



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RICHARD LEE CRISPIN and MARILYN JO CRISPIN

Upon the Petition of)

RICHARD LEE CRISPIN,)

Appellee,)

And Concerning)

MARILYN JO CRISPIN,)

Appellant.)

Filed March 14, 1977

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3-59582

Appeal from Polk District Court - Dale Missildine, Judge.

Appeal by mother from order of trial court modifying decree of dissolution to change custody of minor child from mother to father. Reversed and remanded.

Keith Uhl of Des Moines, for appellant.

Harlan Lemon of West Des Moines, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

OXBERGER, J.

Marilyn Jo Crispin appeals the modification of the dissolution decree which transferred custody of her daughter Holly Michelle to Holly's father, Richard Lee Crispin. We reverse.

The marriage of Marilyn and Richard was dissolved by court decree December 9, 1974. Custody of Holly, born to them October 6, 1968, was given to Marilyn with Richard's consent. Richard filed an application for modification on September 4, 1975. On May 5, 1976 custody of Holly was transferred to Richard. We must now decide who shall have custody.

This court sits in this case without power to order a change of custody unless Richard has met his twofold burden. First, he must, as the noncustodial parent, establish by a preponderance of the evidence that conditions since the dissolution have so materially and substantially changed that Holly's best interest makes it expedient to award her custody to him. *Hobson v. Hobson*, #3-59410, at 4, filed December 15, 1976. *Zaerr v. Zaerr*, 222 N.W.2d 476, 477 (Iowa 1974).

Secondly, he must demonstrate that such a modification would inure to the benefit of Holly. It is not enough to show that Holly would be just as well off. It must appear the change in custody would serve her *interest* better than the environment from which he wants to take her. In re *Marriage of Pokrzywinski*, 221 N.W.2d 283, 284 (Iowa 1974).

These burdens emanate from the first and governing consideration in the custodial placement of children, the best interests of the child. Rule 344(f)(15), Rules of Civil Procedure; *Zaerr*, 222 N.W.2d at 477; *Pokrzywinski*, 221 N.W.2d at 284. Our inquiry into Holly's best interest

is further governed by the "familiar rule (that) custody of children who are receiving proper care should not be disturbed in the absence of cogent or compelling reasons."

Pokrzywinski, 221 N.W.2d at 286; *Miller v. Miller*, 202 N.W.2d 105, 112 (Iowa 1972). A corollary rule in this jurisdiction is that "the status of children should be fixed as soon as possible and thereafter seldom disturbed and then only for the most cogent reasons." *Schoonover v. Schoonover*, 228 N.W.2d 31, 34 (Iowa 1975).

Richard urges the following facts are sufficient to support an uprooting of Holly from her mother's home.

1. Marilyn occasionally has a man stay overnight.
2. Holly was absent 26 days from school.
3. Marilyn stole a box of soap and paper towels and cloth towels.
4. Marilyn tried to sell a coat under suspicious circumstances.
5. Marilyn screamed at Holly.

The *In re Marriage of Jacobs*, 216 N.W.2d 312 (Iowa 1974) decision held the following facts were not sufficient to uproot the children from their home:

1. Mother gave up first child, born before marriage, for adoption.
2. Mother had two illegitimate children by a man who lived with her and the parties' children after the divorce.
3. Mother was arrested for drunkenness and drug possession and given a six month suspended jail sentence.

The court said:

" . . . certainly she has used up a lifetime's quota of mistakes . . . While the issue before us is extremely close there is no evidence Jeffrey has suffered damage from Mary's mistakes." 216 N.W.2d at 314.

In the *In re Marriage of Dawson*, 214 N.W.2d 131 (Iowa 1974) decision the court refused to uproot the children where the mother had an adulterous relationship with a man in her home and had committed perjury during the trial. The court said:

" . . . apparent disregard for truthfulness and sanctity of oath reflects adversely on her custodial fitness. It has weighed heavily against her in this case. However, we must still balance that against the best long-run prospects of the children." 214 N.W.2d at 133.

In the *In re Marriage of Morton*, 244 N.W.2d 819 (Iowa 1976) decision the court refused to uproot the child where the mother:

1. Had sexual relations in the home with her daughter present.
2. Took the daughter, age two, with her in driving around downtown after midnight on several occasions.
3. Denied father visitation with the child.

The *Morton* court said:

"The conduct is not to be commended. (citation) However Stacy was not shown to be anything but healthy, well adjusted and well rested." 244 N.W.2d at 822.

Recently, *In re Marriage of Gutermuth*, 246 N.W.2d 272 (Iowa 1976) decision refused to grant a change of custody to the father. In *Gutermuth* the father charged the mother's "demonstrated disregard for truth and the sanctity of an oath reflects adversely on her custodial fitness." 246 N.W.2d at 274. While not "condoning" her untruthfulness and giving "serious consideration" to such conduct, the court found it was not "necessarily controlling" and that

"the most charitable characterization" of the mother's conduct was that she may have acted in extreme anger. 246 N.W.2d at 274.

It is abundantly clear that the prior decisions in Iowa do not support a change of custody in this case. No material and substantial change or deterioration in Marilyn's custodial fitness has been demonstrated. Further, Richard has not demonstrated Holly's interests will be better served by the environment he proposes to substitute. The court in *Jacobs* noted that if the father secured custody of the child and the sleep "he may need following his night-shift employment, he will be able to spend time with his son only on every other weekend. The record indicates he now has such opportunity by visitation and in the meantime Jeffrey has the benefit of a full-time mother." 216 N.W.2d at 314.

In this case the issue is not which home is the better home. The desire of the court to provide stability in a child's life requires us to focus on the effect the present home has had on Holly. We must not let our displeasure with Marilyn's mistakes cloud our mind to the task. Holly appears happy and well-adjusted with the normal behavioral problem of a seven-year-old of talking too much at school.

There is no evidence sufficient to empower the court to order a change in Holly's custodial care. In the absence of such evidence the order of the trial court is reversed and Holly is returned to her home.

The decree of the trial court is reversed and the cause is remanded for entry of a decree in conformance herewith. Costs on appeal are taxed to Richard.

Reversed and remanded.

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

DONIELSON, J. (dissenting)

I dissent. The majority here presents a gross oversimplification of the factual matters on this appeal. It seems to me to be totally unjustified to refer to five separate specific factual reasons for Richard's attempt to gain custody of Holly. The majority then takes these five items of specific misconduct and attempt to compare them with other cases of specific misconduct which I believe to be inapposite to the case before this court. The majority then comes to the conclusion that Holly should now be taken from her father where she has resided since May 5, 1976, and be returned to Marilyn to live under what I deem to be a highly unsatisfactory environment. *

A careful review of the transcript (not the appendix!) reveals to me no justification for overturning the trial court and even less justification for the majority to agree that there are essentially five specific items of misconduct rather than a generalized bad environment situation.

The record reflects this unsatisfactory home environment from the first page of the transcript to the last page. It is replete with not only specific instances of an unsatisfactory

* I recognize that generally temporary custody is normally not considered a transfer of custody for purposes of appellate decision making, such as this case. However, ten months with the father, almost an entire school year, and now to have the child's home disrupted and her school changed near the conclusion of the school year at this tender age leads me to the common sense conclusion that temporary custody is no different than permanent custody under the circumstances of this particular case. A simple observation of our responsibilities under rule 344(15), Rules of Civil Procedure, "the best interests of the child" commands that conclusion.

home environment but the record presents a general aura of lack of responsibility, maturity or loving interest in the child's welfare on the part of Marilyn.

Other than perhaps instances of someone testifying that Marilyn kept a "clean house", the case presents a set of facts that permeates this record to a point where a person becomes hard pressed to see any enlightened prospects or indeed any future for Holly at all by returning Holly to her mother's household.

This indeed is an unfortunate and sad case involving custody and the shifting of custodial responsibility of this child, Holly, age seven, born October 6, 1968. Richard at the time of the divorce on December 9, 1974, agreed that Marilyn should have custody of Holly. Holly resided in these less than satisfactory surroundings until May 5, 1976, approximately 15 months. The trial court then moved the custody of Holly to her father, Richard, where Holly has resided until the present, approximately 10 months. Her present home conditions are graphically illustrated by petitioner's exhibits 1 through 6 which shows the home as they exist under the trial court's present order.

Perhaps the only satisfactory factual situation facing this court is the financial situation involving these parents. Richard, age 40, has had a stable employment as a dock worker and a truck driver at All American Transport for approximately three years. Previous to that he had a similar employment for approximately five years with another company. His present income is \$7.76 per hour with a modest amount of overtime ranging from two to four hours per week. His "take-home" pay is approximately \$217 per week. He is

current in his child support payments and provides extras for Holly. He rents part of a house in Altoona, Iowa, as set out in petitioner's exhibits 1 through 6 which provides an ideal insight on the home conditions which must be considered superior in nature under the circumstances.

Marilyn, on the other hand, although having a highly unstable employment record with a wide range of short term jobs ranging from a cocktail waitress, laundry worker, mattress worker, bakery worker, office worker, photography studio worker and bartender is now employed at the Ruan Truck Center earning \$3.00 per hour or \$520 per month not including regularly scheduled overtime. In addition, she receives \$222 per month from ADC, \$92 a month from food stamps and approximately \$150 a month in child support.

Marilyn, therefore, has a total income of \$834 or \$984 depending upon whether she receives the child support payments, the record is not clear on this, plus some contribution to her living expenses by her father and as indicated, this does not include her regularly scheduled overtime.

Pursuant to rule 344, R.C.P., our review is de novo, and we are not bound by it but give weight to the findings of the trial court. Rule 344(f)(7), R.C.P. More importantly, we are bound by rule 344(15), R.C.P., *"In child custody cases the first and governing consideration of the courts must be the best interest of the child."* As stated in *In re Marriage of Brown*, 247 N.W.2d 2 (Iowa 1976): *"Our review is de novo. The welfare of the child is the controlling factor to be taken into consideration. Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972)."*

That case goes on to state:

"It must appear a new custodial arrangement will better serve the child's well-being. Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976); Mears v. Mears, 213 N.W.2d 511, 514-515 (Iowa 1973); Crary v. Curtis, 199 N.W.2d 319, 320 (Iowa 1972)."

See also Baker v. Baker, 243 N.W.2d 234 (Iowa 1976).

The responsibility for these decisions is a substantial one, but the guidelines have been quite clearly set forth in the twelve principles set forth in *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974) which in general expands and clarifies *In re Marriage of Bowen*, 219 N.W.2d 683, 687-688 (Iowa 1974).

The legal principles that the status of children should be quickly fixed and thereafter little disturbed, see *Jacobs v. Jacobs*, 216 N.W.2d 312, 314 (Iowa 1974), is applicable here because although there was an agreement between the parties that the mother, Marilyn, should have Holly when the custodial hearing occurred, the trial court changed the custody and placed her with the father on May 5, 1976, where Holly has continually resided. We should be somewhat reluctant to again change the custody unless the trial court was clearly in error. It must appear that any new custodial arrangement will better serve the child's well-being. See *In re Marriage of Brown*, 247 N.W.2d 2 (Iowa 1976); *Davis v. Davis*, 237 N.W.2d 455, 457 (Iowa 1976); *Mears v. Mears*, 213 N.W.2d 511, 514-515 (Iowa 1973); and *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972).

This court generally infers that the mother is the better choice in the case of small children, but that inference yields to evidence tending to show otherwise. See *In re Marriage of Callahan*, 214 N.W.2d 133 (Iowa 1974); *In re*

Marriage of Jennerjohn, 203 N.W.2d 237 (Iowa 1972) and no hard and fast rule governs which parent should have custody. Kayser v. Kayser, 164 N.W.2d 95 (Iowa 1969). Our courts always return to the child's best interest under the particular circumstances. Miller v. Miller, 202 N.W.2d 105 (Iowa 1972) and In re Marriage of Callahan, 214 N.W.2d 133, at 136 (Iowa 1974).

The court no longer gives mothers an automatic preference to custody. Baker v. Baker, 243 N.W.2d 234 (Iowa 1976). The inference that the mother will have more time to devote to the children and to their welfare readily yields when the evidence in a case shows that such assumption is not justified. In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974).

My dissent is founded upon the transcript which reveals to me a general home environment that does not even remotely resemble the five specific items of misconduct that the majority bases its decision upon, and if the record did reveal only these five specific item matters, I would certainly concur with the majority.

Therefore, some detail explanation of the facts seem to me to be necessary.

Marilyn testified that she would have men stay over night with her there once or twice a month. Holly would sometimes be sleeping when they arrived. During this time, she admitted being picked up on occasion by strangers, one of said incidents resulting in the rape of her girlfriend and some evidence of her being raped after being picked up at a local tavern called the Five and Ten. She testified that she "usually" did not bring strange men into her

apartment when Holly was there. Richard testified that on one occasion when he went to the apartment to pick up Holly a strange man partially clothed was present whom the babysitter identified as a hitchhiker. Marilyn did not deny or give any explanation of this occurrence in her testimony. Marilyn's sister testified as to a similar occurrence.

Richard offered evidence of school records showing that Holly was absent from school a total of 26 days during the 1975-76 school year. Marilyn sought in her testimony to attribute this to illness. Her testimony in this regard was less than convincing with respect to many of the absences. She admitted that some absences and late arrivals were due to her (Marilyn's) oversleeping. Marilyn's sister, Mrs. Winterberg, an elementary teacher in the Des Moines School system, testified that she viewed Holly's school absenteeism as excessive. She stated that she had seen Holly on occasions when Marilyn claimed the child was too ill to go to school and this did not appear to be the case.

Mrs. Winterberg also testified that in the fall of 1975 during a trip to attend the wedding of another sister she observed Marilyn steal a box of detergent and paper towels from a service station restroom in Holly's presence - an occurrence which caused the child to comment on the propriety of such action. Marilyn did or said nothing to indicate this course of conduct was wrong. Marilyn, in her own testimony, admitted this theft. She also admitted to stealing towels from a motel during the same trip. Rather than giving any indication that this conduct was wrong, she sought at the modification hearing to justify it on the theory of the financial hardship she was then experiencing while living on

Aid to Dependent Children and Richard's child support payments.

Mrs. Winterberg testified that Marilyn attempted to sell a leather coat to her husband under suspicious circumstances. The price requested was unusually low. Mrs. Winterberg testified that Marilyn told her the coat came from her friend, Billy, who had two coats of this type to dispose of. Marilyn, in her testimony concerning this incident, claimed that she knew nothing of the origin of the coat in question. She stated that the coat had mysteriously appeared in the back of her car and, after her unsuccessful effort to sell it to her brother-in-law, had mysteriously disappeared from the same car.

Mrs. Winterberg testified that some time after the wedding trip of a sister in the fall of 1975, she requested the Department of Social Services to check on Holly's welfare. In October, 1975, while talking to Marilyn on the phone, she heard Marilyn scream at Holly for things the child had told a welfare investigator and threaten to cram an orange down Holly's throat, a far cry from the majority's reason No. 5, "Marilyn screamed at Holly". Mrs. Winterberg testified that she doubted Marilyn's capability of supplying Holly's emotional needs, that she would like to help her sister but Marilyn would not accept help and that in her opinion Holly would be "better off" in Richard's custody. Mrs. Winterberg has been employed by the Des Moines School system for ten years as a fifth grade teacher and her well reasoned opinion was indeed impressive.

Marilyn's parents each testified at the modification hearing. Her mother testified that she had seen Marilyn and Holly three or four times in the year prior to the hearing, that on such occasions Marilyn's apartment was neat and

Holly was neatly dressed, and that she had "no reason" why Holly's custody should be changed to Richard. She stated that she had "no knowledge" of any of the matters about which her other daughter, Mrs. Winterberg, testified. Marilyn's father, a minister and president of the Missouri School of Religion, also testified that he also has "no knowledge" why Holly's custody should be changed to Richard.

There is evidence of Marilyn being beaten by a boyfriend who broke down her door to get in; of Marilyn and Holly visiting a house during an armed robbery; of her complaints about attempts on her life; of attempts to run her off the road; of her concern with someone tampering with her auto; of drug usage; of magazines available that are not generally thought of as acceptable for seven-year-olds; of telling the police off at a state fair incident; and other instances, many of which were confirmed by Marilyn herself causing the trial judge to state in his order of May 6, 1976, the following:

"1. It is the conclusion of this Court that the petitioner has carried the burden imposed upon him to the effect that there has been a material and substantial change of circumstances to require a modification of this decree.

2. From all the evidence in this case, including the evidence of the respondent herself, both on direct and cross-examination, the Court finds that, although it is not critical of her moral values, but does find that this is not the type of atmosphere which is conducive to the best welfare of a seven year old girl.

3. The Court further finds that the father has made provisions and has provisions to establish the daughter in a good home where he will be watchful of her welfare and her moral values and has demonstrated to the Court that he can take adequate care of the child."

In reviewing this matter de novo and in careful reading of the transcript and record, I believe that the majority has failed to give adequate weight to the trial judge's findings. As it says in *Zaerr v. Zaerr*, 222 N.W.2d 476, at 477 (Iowa 1974):

"Even though our review is de novo we give weight to trial court findings of fact, especially when considering credibility of witnesses. As difficult as it is to assess credibility of live testimony, it is more difficult to assess credibility from a cold transcript."

See also in a very similar case *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974) where it states:

"In these dissolution cases, a court is greatly helped in making a wise decision about the parties by listening to them and watching them in person. The trial court did so, and then arrived at the conclusion that the children's welfare would be better served with the father. Although we are not bound by a trial court's findings, we give them weight. *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa)."

See also *Schoonover v. Schoonover*, 228 N.W.2d 31, at 33 (Iowa 1975). See also *Jacobs v. Jacobs*, 216 N.W.2d 312, at 314 (Iowa 1974) where it states:

"Trial court had the opportunity to observe the parties, listen to them and watch them in person. Although we are not bound by trial court's findings, in a case such as this we give them weight. *In re Marriage of Callahan*, *supra*, 214 N.W.2d at 136; *In re Marriage of Williams*, 199 N.W.2d 339, 346 (Iowa 1972)."

The majority cites *Jacobs v. Jacobs*, *supra*, and *In re Marriage of Morton*, 244 N.W.2d 819 (Iowa 1976) for a comparison of similar factual situations. In *Jacobs* the majority

failed to mention that in addition to the facts of the mother's conduct, the court also considered the deplorable facets of the father's character and lifestyle and the hostility between the mother and the father's second wife. The court stated that this hostility would create problems with visitation rights. Also, the child suffered hyperkinetic syndrome and the court found that the father's attitude towards his son's affliction could be potentially disastrous. In *In re Marriage of Morton*, 244 N.W.2d 819 (Iowa 1976), the court found that the father's custody would not be superior to the one already provided by the mother because the father had not demonstrated a consistent and mature sense of responsibility. In *re Marriage of Dawson*, 214 N.W.2d 131 (Iowa 1974) cited affirming the trial court's discretion of not transferring the children and *In re Marriage of Gutermuth*, 246 N.W.2d 272 (Iowa 1976) presents a factual situation not even remotely resembling the facts in this case.

It appears to me that this case is more appropriately within the sphere of the decision in *In re Marriage of Callahan*, 214 N.W.2d 133 (Iowa 1974) which has a somewhat similar factual situation, and I am particularly impressed with the applicability of *Zaerr v. Zaerr*, 222 N.W.2d 476, at 478 (Iowa 1974) where it states:

"The choice is uncertain and unsatisfactory. Considering the alternatives, giving deference to trial court's superior position from which to judge credibility of the witnesses, we believe the court made the right decision.

"As much as it would appear desirable to wait a while longer to see if Donna might reorder her life and offer the children a better home, and to see if

Jack's new business venture would materialize and the stability of his home persist, we recognize the children's welfare would not permit that kind of delay. Courts must act to prevent wounds from being inflicted on children and should not wait until injury occurs. They act on probabilities, not on certainties, and they must put the rights of children ahead of the competing custodial claims of parents. In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974)." (emphasis added)

I view the majority's opinion as overemphasizing the right or best interest concerning the lifestyle of Marilyn. I view this as the trial court, in that it should be neither condemned nor condoned; that is her business and concern. I view our business as the best interest of Holly, and the record is clear to me in support of the trial judge who was there.

I would affirm.