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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

34

**IN THE MARRIAGE OF BARNEY DEAN BUSHORE AND JEAN ANN BUSHORE**

Upon the Petition of )

**BARNEY DEAN BUSHORE,** )

Petitioner-Appellant, ) Filed May 31, 1988

And Concerning ) 8-105
87-1106

**JEAN ANN BUSHORE,** n/k/a Jean Ann Nagle, )

Respondent-Appellee.

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Appeal from the Iowa District Court for Jasper County (No. D.D. 7-8), Ray A. Fenton, Judge.

Former husband appeals the trial court's rulings on both parties' applications for modification of a dissolution decree. **REVERSED.**

Lee M. Walker and Eugene Knopf of Walker, Knopf & Billingsley, Newton, for appellant.

R. Steven Johnson of Newton for appellee.

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

**DONIELSON, J.** 35

Petitioner-appellant appeals from the trial court's rulings on both parties' applications for modification of a dissolution decree. He contends the trial court erred: (1) by refusing to place custody of the minor children with him; (2) by considering evidence that occurred prior to the dissolution decree; and (3) by increasing his child support obligation from $500 a month to $600 a month. We reverse.

The marriage of Barney and Jean Bushore was dissolved in 1983. Respondent, now known as Jean Nagle, was awarded custody of the three boys who are now ages fourteen, twelve, and ten. Petitioner was directed to pay child support in the amount of $166.67 per child per month. In 1986 petitioner applied for a modification of the decree to transfer custody of the three children to him. He asserted that both parties had remarried and that respondent had married a convicted rapist and kidnapper. Respondent responded by applying for a modification to increase petitioner's child support obligation.

The trial court denied petitioner's request for a change in custody. The trial court found petitioner had begun dating his new wife, Julie, while the parties were still married, "which, to some extent, contributed to the dissolution." The trial court commented on the criminal background and inappropriate sexual behavior of respondent's new husband, Gerald Nagle. The trial court also found the respondent to be a good mother, and that the boys were thriving in her care. The trial court found no evidence that Gerald presented any threat to the boys. The court also noted two of the boys expressed a preference to live with their mother. The trial court then granted respondent's modification and increased petitioner's child support obligation to $600 per month.

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

The following standards guide our review. To receive a modification:

> [T]he 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 Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

We find the facts in this case warrant awarding the physical custody of the children to petitioner. The trial court noted petitioner has a stable home and marriage with his new wife. We find the trial court's indirect attack on petitioner for having an affair with his present wife was improper in attributing fault to both petitioner and his new wife and was not relevant to the instant modification proceeding. From the record before us, petitioner and his present wife are ready, willing, and capable to care for the children.

On the other hand, respondent's current situation appears to have deteriorated since the initial dissolution decree was entered. It is not contested that she is a good mother and cares for her children. However, unlike the trial court, we cannot ignore the circumstances surrounding respondent's current marriage to her new husband, Gerald Nagle. Specifically, with regard to Gerald, the trial court made the following findings of fact:

> 4. On September 14, 1985, the respondent married Gerald Nagle. In 1978 Mr. Nagle was arrested, convicted, and served time

in prison in Minnesota for sexual assault. He was 19 years old at the time. He has successfully completed his parole from the Minnesota prison system and is no longer on parole or probation.

5. An incident occurred during the month of June 1986 between Mr. Nagle and Jennifer Mallory, age 17, who baby-sat with the children. Jennifer was baby-sitting the children on this particular day and because it was raining, Mr. Nagle had not left for work. Jennifer was downstairs watching TV and during the course of the conversation was asked by Mr. Nagle if the discussion of sexual matters bothered her. She indicated that she really didn't care what he had to say, and he stated that he had been watching her and that he liked the way she looked. He then asked her to come over early and said, "I would like to eat you out." She began to get scared; and he said, "If you don't like the idea, forget about it; if you do like the idea, let me know."

6. He then grabbed her around her neck and butt, kissed her on the cheek and squeezed her butt, and said, "Don't say anything, people could get in trouble."

7. In approximately May 13 and 14 of 1985, a man driving a blue station wagon was yelling something at the girls, ages 12 to 14, in the vicinity of the West Junior High School in Waterloo, Iowa. Mr. Nagle was stopped in the area driving a blue station wagon with a license plate that matched the number given by one of the girls. Mr. Nagle denied being in the junior high school area and denied yelling anything at young girls.

8. On another occasion, approximately August 19, 1986, the Newton Police Department received a complaint that Mr. Nagle was in the area of one of the schools trying to pick up young girls.

In addition, Gerald has a temper which he has trouble keeping under control; he has used threats and force to satisfy his needs. In fact, respondent has expressed her fear of him. At one time she called the police and said she was afraid Gerald was going to kill her and the children. A psychologist testified she had doubts that the children's best interests would be served by having them remain in the same environment as Gerald.

The children expressed a preference to live with their mother. A child's preference in custody determinations is given weight, although less weight may be given in modification proceedings. Zabecki, 389 N.W.2d at 399-400.

We have serious concerns about the sexual behavior of the stepfather, Gerald Nagle. While we do not want to place too much emphasis on his parenting abilities, we question respondent's judgment and maturity in maintaining the children in the present situation. Testimony was elicited from respondent's brother, who has baby-sat the children, that the children appear to be afraid of Gerald; the brother also testified he was afraid of him. The children's best interests will not be served by staying in their present surroundings where they will be influenced by their stepfather's attitude and behavior. Gerald Nagle is not a good role model for the children, nor does he appear to be an appropriate parent with the children.

For the foregoing reasons, I find petitioner has the superior parenting ability and can provide a more suitable environment for the children. The decree is modified and physical custody of the children is awarded to petitioner. Because of our ruling, we need not address the issue of child support.

**REVERSED.**

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

**OXBERGER, C.J.** (dissenting) 33

I respectfully dissent. The supreme court has repeatedly said the question of child custody should be settled once and thereafter little disturbed. See In re Marriage of Frederici, 338 N.W.2d 156, 160 (Iowa 1983).

The father, Barney D. Bushore, testified he had no complaints against the mother's care for the children. His sole complaint is against her new husband. He said he had no information about any wrongful conduct by the stepfather towards the boys. He objected to the stepfather's criminal record and current conduct toward young ladies.

The boys, ages 13, 11, and 9, desired to remain with their mother. Their mother had always been the primary parent. The father consented to giving original custody to the mother June 1, 1983. He has no complaints about the past or current care the mother has and is providing the boys.

I have the same concern the trial court and the majority express about the stepfather's conduct. However, the mother has adequately provided the proper care for the boys in spite of the negative influence of the stepfather.

I would affirm the trial court and continue to rely on the demonstrated record of parenting provided by the mother. I believe we can express our disapproval of the stepfather's conduct without breaking the psychological bonding between the mother and the boys.