FILED
MAY 20 1977
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF REX BALLINGER AND BARBARA A. BALLINGER

Upon the Petition of	)	
BARBARA A. BALLINGER,	)	Filed May 20, 1977
Appellant,	)	
And Concerning	)	132
REX BALLINGER,	)	No. 3-59480
Appellee.	)	

Appeal from Cass District Court -- Paul H. Sulhoff, Judge

An appeal from the trial court's modification order in a child custody case awarding the children to the father. - AFFIRMED.

Louis, Moore & Kohorst, of Harlan, Robert Kohorst, counsel for appellant.

Wilson, Bonnett & Christensen, of Lenox, David L. Christensen, counsel for appellee.

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

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DONIELSON, J.

The appellant-mother appeals from a district court modification decision finding a change of circumstances and awarding custody of her three sons to the appellee-father. The boys are Michael John, born January 31, 1966; Robert Ray, born August 17, 1963; and Brian Walter, born April 30, 1962.

The dissolution was filed April 14, 1972, and unfortunately has been the subject of almost continuous litigation since that time. * The certifying copy of the docket calendar entry shows some 81 entries on that docket since that date of April 14, 1972.

The same trial judge who disposed of the original dissolution has handled all the substantive trial matters. His frustration of finding the key to finality is exemplified by the opening sentence of his last order in decree of April 18, 1976, where he stated:

> "Now on the 15th day of April, 1976, the latest saga of Ballinger v. Ballinger came on again for hearing ... "

We hope to provide the elusive finality in this matter and affirm the trial court.

For purposes of brevity, we need not restate the facts and list all of the prior legal actions. The parties and their attorneys are all too familiar with the facts and legal proceedings of this instant case.

The issue before us is whether there was sufficient basis in evidence to support the trial court's finding of a material and substantial change of circumstances which is required to justify a modification of a custody decree.

In the instant case, we are guided by well known legal

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* Since the original dissolution and an appeal, see In re Marriage of Ballinger, 222 N.W.2d 738 (Iowa 1974), there has been two contempt citations and three modifica-

propositions. First and foremost, is the premise that in child custody cases, the first and governing consideration of the court must be the best interest of the child, rule 344(f)15, Rules of Civil Procedure. In addition, change of circumstances relied upon to justify a change of custody must be such as were not within the knowledge or contemplation of the court when the decree was entered. Dworak v. Dworak, 195 N.W.2d 740, 741-742 (Iowa 1972).

The appellant argues that there has not been a material change of circumstances since the original key factual issue; the relationship between Barbara Ballinger and Tom Arn was known to the court at the time of the dissolution hearing and subsequent hearings. However, the court in its decree does not rely upon the sheer existence of that relationship but rather the subsequent effect the relationship has had between Barbara and her three sons. The lower court found from the evidence, that, Barbara, because of the continued relationship, had so alienated the affections of her children that they no longer desired to reside with her. It is this portion of the evidence that supports a substantial change of circumstances. In the instant case, we give weight to the trial court's decision and its ability to exercise judicial discretion with regard to the evidence and the appearance and demeanor of the parties. See Heater v. Heater, 254 Iowa 586, 118 N.W.2d 587, 591 (1962).

We also note the court's reliance on the testimony of the three Ballinger children: Brian on the August 8, 1975 modification hearing and again all three children on the April 15, 1976 hearing. The children were examined by the court and they were shown to be of sufficient age, intelligence and

discretion to exercise an enlightened judgment. Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970). The court had the benefit of a report by a social worker for the Iowa Department of Social Services, the Cass County office. This report is complete and is well-prepared to assist the court in the difficult decision on whether there had been a change of circumstances warranting the change in custody of these children. The report makes the final recommendation that the desires of these children to be with their father were not unreasonable and is a recommended solution. The children's wishes of custodial preference though not controlling, may be considered by the court. Jones v. Jones, *supra*. See also In re Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974); Lursen v. Henrichs, 239 Iowa 1009, 1015, 33 N.W.2d 383 (1948).

We are also impressed with the fact that this same trial judge has had frequent opportunities to observe the witnesses, evaluate them, ask questions of the children, over an extended period of time, and we are prepared to give particular weight to his views under the circumstances of this case. See Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974); In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974); Jacobs v. Jacobs, 216 N.W.2d 312, 314 (Iowa 1974).

We, therefore, find that after a de novo review of the record, the best interests of these children will be served by the father having custody of his three sons as the trial court ordered.

We affirm.