FILED
MAY 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF THERESA LYNN HOCKEN AND RONALD JOSEPH HOCKEN

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Upon the Petition of	)	
THERESA LYNN HOCKEN, n/k/a THERESA LYNN LOEHR,	)	Filed May 28, 1987
Petitioner-Appellee,	)	
And Concerning	)	7-123 / 86-908
RONALD JOSEPH HOCKEN,	)	
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Buchanan County (CD635-0880), George L. Stigler, Judge.

On appeal, respondent asserts the trial court should have given him physical care of the child. **AFFIRMED AS MODIFIED AND REMANDED.**

Terry L. Hinman, Independence, Iowa, for respondent-appellant.

Craig C. Ament of Olsen, Parsons & Ament, Cedar Falls, for petitioner-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Petitioner, Theresa Lynn Hocken Loehr, and respondent, Ronald J. Hocken, were married on December 31, 1976; Theresa was 18 and Ron was 19 years old. During their four-year marriage one child was born, Jason Joseph Hocken, on September 3, 1978. The marriage ended by dissolution decree dated February 10, 1981. Prior to the entrance of the decree the parties stipulated Theresa would have sole custody of Jason and Ron would have generous visitation.

Since the dissolution decree Ron has worked as a farmer on land which he rents from his father. He has resided with Judy Ball since late 1981. She has five children from a former marriage and lives in a five-bedroom house which she is currently purchasing. She and her children exist on government assistance. Ron and Judy were engaged at the time of the modification hearing and intended to be married in July of 1986.

Theresa met her current boyfriend, Craig Corkery, in the fall of 1983 and they have lived together intermittently since December 1983. At the time of the modification hearing Theresa resided during the weekdays at her own residence in Independence, Iowa, and spent the weekends with Craig at his home in Rowley, Iowa. The relationship between these individuals has been less than perfect. It has involved at least one assault by Craig upon Theresa, admitted drunkenness by Craig, and three calls to the police by Theresa regarding Craig.

Respondent filed an application for modification in Buchanan County court on August 28, 1985. In his application respondent sought to modify the dissolution decree to provide for joint custody with primary physical care of Jason in him and Theresa having liberal visitation. The modification proceeding commenced on April 30, 1986, and lasted approximately two and one-half days.

On May 22, 1986, the trial court entered its order allowing joint custody, but denying respondent physical care of Jason. From this order respondent has appealed.

Respondent contends the trial court erred in its failure to modify the custody provision to provide for joint legal custody with primary physical care in respondent. We agree and modify.

Our review of a trial court decision to modify a child custody decree issued pursuant to a dissolution is de novo. In re Marriage of Leyda, 355 N.W.2d 862, 864 (Iowa 1984); Iowa R. App. P. 4. We review the facts and the law and determine anew the rights of the parties based upon credible evidence where issues have been properly presented and preserved. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985). Although we give weight to the findings of the trial court, especially concerning the credibility of the witnesses, we are not bound by them. In re Marriage of Bornstein, 359 N.W.2d 500, 502 (Iowa App. 1984); Iowa R. App. P. 14(f)(17).

> To change a custodial provision of a 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. 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. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

Respondent had the burden of showing conditions since the 1981 dissolution decree was entered had so substantially changed that Jason's best interests required a change of custody. We conclude respondent sustained his burden.

In an attempt to categorize the conditions which have changed since the original decree we have grouped them in two general categories: petitioner's relinquishment of Jason and the parties' emotional relationships.

On January 29, 1984, petitioner took Jason to respondent's home to reside, the specific reasons for this transfer will be discussed later. Jason resided with respondent and Judy Ball from January 29, 1984, to August 30, 1985. During this period of time petitioner did exercise visitation. From August 30, 1985, until May 1986, Jason continued to reside with Ronald Monday through Friday and every fourth weekend. Initially petitioner had intended to leave Jason with respondent for two weeks; however, Jason spent over twenty-six months living primarily with respondent.

Petitioner took Jason to respondent in order to get her life "straightened out." Her reasons were: she was financially unable to meet the debts she had collected; she felt she did not have any quality time to spend with Jason; she decided Jason's father could better discipline him; and she had problems with her boyfriend, Craig Corkery. In petitioner's favor we note she was holding down two jobs and exercised regular visitation during the twenty-six month period. The genesis of this court action was an argument which arose on August 26, 1985, when Theresa brought Jason back from visitation late. As a result of this argument Jason was returned to his mother who then, in October, stipulated Jason's return to his father. We conclude Theresa's relinquishment of parental control from January 1984 to August 1985 and then April of 1986 is a material and substantial change of conditions warranting a change of custody.

The other substantial change since the entering of the dissolution decree is the parties' familial relationships. As mentioned earlier, petitioner became involved with Craig Corkery in December of 1983 and respondent began dating

Judy Ball late in 1981. It is important in the modification of a child custody decision to consider the parents living relationships and partners, and its possible effect on the child. This is particularly true in a case such as this, where both parents have long-term relationships.

Petitioner met Craig Corkery when she began working for his company. He moved in with her in December of 1983 and had resided with her intermittently since then. In April or May of 1984 Craig beat Theresa, which resulted in her having two black eyes. Theresa has called the police three times because of Craig's conduct during their relationship. In December of 1984 they were involved in an argument and she called the police when Craig would not leave. In April or May of 1985 she called the police in order to prevent Craig from "messing up" her home. Finally she contacted the police in August of 1985 when he left her house at a high rate of speed. In the past Craig had a severe drinking problem. He contends the problem was due to the pendency of his divorce and he has since been cured of his problem. The record does not support this conclusion. Craig expressed no intention to marry petitioner in the near future. At the time of trial Theresa resided during the week in Independence and the weekends with Craig in Rowley.

Ronald has resided with Judy Ball since late 1981. During the four and one-half year period prior to trial they experienced one dispute which lead to respondent leaving the residence; but besides this one fight they have exhibited a stable family home. Their home is large and inhabited by Judy's five children. While respondent farms, Judy stays at home. At the time of trial the parties were engaged and planned to be married in the summer of 1986. There is stability in respondent's relationship with Judy Ball and her children. During his long stay in his home Jason was described as an intrinsic part of this family unit.

When considering the two factors, petitioner's relinquishment of Jason and the parties' post-decretal relationships, we conclude respondent has established by a preponderance of the evidence conditions have so substantially changed that it is in Jason's best interest his physical care be given to him. Due to Jason's emotional and physical needs, stability is required in his life. It is apparent respondent can provide such stability. The burden upon a party seeking to modify a custody decree is heavy because once physical custody is fixed it should not be disturbed except for the most cogent reasons. From January 1984 to April 1986 Jason's residence was with respondent and Judy Ball. Furthermore, we note, throughout the record petitioner sets forth her reasons for leaving Jason with respondent. From a review of the record we believe the reasons for Theresa's relinquishment of Jason's physical custody to Ronald have not been resolved. Jason's best interests will be served through joint custody with primary care in respondent and liberal visitation for petitioner.

In its decision the trial court made what we consider two erroneous findings. The court concluded Craig Corkery had controlled his drinking problem. From the record testimony it appears Craig continues to drink five to six drinks, two or three times a week. The record fails to support the conclusion he no longer has a problem, particularly when considered in light of Jason's possible contact with Craig. The court also concluded petitioner was Jason's primary caretaker. Although this is unquestionably true from Jason's birth to the dissolution, September 3, 1978 to February 10, 1981, after the dissolution her role as caretaker significantly diminished. From the dissolution until January 1984 Jason was constantly with day care or baby-sitters. And of course respondent and Judy Ball were the primary caretakers from January 1984 to April 1986. The trial court should have made this distinction clear in its decision. Finally