IN THE COURT OF APPEALS OF IOWA

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FILED

DEC 30 1981

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOHN L. MILLER AND SYLVIA R. MILLER

Upon the Petition of	)	
JOHN L. MILLER,	)	Filed December 30, 1981
Petitioner-Appellant,	)	
And Concerning	)	
SYLVIA R. MILLER,	)	1-314 3-66255
Respondent-Appellee.	)	

Appeal from Washington District Court - Ira F. Morrison, Judge.

Petitioner-father appeals from trial court's refusal to modify the child custody provision of the parties' dissolution decree asserting trial court erred in (1) determining that there had not been a material change of circumstances justifying a permanent custodial change of the parties' only son and (2) failing to find petitioner-husband would more effectively minister to his son's needs. AFFIRMED.

Joseph C. Johnston and Clemens Erdahl, Iowa City, Iowa, for petitioner-appellant.

R. Bruce Haupert of Leff, Leff, Leff, Haupert & Traw, Iowa City, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Carter and Johnson, JJ. Snell, J., takes no part.

Petitioner-father, John L. Miller, appeals from trial court's refusal to modify the child custody provision of the parties' dissolution decree. He asserts trial court erred in (1) determining that there had not been a material change of circumstances justifying a permanent custodial change of the parties' only son, and (2) failing to find petitioner-father would more effectively minister to his son's needs. We affirm.

The parties were married on October 14, 1956. Ryan, their second child, was born on June 21, 1965. The marriage was dissolved on July 27, 1979, and the decree incorporated the parties' stipulation giving respondent-mother, Sylvia R. Miller, custody of both children. On November 5, 1979, petitioner married Ms. Grace McFadden. On June 6, 1980, Ryan began an extended summer visitation with his father, during which the two interacted very well. They went camping and fishing together. Petitioner purchased a new set of golf clubs and a shotgun for Ryan. Petitioner filed his application for modification on July 11, 1980. Following a hearing on October 28, 1980, trial court entered its order dismissing the application on December 18, 1980. This appeal followed.

I. Scope of Review. Our review of modification proceedings is de novo. Iowa R. App. P. 4. The principles governing such proceedings are well established. The best interests of the minor child are our first concern. Iowa R. App. P. 14(f)(15); In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The noncustodial parent has the burden of establishing by a preponderance of the evidence that there has been a material and substantial change of circumstances since the entry of the original decree, not within the contemplation of the trial court at that time, which makes it expedient to change custody. Id.; In re Marriage of Hobson, 248 N.W.2d 137, 139 (Iowa 1976). Where the custodial parent has properly provided for the child's social, moral, and educational needs, and the child has become attached to his environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the child's well being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1976); In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

II. Discussion. In light of these principles, we do not believe petitioner sustained the heavy burden the law imposes on him to demonstrate his superior claim to

custody due to a change in circumstances. We emphasize that this is not an initial determination of custody wherein trial court simply concludes which parent is preferrable for custody.

Petitioner alleges two material changes in circumstances which justify the modification. First, he argues that his remarriage has created a stable home environment, an option not available for Ryan at the time of the dissolution proceeding. Second, he argues that there has been a deterioration of the relationship between Ryan and his mother. He also asserts that he is better able to minister to Ryan's needs because of his remarriage and stable home environment and that his son's stated desire to be with him instead of his mother should weigh heavily in the court's determination of the custody issue. Having reviewed these arguments and the entire record, we conclude that petitioner has failed to satisfy his burden of proof and that custody should therefore remain with respondent.

Remarriage of the parties is not in and of itself a change in circumstances sufficient to warrant modification of custody. Eddards v. Suhr, 193 N.W.2d 113, 116 (Iowa 1971); McCrery v. McCrery, 258 Iowa 354, 357, 138 N.W.2d 876, 878 (1965). Neither remarriage nor the resulting stabilization of a divorced/remarried parent's home environment are circumstances outside the trial court's contemplation when making its initial custody determination. Nor is evidence of a child's comfortable adjustment to a new family environment resulting from a parent's remarriage so unexpected as to be outside trial court's determination when originally determining custody.

Furthermore, we conclude, that petitioner has wholly failed in proving that the relationship between Ryan and his mother has deteriorated to such an extent that a change in custody would be expedient. Rather, we conclude that, despite occasional problems in communication, the relationship between mother and son is healthy. We do not consider the emotional, educational, and disciplinary problems encountered by this child in his maturing process to be evidence of his mother's inability to care for him. The evidence is overwhelming that respondent can effectively care for her son's emotional and physical needs. At trial, petitioner conceded that there was nothing about living with his mother that his son did not like and that his son loved his mother very much. He also testified that his son loved his sister very much. Ryan likewise testified that he got along fine with his mother.

We have also considered Ryan's stated desire to live with his father. A child's preference, while not to be ignored, is not controlling and is entitled to less weight in a

proceeding to change custody than in an original hearing. See In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979); In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976); In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). We find that Ryan's preference in this case is not the mature and reliable preference that the petitioner argues it is. We cannot ignore that this preference arose during an extended visitation period between father and son where the father provided his son with lavish gifts, exciting trips, and constant attention. We decline to give substantial weight to the child's preference under these circumstances.

We further believe that the fact that respondent has custody of Ryan's sister is an important consideration in this matter. Ordinarily, the best interests of a child is served by not separating him or her from siblings. Junkins, 240 N.W.2d at 668. The record in this case indicates that there is little contact between petitioner and his daughter. In view of the fact that the evidence also indicates Ryan loves his sister very much, we believe that placing Ryan in the custody of his father would greatly alter that relationship and thus not be in the best interests of Ryan. Further, this court will not speculate, as the petitioner urges it to do, as to a sibling's future plans upon reaching majority.

Finally, we are cognizant of the rule that the status of children should be quickly fixed and thereafter little disturbed. In re Marriage of Castle, no. 3-65610, slip op. (Iowa, Oct. 27, 1981); In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974). Finding no material change in circumstances to justify modification of the original custody provision, we, like trial court, decline to modify custody in favor of the petitioner.

AFFIRMED.