FILED
DEC 31 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-400 / 91-722

IN RE THE MARRIAGE OF DAVID DETLEF DAU AND MELANIE ANN DAU

Upon the Petition of

DAVID DETLEF DAU,

Petitioner-Appellant,

And Concerning

MELANIE ANN DAU,

Respondent-Appellee.

135

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Petitioner former husband appeals from a modification of the joint custody provision of the decree dissolving the parties' marriage. **MODIFIED AND REMANDED.**

A.W. Tauke of Porter & Tauke, Council Bluffs, for appellant.

Scott H. Peters of the Peters Law Firm, P.C., Council Bluffs, for appellee.

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

SACKETT, J.

The trial court modified a 1987 dissolution decree to transfer the physical care of two children from their father to their mother. The father appeals contending the modification was not justified and the mother's child support obligation should be increased. We determine the physical care provision should not have been modified. We find substantial evidence to support a modification of the mother's child support obligation. We modify and remand.

The marriage of appellant David Dau and appellee Melanie Dau was dissolved in April 1987. They were granted joint custody of their children, Christina born in October 1981 and David born in July 1984. The parties agreed and the trial court ordered that David was to have physical care, and Melanie was to pay child support of $12.50 per month per child. Melanie did not seek physical care at the time of the dissolution. Prior to her decision not to seek custody, she left the family home with the children and went to live with the man who is her current husband. Two weeks later she returned the children to their father's physical care.

In August 1990 Melanie filed a petition asking that the dissolution decree be modified to grant her physical care of the children. In April 1991 the trial court modified the decree, granted Melanie physical care, and ordered David to pay child support of $150 per month per child.

David first contends physical care should not have been modified. Our review is de novo. In re Marriage of Kalvig, 460 N.W.2d 189, 190 (Iowa App. 1990).

In seeking to modify the dissolution decree, Melanie carries a heavy burden. See In re Marriage of Downing, 432 N.W.2d 692, 693 (Iowa App. 1988). She has the burden to show by the preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award custody to her. See In re Marriage of Jerome, 378 N.W.2d 302, 304 (Iowa App. 1985). Melanie must show an ability to minister to the children's needs superior to David's. See In re Marriage of Ivins, 309 N.W.2d 75, 78 (Iowa 1981); Crary v. Curtis, 199 N.W.2d 319, 320 (Iowa 1972). Custody once fixed should be disturbed only for the most cogent reasons. See Downing, 432 N.W.2d at 693.

At the time of trial Melanie had been married for about a year and a half. They live in Nebraska where her husband works in a bank. Melanie's husband did not testify or appear at trial. Melanie has had five different jobs in the past five years. She now works in a nursing home. She is licensed as a practical nurse and is taking courses to become a registered nurse.

Melanie has not spent much time with the children since the dissolution. The children have spent considerable time

with her parents. Melanie has assumed little financial responsibility for the children. The $12.50 per month per child she was ordered to pay in child support can be considered only token support. There is little evidence from which to assess Melanie's parenting skills and no evidence from which to assess the parenting skills of her husband.

David on separation assumed the physical care of the children. He has been the one responsible for meeting their financial needs. He is a farmer with an adjusted gross income of less than $10,000 annually. David, with the help of his parents, his fiance, and the children's maternal grandparents, has assumed almost total custodial responsibility for the children. There have been no serious problems. The children are healthy and their family doctor feels their medical needs are met.

Melanie contends David did not take care of the children's dental problems. She testified she took them to her dentist who determined the children needed dental work. Melanie did not have the dental work done because she did not want to pay for it. David pays for and carries health insurance but not dental insurance on the children. David has assumed nearly all the financial responsibilities for the children. He has limited resources. Melanie and her current husband are both gainfully employed and their only dependents are these children. At the point Melanie

determined the dental work needed to be done she was in a better financial position to pay for it than was David. Melanie is a joint custodian. As a joint custodian she has certain rights and responsibilities. See In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa App. 1988). Her responsibilities include equal participation in decisions affecting the children's medical care. Iowa Code § 598.41(4). See also In re Marriage of Zabecki, 389 N.W.2d 396, 399 (Iowa 1986); In re Marriage of Fish, 350 N.W.2d 226, 230 (Iowa App. 1984). David can be criticized for not checking the children's dental problems. Melanie can be criticized for failing to assume any responsibility for correcting the children's dental problems after they were identified. She was a joint custodian and her responsibilities to the children exceeded the responsibility she assumed.

The children have been happy and content in their current living situation. They have suffered stress as a result of this custody fight dispute. The custody dispute has also strained the children's relationship with their maternal grandparents. The stress the children have endured because of the modification points to the wisdom of the premise that custody once fixed should not easily be disturbed.

The children are not without problems. The younger child has a learning disability. It may not have been immediately diagnosed.

David has had some problems with the use of alcohol. Melanie complained about David's drinking problems at the time of the dissolution. David was evaluated and determined not to have a drinking problem. However, two alcohol related charges were brought against David in the past two years. Melanie's parents claimed David drinks to excess. This was denied by David, his fiance, his mother and a close neighbor. There is no evidence David's alcohol problems have had an adverse effect on the children. There is evidence Melanie, too, has used alcohol to excess. These problems cause us concern. We hope the parties will seek counseling and treatment, as alcohol is or could become a serious problem. The failure to do so could result in problems for the parent and child.

David complained about the type of music Melanie provided for the children. Melanie complained because there were movies in David's home that were not appropriate for children, and the children, without David's knowledge, watched them. An investigator contends Melanie's house is cleaner than David's. The investigator was concerned because the table in David's house was greasy and there were dead flies in an upstairs light fixture. There is a tendency in custody matters to overemphasize everyday family problems and less than perfection in housekeeping and child raising. No home is perfect and no home is without problems. We give little consideration to these complaints.

We look to the fact the children are healthy and fairly well adjusted. We recognize David has assumed physical care and financial support for the children since the dissolution. David has had the help of both sets of grandparents. The children have become accustomed to the security of grandparents in close proximity to their home.

While David was assuming these responsibilities, Melanie was finding herself. She went through a series of jobs. She had minimal contact with the children despite the fact they spent considerable time with her parents. She paid only $25 per month in support, putting little or no financial strain on herself for the children's care.

Today she professes to be in a position to do a better job caring for the children than David. She has no track record. She claims she and her new husband can provide superior care. However, when she and the children went during her marriage to live with the man now her husband, she returned the children to their father in two weeks. We look to parents' past conduct in assessing their parenting skills. Custody once fixed should not easily be disturbed. Melanie was content in 1987 for David to have primary care. The children have the stability of a home, school district, and an extended family. Melanie has not met her burden. The decree should not have been modified to change physical care.

There has been a substantial change in Melanie's ability to pay child support. We remand to the trial court to fix Melanie's obligation for child support in accordance with the child support guidelines. See In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). We do not retain jurisdiction.

We deny Melanie's request for attorney fees on appeal. The costs of this appeal should be taxed against her.

MODIFIED AND REMANDED.

Donielson, P.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result.