

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF KIMBERLY S. ECKHOFF AND WENDELL R. ECKHOFF

Upon the Petition of)

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KIMBERLY S. ECKHOFF,)

Petitioner-Appellant,)

Filed February 26, 1986

And Concerning)

WENDELL R. ECKHOFF,)

5-673
85-798

Respondent-Appellee.)

Appeal from the Iowa District Court for Black Hawk County (No. Eq. 31320) - James C. Bauch, Judge.

Petitioner appeals from the trial court's modification of the child custody provisions of the decree dissolving the parties' marriage, transferring physical care of the minor child from petitioner to respondent. **AFFIRMED.**

R James Sheerer of Price, Correll & Sheerer, Cedar Falls, for petitioner-appellant.

Richard A. Knock of Mershon, Snow & Knock, Cedar Falls, for respondent-appellee.

Robert Griffen of Gallagher, Langlas & Gallagher, Waterloo, for the minor child

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

DONIELSON, J.

Petitioner appeals from the trial court's modification of the child custody provisions of the decree dissolving the parties' marriage in which physical custody of the minor child was transferred from petitioner to respondent. Petitioner contends the trial court erred: (1) in ruling that respondent met his burden of proof of showing a substantial change in circumstances by a preponderance of the evidence; (2) in finding that petitioner's life-style had an adverse effect on the child; (3) in improperly relying on and admitting hearsay evidence in its decision to change physical placement; and (4) in ordering petitioner to pay child support and attorney fees beyond her means. We affirm.

Petitioner mother, Kim Eckhoff, and respondent father, Wendell Eckhoff, were married on June 2, 1980. One child was born to the marriage on December 17, 1980. The marriage was dissolved on October 15, 1982. The parties were awarded joint custody of the child with physical custody in the mother, pursuant to stipulation of the parties.

On November 13, 1984, the father filed his application for modification of the decree as to physical placement of the child. After the modification petition was filed, Kim enrolled David in a pre-school program where a marked improvement in his development took place. The father testified at trial he had become disturbed by the mother's absence from home, and began surveillance of her evening activities which he claimed consisted of nightly "barhopping." At trial he read dates and bars visited from a booklet he had kept of her alleged evening activity.

The mother at time of modification was 21 years old, unemployed, and living in a home given to her by her great-grandmother. She disputed the testimony as to "barhopping." Her attorney objected to the father's reading his

notes on the grounds of hearsay. The mother testified that once the child started school she planned to receive further vocational training.

The father, who is 25, has a stable job, has remarried, and supports his wife's child from a previous marriage. Wendell can provide a stable living environment.

The judge transferred physical custody to the father based on the mother's "barhopping," her life-style, and her alleged lack of maturity. The court ordered the mother to pay child support and the attorney fees for the child.

Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

I.

The first and governing consideration in modifying a child custody order is the best interest of the child. Iowa R. App. P. 14(f)(15). The noncustodial parent has the burden of establishing by a preponderance of the evidence that conditions since the court decree have so materially and substantially changed that the child's best interests make it expedient to award such parent custody of the child. Iowa Code § 598.21(8) (1985); In re Marriage of Hubbard, 315 N.W.2d 75, 80 (Iowa 1982); In re Marriage of Melton, 256 N.W.2d 200, 209 (Iowa 1977); Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). Once custody is fixed, it should seldom be disturbed and only then for the most cogent reasons. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975); Stouwie v. Stouwie, 222 N.W.2d 435, 438 (Iowa 1974). Thus, the parent seeking to take custody from the other must show some superior claim based on the ability to minister not equally but more effectively to the child's well-being. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976); In re Marriage of Guteruth, 246 N.W.2d 272, 274 (Iowa 1976).

Kim submits Wendell did not show he could care for David better than she and that a substantial change of circumstances since the decree did not take place.

Wendell is gainfully employed and has remarried. It was not disputed that Wendell had a stable home environment and was already raising one child. The drawback Kim raised as to Wendell having custody was that David would have to be taken to a day care center or baby-sitter when Wendell worked.

Kim, on the other hand, does not work and receives Aid to Dependent Children. She has a male friend who stays in her home occasionally. Kim cares for David during the day, but her activities at night led to the present dispute.

Wendell claims Kim goes to various bars several times a week until late hours and Kim claims she goes to bars less frequently than alleged by Wendell. Kim did admit to going to the Eagles Club, which she contended should not be characterized as a bar. While this case presents a close question because Wendell had to demonstrate a better, not equal, ability to care for David, we, nonetheless, find he met this burden.

Kim claims Wendell failed to show a substantial change in circumstances because at the time Wendell entered into the dissolution stipulation she was leading an active night life and the resumption of such activities is, therefore, not a substantial change. We read the record differently than Kim and find her position to be misplaced.

Granted, before the stipulation Kim frequented bars on a regular basis. But her male friend moved into her home and Kim apparently began staying home more often. Wendell viewed this change of events as a positive step for David's welfare and agreed to let Kim have physical care of David. Wendell based the stipulation on the understanding that Kim would lead a life-style which would provide a stable living environment for David. We have little diffi-

culty accepting the trial court's conclusion that Kim's actions indicate she is more interested in her personal life than in David's welfare.

Wendell had no problems with the custody arrangement until Kim began frequenting bars. While the number of times she goes to bars each week is disputed, we find sufficient evidence to support Wendell's claim. We do not hold that a single parent can never go out for evening entertainment, but, in this case, the mother's social needs are creating an unhealthy and unstable living environment for her son. Kim's current life-style was not contemplated when the stipulation was entered and this change does constitute a substantial change of circumstances.

II.

Kim disputes the finding that her life-style would have an adverse effect on David. We disagree.

David will be entering kindergarten in the fall of 1986 and as he enters his formative years his home environment will have a great influence on his character and learning development. While there is no indication Kim has physically or emotionally abused David, a continuation of her life-style of going to bars on a regular basis and living with another man against the wishes of her great-grandmother, who cares for David while Kim is not at home at night, presents a troublesome scenario. Kim's male friend has had treatment for alcoholism, is unemployed, and apparently has volatile arguments with Kim. Kim and her male friend cannot provide as stable an environment for David as Wendell and his wife can. Kim loves David, but her level of maturity indicates she is unable to prevent adverse consequences to flow to David from her present life-style. Given that Kim will not be able to spend time during the day with David while he is in school, her nighttime socializing will adversely impact their relationship. Kim has not demonstrated an ability to care for a grade-school-aged

child. Even if David will have to go to day care or a baby-sitter because Wendell works, David will be entering grade school in the near future so that he will not be home during the day in any event. These factors lead us to conclude that David will suffer adverse effects from living in his mother's home and will have a better living environment in his father's home.

III.

Kim claims Wendell's notebook in which he kept a record of her nightly bar activities was inadmissible hearsay. Wendell sought to use the book to refresh a past recollection, see Iowa R. Evid. 803(5), but Kim's counsel objected that the book was being read into evidence. See Iowa R. Evid. 801, 802. The trial court allowed the witness to testify and provided Kim's counsel with the opportunity to review the document if it was introduced into evidence. The trial court reserved ruling on petitioner's standing objection.

While we do not address whether such evidence was hearsay, we cannot find any prejudicial effect even if it was hearsay. Wendell's assertions of Kim's nightly bar activities were corroborated by other witnesses.

IV.

Kim's final claim is that the trial court erred by requiring her to pay \$20 in weekly child support and \$331 in attorney fees for David's counsel.

Child support is awarded by considering "each parent's earning capacity, economic circumstances, and cost of living." Iowa Code § 598.21(8) (1985).

Wendell has a net weekly income of \$167, a net worth of \$6,760, and monthly expenses of \$946. Kim does not work, received \$355 in monthly Aid to Dependent Children and \$35 child support payments, and had monthly expenses of \$724 for her and David. However, Kim had a net worth of \$60,165; her home, which is worth \$50,000, is the primary asset. While we wonder how she met

her expenses listed at \$724 with only an income of \$355, and was able to frequent bars and not work, we will not disturb the child support award.

David's attorney fees were \$831 and each party had paid \$250 toward such expenses, which left a balance of \$331. Kim claims she should not have been ordered to pay the remaining balance. In determining whether it is appropriate to award attorney fees, the parties' resources are considered. Locke v Locke, 263 N.W.2d 694, 696 (Iowa 1978); In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa 1982). The criteria reviewed are the needs of the requesting party, the party's ability to pay, and the results on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981).

We do not disturb the trial court's award as to attorney fees.

AFFIRMED.

Snell, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C J (dissenting)

I dissent I do not find that the respondent-appellee has shown "cogent" reasons to change custody I would leave the minor child with the mother.