

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF STEVEN L. UDELHOFEN
AND JANET M. UDELHOFEN

FILED

MAR 16 1989

CLERK SUPREME COURT

Upon the Petition of
STEVEN L. UDELHOFEN,

Petitioner-Appellant,

And Concerning
JANET M. UDELHOFEN

Respondent-Appellee.

357

8-698
88-466

Appeal from the Iowa District Court for Polk County
(CD-52-30808), Joel Novak, Judge.

Petitioner appeals the decision of the district court
which denied his application for modification to change the
physical care of the parties' minor child to him. **MODIFIED
AND REMANDED.**

Tom Hyland, of Hyland, Laden & Pearson, P.C., Des
Moines, for petitioner-appellant.

Kenneth W. Rittgers, Des Moines, for
respondent-appellee.

Eric Borseth for amicus curiae, Fathers for Equal
Rights.

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

SACKETT, J.

We are asked to modify a dissolution decree to change the physical care of Steven Udelhofen, born September 16, 1979, from his mother respondent-appellee, Janet M. Udelhofen, to his father, petitioner-appellant Steven L. Udelhofen.

The parties were married in November 1978 and their marriage was dissolved in 1986. The parties were awarded joint custody with Janet receiving physical care. Steven, a lawyer, has since the dissolution married Myrna, a legal assistant he knew before the dissolution. Janet, a nurse, has not remarried and has not worked outside the home since 1980. Steven filed for physical care primarily because of Janet's alleged denial of visitation and outrageous actions surrounding transfer of care during visitation periods. The trial court heard evidence and refused to modify the decree.

On our de novo review, we determine certain factual findings made by the trial court very accurately reflect the record we have reviewed. The trial court's findings include the following:

The court finds that Janet not only denied Steven visitation, but also injected young Steven between mother and father. She used young Steven to punish his father. On numerous occasions she would bring young Steven into conversations between she and Steven and indicate to the boy that his father would not do something with them because he no longer loved them or cared for them, that he only loved his new family. Janet has indicated to the boy that his father is possessed by the devil and that is the cause of many of their problems.

She has indicated to young Steven that Myrna is either the devil or possessed by the devil which has created a fear in the boy.

Other examples of Janet's involving Steven in this matter are shown in the taped telephone messages. For example, . . . there were two occasions where the son called and left a message on the answering tape. On one he said, "Dad, you said you were divorcing Myrna, when are you going to divorce Myrna and come home?" In another place . . . the son called and left the following message, "Myrna, I think you are a whore." . . . Janet makes the statement to Steve that if he doesn't call him back to talk to him about his hockey game, she will tell young Steven that his father refused to take him. . . . Stevie leaves one message, "Dad, I want you to go to the priest in Ankeny. You need help." . . . a little later, he calls and states, "Dad, I don't ever want to see you again unless Myrna is gone." It is interesting to note that this last message from the boy comes after a message from Janet . . . where she states that the son did not want to see him again until he has left Myrna and that if he attempts to try contacting him she will make sure that he quits harassing him, that the boy wants nothing to do with him and that he is to leave him alone until he gets his life straightened out.

. . . [T]here is a phone call from young Steve stating "Dad, how come you lied to me, you said you were coming home. Can you tell me when you are?" This Court is of the opinion that Janet has put young Steve up to making these phone calls or it is her conditioning of his mind that resulted in his making the calls on his own.

. . . [A] telephone conversation between Janet and Steven concerning a haircut where Janet gets young Steve involved and attempts to place the father in a position where he should come over and give him a haircut even though the father says he can't do that but he will pick up the boy and give him a haircut at the father's home. It is obvious that Janet is attempting to make it look like the father doesn't want to come over to see his son.

. . . [A] message on the answering service on Memorial weekend in which Stevie calls and says, "Dad, I would really like you to come home. Could you please call me on the phone at home?"

. . . [A] reference or conversation where Janet is going to take Stevie on an Easter egg hunt and the father asked if he could have him afterwards and she says no because that is her weekend and he is not going to touch him or her weekend, and that he

can take it to court if he doesn't like it. . . . [T]here is a conversation between Janet and Steven as to how he regards Myrna's children in relation to young Steve. She states that Stevie wants to know how he regards Myrna's children, that is important to young Steve. Janet seems to indicate that its wrong to consider Myrna's children his children as much as young Steve is. The Court finds this important because it manifests that Janet discusses these things with the boy and attempts to breed resentment between the boy and his father.

There is no dispute that Stevie socializes well with his friends at school and in the neighborhood. According to his teacher, Marilyn Wilson, Stevie is a bright, young student who is always clean, well-dressed, healthy, and attends school regularly. There is no dispute but that the young boy is well-behaved and a disciplined child.

Dr. Todd Hines is a clinical psychologist. He has been practicing as a clinical psychologist in Iowa since 1971. He has a lot of experience and work in the area of child and family consultation. He first met Steven in the early '80s on work related matters with Steven's law firm. He first saw Steven in a professional capacity on November 2, 1987 when Steve approached him about doing a custody evaluation and opinion in this case. Dr. Hines estimates that he spent approximately 8 hours alone with the father and also saw Stevie alone on February 6, 1988, and then together with his father on that same day. His work also included a visit to the family home on December 31, 1987. He also saw Myrna individually on December 4, 1987, and February 4, 1988.

According to Dr. Hines, the father has a serious concern for the tumultuous and chaotic situation that exists between the father and mother. The son advised Dr. Hines that he would be comfortable living with either his mother or with his father and Myrna. He liked and felt good about his parents and Myrna, however, Stevie was sure that his parents were going to get back together because his mother told him they would. When asked if he was going to be a lawyer like his dad he indicated he could not be a lawyer because his mother told him that God did not call him to be a lawyer. Dr. Hines was concerned that Stevie parrots back information that is given to him without really understanding why and what he is saying.

As mentioned, On December 31, 1987, Dr. Hines visited the whole family so he could observe the

interaction. Nothing had been prearranged. Dr. Hines found as a result of this observation that Stevie was relaxed and accepted as a member of the family. There was spontaneity, humor and physical contact. Dr. Hines summed it up somewhat as it was definitely a feeling of mutual warmth, caring and involvement in this setting with all the family members including Stevie.

On February 6, 1988, when Dr. Hines visited with Stevie alone, Stevie's demeanor was different. He was tense, tight, anxious, and concerned about the questions and answers. He was concerned about saying the wrong thing. However, when his father came in for the joint session, Stevie was relaxed and became more spontaneous and there was physical contact between the two.

Dr. Hines visited with Myrna, and, in fact, administered an MMPI personality test. There was no personality disorder as far as Myrna was concerned. Myrna was positive about young Steve living with them and she was also realistic about it. She understood things would not be perfect and she believed that therapy would be helpful for the family.

Dr. Hines never talked to Janet so he is not rendering any opinion as to her. He believes the father is an excellent parent for Steve and that he can inter-react and contribute to Steve's welfare and development. He feels Steve can adapt to the family situation with Myrna. Dr. Hines believes that the combatant warfare and confusion between the natural parents has been disruptive on Stevie and will continue to be disruptive unless it terminates. He suggests extended family therapy including Janet, so that all of the people who serve as caretakers and siblings for Stevie would be involved.

Dr. Janet McDonough testified. Dr. McDonough is a clinical psychologist and her involvement was with the natural parents, Stevie and Myrna. Dr. McDonough's involvement commenced on October 1, 1987, and ended sometime in mid-January, 1988. Dr. McDonough spent approximately 11-1/1 hours with the various family members. This included time with the father alone, the mother alone, Stevie alone, and Stevie with the parents. It also included administering an MMPI test to the parents.

Dr. McDonough sets forth her findings pertaining to Stevie in her report. In essence, this report shows a stable and well-adjusted child. The report from school indicates that Stevie is progressing satisfactory academically and socially and is always clean and regularly in

attendance. For the most part his teacher sees no sign of emotional distress or no particular concerns about Stevie's mental or emotional condition. He is physically healthy and studious. He gets along well with other children and is well-behaved. He attends church regularly and engages in extracurricular activities such as hockey and cub scouts.

Dr. McDonough, herself, found Stevie presented himself as a quiet, pleasant young boy who was cooperative, well-informed, poised and in command of himself. His behavior was age appropriate. He is articulate, thoughtful, perceptive and organized.

On three separate occasions Stevie told Dr. McDonough he wanted to live with his mother.

According to Dr. McDonough, Stevie is attached to both parents but quite torn between them. There is no doubt that the fighting between the parents has had an adverse effect on Stevie and seems to be related most closely to his mother hostility toward his father. However, Dr. McDonough does state that Stevie perceives his mother as a good mother, as available, reliable, interested in him and as loving him. He sees her as more personally involved with him than is father is in a care-taking relationship. Stevie does not feel at liberty to express his feelings about his father but there is no doubt he has a considerable yearning for his father and very much wants a more substantial relationship with him.

Dr. McDonough's report proceeds to discuss her observations and opinions concerning the father and mother. There was nothing remarkable concerning her observations of the father that would reflect negatively upon him.

Her report also addressed her observations and findings concerning the mother. As indicated, the mother was given an MMPI test.

According to Dr. McDonough, the mother made a deliberate effort to put herself in a good light, and her profile indicated an unusual amount of both conscious and unconscious minimization of defects. A frequent characteristic of an individual with the mother's profile is chronic intense anger at family members, with a persistent refusal to regard their own behavior as at all problematic although others may see it differently. The mother appears inwardly rebellious and outwardly conforming. Dr. McDonough feels the mother's profile is fairly common among mother's of children who are referred to guidance clinics, and suggests a demanding mother who tacitly reinforces a child's acting-out

behavior. By this the Court believes Mr. McDonough means that the mother is getting the child to "act-out" the child's desire not to have anything to do with his father.

Dr. McDonough's summary concerning the parents is . . . as follows:

"In summary, both parents appear able to exercise the nurturance and control required of parents. They both support the importance of education, and communicate its importance to Steven. Mr. Udelhofen is more secure and independent financially. Their morality appears conventional, and Steven is aware of moral issues communication from both parents. Ms. Udelhofen is likely to disrupt the child's relationship with Mr. Udelhofen, and there is some evidence that that is occurring with a negative impact on Steven."

Dr. McDonough's formal recommendations are as follows:

Recommendations

1. Joint custody has appeared to perpetuate the parental dispute and keep the focus on Steven. They cooperate reluctantly with third party intervention. I think it would be in Steven's interests to dispense with joint custody, and have a sole custody arrangement.
2. I recommend that Steven live with his father.
3. Serious consideration should be given to permitting him to remain in the school where he is presently enrolled.
4. Visitation with his mother should be liberal, specified, and not left up to negotiation. If Mr. Udelhofen's work takes him out of town, it would be desirable for Steven to stay with his mother during those times, for example.
5. Steven does not seem troubled enough to support referral for counselling or treatment. However, he would probably get some relief by having a person to talk to, and it may be that his school has a counsellor or a school psychologist, or simply a sympathetic adult that could be of assistance to him, and help him develop some distance from his parents' concerns. Since he is an only child with no siblings to share the burden, it is important that he not allow the family

problems to interfere with his relationships with other children.

In layman's terms, Dr. McDonough feels that the father is the parent better able to minister to the needs of the child for the following reasons: 1) the father shows an ability to be a good and nurturing parent; 2) Steven has strong feelings for his father and an interest and a need in having a relationship with his father; 3) Literature that would indicate that boys do not fare as well after a dissolution and recent literature indicates there is some evidence that children, particularly boys, tend to adjust better when they live with their same-sex parent; 4) The mother's anger and its expression is undercutting or preventing the type of relationship that the child needs with his father.

To change a custodial provision of 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. In re Marriage of Frederici, 338 N.W.2d 670, 671 (Iowa 1980). 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. Id. They must relate to the welfare of the children. Id. The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id.

We have held a custodial parents' lack of cooperation with the noncustodial parent's efforts to maintain satisfactory visitation and communication with the children can evidence a substantial change in circumstances

warranting a modification of the dissolution decree. In re Marriage of Downing, 432 N.W.2d 692, 694 (Iowa App. 1988); In re Marriage of Grabill, 414 N.W.2d 852, 853 (Iowa App. 1987).

We determine Janet's conduct toward visitation to be outrageous and irrational. We have serious concern about the effect such conduct will have on her son's development. We modify the decree to award physical care to Steven and to terminate his obligation for child support as of the date of the filing of this decision. We further determine Janet shall have visitation the first and third weekends of each month from nine o'clock a.m. Saturday through seven o'clock Sunday; and each year from July 1 through July 31, from nine o'clock a.m., and from December 25 of one year through 12 Noon January 1, of the next year.

Because of our serious concern about Janet's irrational behavior, we remand to the trial court to appoint a family mediator to meet with the parents (including stepparent) and the child. Mediation shall continue until the mediator reports to the court he or she determines the parents have a reasonable chance of being able to communicate with each other on visitation issues. Joint custodians need to be strongly encouraged to communicate. See In re Marriage of Behn, 385 N.W.2d 540, 542 (Iowa 1986). The cost of necessary mediation shall be paid by Steven. See In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa App. 1988).

Costs on appeal are taxed one-half to each party. Each party shall pay his or her own attorney fees.

MODIFIED AND REMANDED.