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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

IN RE MARRIAGE OF JANIS L. HARVEY AND ROBERT G. HARVEY

Upon the Petition of	)	
JANIS L. HARVEY n/k/a	)	
JANIS I. BALZER,	)	Filed February 20, 1980
Petitioner-Appellant,	)	
	)	
And Concerning	)	
	)	
ROBERT C. HARVEY,	)	245
	)	3-62508 & 64200
Respondent-Appellee.	)	

Appeal from Polk District Court - John N. Hughes, Judge.

Appeal from trial court orders on application for modification of child custody decree. Trial court order, as proposed to be amended following limited remand, is confirmed.

Joseph Z. Marks of Marks, Marks & Marks, Urbandale, Iowa, for petitioner-appellant.

P. F. Elgin of Elgin, Hoyman & Clogg, Indianola, Iowa, for respondent-appellee.

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

PER CURIAM

This action for modification of the child custody provisions of a dissolution of marriage decree was originally heard in the district court on July 18, 1978. Following trial of the issues, that court filed findings of fact and conclusions of law which proposed modification of the then existing custodial decree by awarding custody of one of the parties' four children to the petitioner, but denying her request for change as to the other three children. Those three children were left in the custody of their father, Robert Harvey. Decree was entered accordingly. Janis Harvey Balzer, mother of the children and the party petitioning for modification, appealed.

During the pendency of the appeal in this court, Janis asked for a limited remand for purposes of receiving additional evidence as to happenings since the appeal was pending. That request was granted by order of this court on August 24, 1979. In addition to providing for the taking of new evidence, our order provided that:

The district court shall review the new evidence together with that received July 18 and 19, 1978, and enter written findings and judgment based on all the evidence. The district court shall forward this court a transcript of the remand hearing and the pleadings and exhibits introduced at the hearing.

In accordance with this order, the same district judge who heard the application for modification in July of 1978 took additional evidence of happenings since that time and the current situation of the parties. The court thereupon entered new findings of fact and conclusions of law and proposed the result whereby custody of three of the four children be transferred to Janis rather than only one of the children. The transcript of the hearing on remand together with exhibits and the trial court's additional findings have been transmitted to this court.

Before proceeding to consider the issues, we believe it necessary to clear up two areas of confusion which may have arisen as a result of our order of limited remand. We directed that the district court should review the new evidence together with the evidence received in July of 1978 and enter new findings based upon all of this evidence. The first area of confusion arises from the fact that we referred to written "findings and judgment" in that order. It was not our intent that a new operative decree be entered in the district court while this appeal was pending. We only intended the trial court to indicate the judgment it would propose to enter upon considering the additional evidence together with the evidence previously offered. While a purported decree was entered on October 8, 1979, and a notice of appeal has been filed by Robert from that

order, we deem both to be without legal significance. The matter is before us on the original appeal taken by Janis. We dismiss the purported appeal by Robert. We note, however, that all issues he seeks to raise on his own appeal are considered by us as part of Janis's appeal.

We will review the custody issues *de novo* on the evidence taken in July of 1978 and the additional evidence taken during the limited remand. The purpose of asking the trial court to make new findings was to give us the benefit of the firsthand vantage point enjoyed by that court in order that we might give such findings the deference to which they are entitled under Iowa R. App. P. 14(f)(7). The second area of confusion growing out of our order of limited remand is the fact that Janis attempted to file a new application for modification after the remand had taken place based upon a change in circumstances since the July, 1978 hearing. As a result of this, the trial court's findings on the limited remand are couched in terms of a change in circumstances found to exist between July of 1978 and the time of the hearing on limited remand. We deem the latest application filed by Janis to be without legal significance as to the appeal before us. The issue is whether there has been a sufficient showing by Janis of a change in circumstances since July 30, 1975, to justify modifying the custodial order entered on that date. The evidence received upon limited remand may be considered in determining that issue. To the extent that the trial court's findings failed to correspond with our view of the issue, this variance is obviated by our *de novo* review.

We next consider the merits of Janis's application for modification. The four children of the parties involved and their birthdates are: Robert, March 8, 1963; Rhonda, July 11, 1964; Raynee, August 21, 1967; and Rustin, July 15, 1969. The parties' marriage was dissolved by decree entered September 15, 1972, which granted custody of all four children to Janis. On July 30, 1975, this decree was modified so as to award Robert custody of all four children. Janis sought to regain custody of the children in her application for modification filed June 7, 1978. Following hearing on this application in July of 1978, the trial court concluded that there was considerable question as to whether Robert should retain custody. The court was particularly concerned with the use of marijuana by Robert and his present wife, Robert's actions in concealing the children from their mother, and an assault committed on Janis by Robert and his present wife. Nevertheless, the trial court's order, at that time, changed only

the custody of Rhonda, who the evidence showed had been living with Janis by mutual agreement of the parties.

In the additional findings made by the trial court after hearing the evidence presented on limited remand, the court proposed that custody of Raynee and Rustin also be changed to Janis. It based this change of position on evidence that: (a) Robert has continued to systematically prevent contact between the children in his custody and their mother; (b) Robert regularly and frequently uses marijuana in the presence of Raynee and Rustin; (c) Robert refuses to provide support for Rhonda; and (d) both Raynee and Rustin now express a preference for living with Janis. In addition to this evidence, the record disclosed that Janis and her present husband have adequate means and living arrangements to provide for Raynee and Rustin as well as for Rhonda.¹

In the present case Janis has the burden of showing by a preponderance of the evidence, a substantial and material change in circumstances since the July 30, 1975 order which makes the modification expedient or necessary. It must appear that the proposed arrangement will better serve the children's well-being. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976); Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976); Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). While the issues presented are troublesome and not completely free from doubt, we find on the record, including the record made following limited remand, that circumstances have so materially changed since the July 30, 1975 custody order as to indicate Janis now has the superior ability to provide for Rhonda, Raynee and Rustin. While Janis, in her original brief on appeal, also asked for custody of Robert, she has not seriously asserted this claim since the limited remand. Robert is now almost 17 years of age, expresses the desire to live with Robert, and is sufficiently tied to that environment that changing his custody at this time is not indicated.

In reaching our decision we have considered Robert's claim that our order of limited remand was improper. We believe this procedure was authorized by Iowa R. App. P. 12(f). See In re Marriage of Blessing, 220 N.W.2d 599, 603 (Iowa 1974).

On the issues presented we direct that the trial court's order as proposed to be modified upon limited remand is confirmed. This means that the July 30, 1975 order at

¹ Janis, at the time of the July 30, 1975 order, was financially destitute and suffering from uncontrolled alcoholism. Both conditions have been alleviated since her marriage to Gerald Balzer.

the district court, giving custody to Robert, is modified as follows: (1) custody of Rhonda, Raynee, and Rustin is now awarded to Janis; and (2) Robert shall pay support for the children in Janis's custody as indicated in the trial court's order of August 11, 1978 and proposed order of October 8, 1979. The appeal numbered 64200 is dismissed. Costs are assess three-fourths to Robert; one-fourth to Janis.

AFFIRMED.