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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DIANA L. TAYLOR AND RICHARD TAYLOR

Upon the Petition of DIANA L. TAYLOR,	)	
Petitioner-Appellee,	)	137
And Concerning RICHARD TAYLOR	)	Filed April 22, 1987
Respondent-Appellant.	)	7-03 / 85-1094
CARL E. TAYLOR and JACQUILENE TAYLOR,	)	
Intervenors-Appellants.	)	

Appeal from the Iowa District Court for Polk County (No. CD39-22410) - Gene L. Needles, Judge.

Respondent and Intervenors appeal from a trial court refusal to modify custody. **MODIFIED AND REMANDED.**

Ray Sullins, Des Moines, for respondent-appellant.

Philip F. Miller, Des Moines, for intervenors-appellants.

Diana Taylor Dobbins, Bellevue, Nebraska, appellee, pro se.

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

SACKETT, J.

We must decide whether the fact an adequate custodial mother who is married to and lives with a man exhibiting serious deficiency in parenting justifies a modification of custodial care where the evidence shows the children will have a safer environment in their natural father's home. We determine custodial care should be granted to the natural father and modify the trial court's award.

Respondent Richard Taylor, natural father, and Intervenors Carl E. Taylor and Jacquilene Taylor, maternal grandparents[1], have appealed from a custody order in a modification proceeding. Petitioner Diana Taylor (Dobbins), natural mother, had been granted custody in the original decree. The trial court modified to provide for joint custody but left physical care with Diana.

The crucial issue centers on Richard's contention he should have been awarded physical care and Carl and Jacquilene's contention they should have been awarded physical care. Richard's major contention is custody should not be left with Diana because of the attitudes and actions of her current husband, Bert Dobbins.

Our review is de novo. Iowa R. App. P. 4. The first and governing consideration is the best interest of the children. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985). A person seeking a change of custody must show a superior claim, based upon an ability to minister to the childrens' needs more effectively than the custodial parent. Id. If the children are receiving proper care their custody should not be disturbed in absence of cogent or compelling reasons. Id.

This marriage followed a high school pregnancy. Diana was 16, Richard 17 when they married. Because of their age and lack of financial resources,

[1] Carl E. Taylor and Jacquilene Taylor are Diana's parents.

Diana's parents and Richard's mother provided substantial financial support. They also provided emotional support and assisted with child care.

Richard and the maternal grandparents are most concerned about the influence Diana's current husband has on the children's lives. Both Richard and Diana exhibit some immaturity. The trial court made the following finding:

> If Diana Dobbins' claim for custody would be dependent upon Bert Dobbins, this Court would have no hesitancy in removing the children from her and placing them in the custody of someone else. Dobbins has interfered with the visitation schedule and right of the respondent and his present wife. He's called the children names and in other ways demeaned their personhood. There is no interaction between the children and Bert Dobbins. His only interest in talking with the custody investigator was to talk about himself, rather than the children and his relationship with them. He was unemployed the entire year until the very day of this hearing. He did not contribute toward the support of his wife nor the two children in 1985, through the time of trial. He has directed physical violence toward women in the past and was convicted of assault recently. He has been counseled to avoid ever drinking alcohol and chose to ignore that advice. His actions more than any other have contributed to the conflict between the mother and father of these children and between the mother and her parents. In deed, except for her relationship with Dobbins, the intervenors testified they would not have attempted to obtain custody.
>
> Richard and his present wife have a stable home and a growing and successful business. Their relationship with the children is good when they have had the opportunity to exercise their visitation. Dobbins has interfered with that effort. As an example, there was an episode of confrontation between Dobbins and Richard and his present wife when they were in Omaha to pick up the children. Dobbins threw a shoe and hit Richard's present wife in the face.
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> Petitioner Diana must share the responsibility for Dobbins' attitude and actions which affect the children. . . .

The record clearly supports the trial court's findings. However, the question *is whether these facts justify a change of custody. Unlike the trial court, we* believe they do. Children deserve to be protected from persons who demean their personhood. The record clearly establishes Bert has a violent temper and exerts physical force when enraged. Although there was no evidence Bert had physically abused the children, we have concern the violent and abusive actions he has directed toward others may be directed to the children. Both

Richard and the maternal grandparents argued the children were being jeopardized by each day they spent with their stepfather. We too determine the stepfather poses a threat to these children. Children should not remain in such an environment, especially here where the homes of their father and their maternal grandparents are open to them. They have a strong bond with both their father and their maternal grandparents. Both families want the children and are able to supply an adequate and safe home.

We determine the burden has been met for a change of custody and determine both the father and maternal grandparents have shown the ability to provide superior care. The child custody investigator determined the father should have custody. There is a presumptive preference for parental custody and it is only when neither parent is a suitable custodian that an alternative should be considered. In re Marriage of Reschly, 334 N.W.2d 720, 721 (Iowa 1983). We determine, as did the trial court, the children would be well taken care of by Richard and his current wife. He is a very suitable custodian. We modify the modification award to make Richard physical custodian and award him custody of the children.

The intervenors complain that the trial court erred in requiring them to pay all of the child custody investigator's fees. We agree and apportion the fees one-third to each party.

We find it necessary to address two other issues. Richard was not current with child support. This was a factor we considered in assessing the custody award. See In re Marriage of Gravatt, 371 N.W.2d 836, 840 (Iowa App. 1985). Richard counters he was advised by legal counsel to make payments on the house contract rather than pay child support directly to Diana. Richard knew the children were not benefiting from those payments and Diana did not have

resources to provide for their support. We do not excuse Richard's actions in failing to help support the children under these circumstances.

The judgment appealed from was entered July 10, 1985. The transcript was ordered July 16, 1985. The transcript was filed November 24, 1985. The intervenor grandparents filed their final brief on August 26, 1986. Richard did not file his final brief until November 11, 1986. We note there were several extensions granted. However, both parties had delinquencies. In addition, no attorney appeared for or represented the children's interests. The children's interests were not served by the delays. We are critical of the failure to file briefs in a timely manner.

We remand to the trial court to make orders for visitation by intervenors and Diana.

Appellate costs are taxed one-third to Diana, one-third to Richard and one-third to Carl and Jacquilene.

MODIFIED AND REMANDED.