FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF MELINDA SUE ZEILSTRA AND DAVID LEE ZEILSTRA

Upon the Petition of)

MELINDA SUE ZEILSTRA, n/k/a MELINDA SUE LAUCK,)

Petitioner-Appellant,)

And Concerning)

DAVID LEE ZEILSTRA,)

Respondent-Appellee.

Filed May 31, 1988

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87-1078

Appeal from the Iowa District Court for Linn County (DM 10977), Thomas L. Koehler, Judge.

Petitioner wife appeals the trial court's ruling on both parties' applications for modification of a dissolution of marriage decree. **REVERSED AND MODIFIED.**

Matthew Glasson of the Glasson Firm, Cedar Rapids, for appellant.

Ronald L. Ricklefs and William G. Faches, Cedar Rapids, for appellee.

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

SCHLEGEL, J.

We are, in this case, once again faced with the effect on custodial rights of a move out-of-state by the mother who has physical custody of a child under a joint custody decree. The trial court changed the custody from the mother to the father and granted visitation to the mother. The mother has brought this appeal. We reverse the change of custody and modify the visitation schedule.

Petitioner, Melinda Zeilstra, now known as Melinda Lauck, and respondent, David Zeilstra, were granted a decree of dissolution in October 1983. The decree confirmed a stipulation of Melinda and David that they would have joint custody of their son, Lee, and that Melinda would have physical custody. In early 1987, Melinda informed David that she would be moving to Texas to attend law school at the University of Houston. Shortly after receiving that information, David filed the application to modify the custody provisions of the decree, seeking physical custody for himself. Melinda filed an answer, in which she seeks modification of the child support and visitation provisions of the decree. Upon trial, the district court modified the custodial provisions of the decree and awarded physical care of the child to David, and granted visitation rights to Melinda.

To change a 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 child's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the court when the decree was entered, must be more or less permanent, not temporary, and must relate

to the welfare of the child. Id. A parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well being. Id. 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 Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Our de novo review of this record shows parents who have provided a model for the conduct of parents with joint custody. Melinda has provided the primary residence for the child, Lee, and has had the responsibility for his day-to-day routine care. David has exercised extensive visitation, which has been liberally provided for him by the cooperation of both parents. He has participated actively in Lee's activities, both at school and in other settings. He acted as baby sitter for Melinda, at times other than scheduled visitations. Both parents characterize the other as a good parent. Both appear to be genuinely concerned for the best interests of their child.

Melinda, being concerned for the welfare of Lee, and being concerned as to the effect upon both Lee and David, of her proposed move to Texas, notified David well in advance of that move, of her intention to do so. David indicated to Melinda that he did not wish the child to be removed from the state, for various educational, moral, and environmental reasons.

Both parties recognize that Melinda's moving to Houston will be disruptive to the situation as it now exists. There will, of necessity, be diminished contact between Lee and his father. Visitation will, of necessity, be less frequent, although it may be for a longer period of time when it occurs. As stated in Frederici, "[t]hese are negative factors that inhere in any long-distance move

by a custodial parent." 338 N.W.2d at 160. On the other hand, continued custody with Melinda will allow Lee to maintain his close relationship with his mother.

We recognize that in this case, not unlike in Frederici, "[n]o move is easy, even for adults. Some emotional trauma can be expected whenever children are removed from familiar to unfamiliar surroundings. But just as this factor does not prevent parents from moving generally, it is not alone sufficient to justifying shifting physical care to the non-moving joint custodian." Id.

Melinda provided Lee with routine day-to-day care from birth. She was granted physical custody of Lee by the initial decree of dissolution in October 1983. Nearly four years passed before a change in custody was sought. As heretofore stated, "once custody of children has been fixed it should be disturbed only for the most cogent reasons." Mikelson, 299 N.W.2d at 671.

Contrary to the district court's observation, the evidence does not indicate that Melinda's move is in any way designed to defeat David's visitation and close relationship with Lee. Her motivation for the move is to seek a legal education at a school that can enhance her employment opportunities in the international law field. It is in that field where her interests, as well as her past work experience, have directed her.

From our de novo review of the testimony, we do not find that Lee will be unable to make the adjustments made necessary by the move. The child is understandably under stress, in view of his knowledge of his father's wishes as well as those of his mother. Questions arise about the overall stability and security of David's home and his potential intemperance, as bearing upon the security of Lee.

A parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well being. Frederici, 338 N.W.2d at 158; In re Marriage of Grabill, 414 N.W.2d 852, 853 (Iowa App. 1987); In re Marriage of Gonzales, 373 N.W.2d 152, 154 (Iowa App. 1985); In re Marriage of Deck, 342 N.W.2d 892, 895 (Iowa App. 1983). In this case, we do not find that David has proven a superior ability to minister to the needs of Lee. Both of these parents demonstrate a strong concern for the welfare of Lee. Difficult as it will be to move away from the close proximity with his father, it would be more traumatic to Lee for the custody, after nearly four years with his mother, to be changed to his father. Those adjustments are likely to be far more difficult than are the adjustments made necessary by the move.

We believe that Frederici controls this case. As in that case, there is no dispute in the evidence that David has had extensive contact with the child of the parties since the decree, and has maintained a close relationship with him. As in that case, even considering such evidence and the inevitable emotional trauma associated with the move, the evidence falls short of demonstrating that the Texas move is a material and substantial change of circumstances making it expedient in the child's best interests to shift his physical care to David. The evidence does not show that Melinda will be less able to minister to Lee's well-being in the new environment or that the new environment will be detrimental to Lee's best interests. Frederici, 338 N.W.2d at 161. We order that physical custody shall be maintained with Melinda.

Due to the move to Texas, it will be necessary to modify the visitation schedule. We order that David shall have visitation of Lee at all times and places as may be agreed upon between the parties. The same shall include, but not be limited to, the following:

a. Whenever petitioner is in the State of Iowa for an extended stay, respondent shall have visitation every other weekend from Friday at 5:00 p.m. until 8:00 p.m. the following Sunday. When petitioner is in the State of Iowa for less than one week, respondent shall have visitation of Lee for not less than two full days, to be arranged by petitioner and respondent.

b. Alternating Thanksgiving vacation, with respondent having Thanksgiving vacation in 1988.

c. In even-numbered years, from the time school is out for Christmas vacation until December 25, at 10:00 p.m., respondent shall have visitation of Lee. In odd-numbered years, respondent shall have visitation of Lee from December 25, at 10:00 p.m., until the Saturday before school starts following the Christmas vacation.

d. During all of Lee's spring school vacation, David shall have visitation.

e. Respondent shall have visitation of Lee during four consecutive weeks during the summer, at times to be agreed upon between the parties. In the event the parties are unable to agree on the starting time of the summer visitation, it shall commence on the 15th day of June of each summer. The parties may arrange for nonconsecutive weeks of visitation, if they can agree to the schedule.

f. Respondent shall have visitation with Lee at all reasonable times when respondent may be in the city where Lee resides, or in the immediate metropolitan area.

Expense of travel for visitation, by means other than personal car (whether provided by Melinda, David, or others), shall be shared equally by David and Melinda. The provisions of visitation specified herein shall be the minimum. The parties may alter or amend these provisions by mutual agreement.

Melinda has asked for an increase in child support. The initial decree incorporated a stipulated provision for child support to be subject to a cost of living adjustment. The parties agreed for David to assist in certain expenses in lieu of the necessity of seeking court approval for such an increase. The record shows that David's earnings have increased substantially since the original decree. It is in the best interests of the child that child support be increased

to $65.00 per week. All other provisions of the decree shall remain the same, excepting the visitation provisions which have been modified above.

We reverse the trial court's modification of the custody provisions of the decree of dissolution, and we modify visitation and child support.

Melinda has requested attorney's fees, both at the district court level and on appeal. We decline the award of fees at the district court level, but order that she shall have judgment in the amount of $750 for appellate fees.

REVERSED AND MODIFIED.