Upon the Petition of
KATHY J. SEAVEY,**
Petitioner-Appellant,

**And Concerning
JACK D. SEAVEY,**
Respondent-Appellee.



Appeal from the Iowa District Court for Marshall County, Carl E. Peterson,
Judge.

Kathy Seavey appeals from the denial of her petition for modification of
the parties' dissolution decree. **REVERSED AND REMANDED.**

John Haney, Marshalltown, for appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

STREIT, P.J.

A father who has done everything possible to destroy his children's love of their mother says he will change. We reverse the district court and grant the mother's request to place the children in her primary physical care.

I. Background Facts & Proceedings.

Jack and Kathy Seavey's marriage was dissolved in March 1998. Jack and Kathy have joint legal custody of their two children, Jesse (October 1987) and Lacey (December 1990). Jack is responsible for the children's primary physical care.

Kathy met John Bradley, a member of the Canadian Air Force, in 1997. They married in December 1999, but Bradley lives in Canada while Kathy continues to live in Iowa. Jack has been highly critical of their relationship and, in the presence of the parties' children, has made wholly inappropriate comments about both of them.

In June 1999 Kathy filed a petition requesting the district court to place the children in her physical care. At the modification trial, Jack apologized for his improper conduct towards Kathy and Bradley and said such conduct would "never happen again." The court denied Kathy's petition. She appeals.

II. Standard of Review.

We review de novo. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). We give weight to the district court's findings of fact, but we are not bound by them. *Id.*

III. The Merits.

Kathy claims we should modify the dissolution decree to place Jesse and Lacey in her physical care. Kathy must prove, by a preponderance of the evidence, a substantial and permanent change in circumstances since the district court entered the decree. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Kathy must also prove an ability to minister more effectively to the children's well-being. See *id.* Her heavy burden stems from the principle that once custody is fixed, it should be disturbed only for the most cogent reasons. See *id.*

Kathy has proven a substantial change in circumstances. To constitute a substantial change in circumstances justifying a custody modification, the change in circumstances must not have been contemplated by the district court when it entered the dissolution decree, must be more or less permanent, and must relate to the welfare of the children at issue. *Id.* Such a change in circumstances may arise when one parent engages in hostile, unreasonable conduct directed at the other parent that adversely affects their children. We recognize there are situations where one parent will seek to put the other parent in an unfavorable light. Some cases are slight and to be expected. Some cases are serious and should not be tolerated. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa App. 1994). The Iowa courts have addressed similar complaints under other circumstances. See *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa App. 1991); *In re Marriage*

of Grantias, 406 N.W.2d 815, 817-18 (Iowa App.1987). Here, Kathy and Jack had a relatively amicable relationship during the first few months after their divorce. Since Kathy became romantically involved with John Bradley, Jack's conduct has been intolerable. In the presence of the parties' children, Jack has blamed Kathy for the dissolution of their marriage, degraded her, and accused her of participating in perverted sexual activity with Bradley. For example, Jack admitted at trial he had a telephone conversation with Kathy that was heard by Jesse in which he told Kathy:

You are a liar, you are a fat-assed whore, a snake in the grass, you have no outstanding personality or qualities. You are nothing to look at. You won't be a mother to these kids if you can take off to Canada for two weeks to be with your perverted boyfriend doing God knows what sick, filthy, nasty things.

Jack has also made disparaging statements of a similar flavor about Bradley to the children. Moreover, he generally does not allow the children to be with Kathy when Bradley is present. As noted by the district court, Jack's conduct "will leave a lasting and indelible impression on the children that will take years to overcome." Jesse is already reluctant to visit Kathy. Accordingly, Jack's emotional traumatizing of the children constitutes a substantial change in circumstances justifying a transfer in physical care to Kathy.

Kathy has proven she has an ability to minister more effectively to the well-being of the parties' children. Kathy has not engaged in conduct that undermines the father's relationship with their children. Rather, she has shown she is the more mature, stable parent. She has also shown she is the parent who is most willing and able to assist the children in developing a strong

relationship with both of their parents. See Iowa Code § 598.1(1) (1999) (“‘Best interest of the child’ includes . . . the opportunity for maximum continuous physical and emotional contact with both parents.”). Because Kathy has met her heavy burden, the children should be placed in her primary physical care.

In reaching this conclusion, we have not overlooked Jack’s promise to refrain from engaging in improper conduct towards Bradley and Kathy. In its modification order, the district court stated it had an opportunity to observe Jack at trial and “observed a humbled person that recognized he had made a grave error in dealing with his anger and frustration. The Court is satisfied that Jack is sincere in his intention not to further degrade the mother or her husband.” Although we give weight to the district court’s finding, we are not convinced Jack can maintain his promise. In reversing a district court’s denial of modification despite a parent’s outrageous conduct, the supreme court in *Udelhofen* stated, “[E]ven accepting [the mother’s] explanations, apology, and pledge [to cooperate in the future, her conduct] remains outrageous and reflects adversely on her qualifications to be the custodial parent.” *Udelhofen*, 444 N.W.2d at 476. Here, Jack’s inexcusable conduct continued after Kathy filed her modification petition and apparently lasted until trial—he never apologized or indicated his conduct would improve before he was on the witness stand. Moreover, even if Jack’s eleventh-hour promise was sincere, the children’s best interests dictate they be transferred to Kathy’s primary physical care. See *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa App. 1998) (“The controlling consideration in child custody cases is always what is in the best interests of the children.”). We share

the district court's concern that Kathy may someday move to Canada to live with her husband. However, we find Jack's conduct and the lasting emotional trauma it has undoubtedly inflicted on the children more troubling than this possibility. We modify the dissolution decree to place the children in Kathy's primary physical care.

We reverse the district court and remand for application of the proper child support guidelines and a determination of an appropriate visitation schedule.

REVERSED AND REMANDED.