

## IN RE THE MARRIAGE OF JUANITA KOHLS AND CHARLES KOHLS

|                       |   |                         |
|-----------------------|---|-------------------------|
| Upon the Petition of  | ) |                         |
| JUANITA KOHLS,        | ) | Filed December 30, 1981 |
| Petitioner-Appellant, | ) |                         |
| And Concerning        | ) |                         |
| CHARLES KOHLS,        | ) | <u>1-384</u>            |
| Respondent-Appellee.  | ) | <u>3-66466</u>          |

---

Appeal from Clayton District Court - C. W. Antes, Judge.

Petitioner-mother appeals from modification of a dissolution decree which changes custody of the former couple's daughter from the mother to the father.  
REVERSED AND REMANDED.

James U. Mellick, Waukon, Iowa, for petitioner-appellant.

R. L. Donohue, Donohue Law Office, West Union, Iowa, for respondent-appellee.

Stephen D. Saunders of Clefisch & Saunders, Elkader, Iowa, for Heidi Hohls.

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

## PER CURIAM

Petitioner-mother appeals from modification of a dissolution decree which changes custody of the former couple's daughter from the mother to the father. She argues that there was not a substantial change of circumstances that would warrant such a modification and that it would not be in the child's best interest.

The marriage of Charles and Juanita Kohls was dissolved September 10, 1976. The decree provided that custody of Suzette, the couple's oldest child, would be with her mother, Juanita, and that Danny and Heidi would be with Charles and Juanita respectively. The custody disposition was made temporary with further hearing or decision to be in ten months, but Charles elected to appeal the custody determination as to Suzette and Heidi immediately so that the further hearing never occurred. On August 16, 1977, this court filed its decision making the custody arrangements of Suzette and Heidi permanent.

On June 1, 1979, Charles filed for a modification of the dissolution decree to obtain custody of Heidi. Hearing was held on November 28 and 29, 1979. On January 22, November 14, and November 24, 1980, before any decision was filed by the court, Charles filed applications to reopen the record alleging the length of time since the hearing, and the existence of new facts bearing on Heidi's best interests. On December 9, 1980, the court entered an order allowing the record to be reopened for the purpose of receiving evidence of any events occurring after the hearing of November 1979. Rehearing for the additional evidence was held January 9, 1981, and trial court filed its decision March 24, 1981, which transferred custody of Heidi to her father. In its discussion the court noted that, as of the November 1979 hearing, evidence did not show a change of circumstances from time of dissolution to warrant a custody change. The decision to change Heidi's custody was based on facts developed at the January 1981 hearing.

The principles governing appeals of this nature are well-established; it is their application which causes the court difficulty. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). Our scope of review is *de novo* and we give weight to the factual findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7). In child custody cases, our first and governing consideration is the best interest of the child. Iowa R. App. P. 14(f)(15). When a party seeks modification of a decree involving custody we must look for material and substantial changes that warrant such a transfer in a child's best interest. In re Marriage of Melton, 256 N.W.2d at 205. The parent

requesting the change of custody must show an ability to administer to the needs of the child not equally but more effectively than the custodial parent. In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976). The change of circumstances must be such as was not within the contemplation of the parties at the time of the decree. Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). The changes must be more or less permanent or continuous, not merely transitory, variable, or temporary; remarriage of one or both divorced parents may or may not be a sufficient basis for a custody change. Spotts v. Spotts, 197 N.W.2d 370, 371 (Iowa 1972). Once custody is settled it should seldom be disturbed and then for only the most cogent reasons. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975).

In considering the evidence developed at both the November 1979 and the January 1981 hearings, we are unable to agree with the trial court that sufficient changes in circumstances had occurred to justify a change in Heidi's custody.

The court enumerated events which had changed its position. Charles had remarried, but so had Juanita. Since Charles's remarriage, Danny (the child whose custody had continually been his) had shown improvement in schoolwork. But Heidi's grades were good, and continued to be, and were at all times better than Danny's. Heidi's step-father was a construction worker and would be away from home a great deal. However, this had apparently always been his trade and we do not see that this constitutes a different set of circumstances. The court also noted the attaining of majority by Suzette, Heidi's older sister, and her moving to Mason City. But surely this factor or any others delineated by the trial court either does not constitute a change in circumstances or else was well within the contemplation of the parties at the time of the dissolution. We also note that, although neither stance is entitled to much weight, both Heidi herself and the attorney appointed to represent her believed Heidi should continue to reside with her mother. We agree with their position, however, and find that Heidi is well-adjusted, doing well in school, and is well-cared for. Both parents appear able to minister to her needs effectively, but the record does not support a finding that Charles's remarriage suddenly makes him a better parent than Juanita, although his new status apparently is having a beneficial effect on Danny. The record does show that Juanita has demonstrated good parenting of Heidi which ought not to have been interrupted.

Much has been made over the alleged character deficiencies and violent propensities of Ted Lang, Juanita's husband and Heidi's stepfather. Testimony was given concerning serious quarrels between Ted and Juanita, often while Suzette or Heidi was

present in the house. Suzette admitted that Ted once slapped her, but she also said that the fights she heard between Ted and Juanita were no worse than what she heard at Charles' house. She also testified that any fighting generally stopped when one of the children entered the room. We also note that, in looking at all of the proceedings, Ted Lang has always been involved with Juanita and a factor under consideration by the court along with many others in making the original custody determination, including the custodial affirmation by this court in 1977. The only change before the court regarding Lang is that he had married Juanita by the January 1981 hearing, a fact that ought to weigh in Juanita's favor, not against it.

We reverse the trial court's custody modification and return the custody of Heidi to her mother, Juanita, with whom she has lived her entire life except for part of this year. The custody change is to take effect immediately, and visitation provisions are to be the same as those in effect prior to Charles's petition for modification, with the exception that his visits are to be for two weekends each month rather than each weekend. For an order consistent with this decision, the case is remanded to the trial court.

REVERSED AND REMANDED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. I would affirm the modification of custody due to the evidence in the record which indicates petitioner's new husband has a proven and frequently exhibited propensity for physical violence against others. This fact creates a potentially abusive situation for the child and should not be ignored by this court. Considering all aspects of this matter, I believe the trial court was correct and I would affirm.