

**FILED**

DEC 30 1981

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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**IN RE THE MARRIAGE OF LANA PATERNO AND JAMES PATERNO**

|                       |   |                         |
|-----------------------|---|-------------------------|
| Upon the Petition of  | ) |                         |
| <b>LANA PATERNO,</b>  | ) | Filed December 30, 1981 |
| Petitioner-Appellant, | ) |                         |
| And Concerning        | ) |                         |
| <b>JAMES PATERNO,</b> | ) | <u>1-402</u>            |
| Respondent-Appellee.  | ) | <u>3-66036</u>          |

Appeal from Polk District Court - Harry Perkins, Judge.

Petitioner mother appeals from the district court order modifying the child custody provisions of the parties' 1976 dissolution decree. She asserts that: (1) no substantial and material change of circumstances was shown to justify transfer of custody of the parties' minor child to the respondent father; and (2) that respondent has not complied with an order of the Supreme Court to pay child support while this appeal is pending and should be found in contempt of court. **AFFIRMED AND REMANDED FOR A CONTEMPT HEARING.**

Philip F. Miller of Haugan & Miller, Des Moines, for petitioner-appellant.

Kristine M. Fasano, Des Moines, for respondent-appellee.

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

DOMBLESON, J.

Petitioner mother appeals from the district court order modifying the child custody provisions of the parties' 1976 dissolution decree. She asserts that: (1) no substantial and material change of circumstances was shown to justify transfer of custody of the parties' minor child to the respondent father; and (2) that respondent has not complied with an order of the Supreme Court to pay child support while this appeal is pending and should be found in contempt of court. We affirm and remand for a contempt hearing.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

#### I.

The parties' 1976 dissolution decree awarded the mother custody of the parties' daughter, now aged twelve. For most of 1978 the father and his new wife informally acted as custodial parents. The mother filed an application for writ of habeas corpus seeking return of the child and the father then filed an application for modification alleging as change of circumstances his superior parenting ability coupled with failure of the mother to provide for the best interests of the child. In sustaining the writ and denying the application for modification the court noted in particular the father's financial difficulties, including a substantial arrearage in child support, and his attempts to alienate the child from the mother.

On February 28, 1980, the father filed a second application for modification again alleging both the mother's failure to provide for the child's best interest and his own superior parenting ability. In a supplemental decree implementing previously entered findings and conclusions, the court modified the decree so as to transfer custody from the mother to the father. The effect of the decree was stayed during the pendency of this appeal.

II.

Petitioner argues that the trial court erred in modifying the custody provisions of the 1976 decree by transferring custody of the parties' child to the respondent. We disagree and affirm the trial court's modification of the decree.

Our first and governing consideration in determining custody is the best interests of the child involved. Iowa R. App. P. 14(f)(15). With this in mind, we note further that the status of children should be quickly fixed and, thereafter, little disturbed. In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974). In deciding the custody issue, we seek neither to punish one parent nor reward the other. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). There is no inference favoring one parent as opposed to the other in deciding which is the more fit custodian except that arising from the particular facts of the case. Bowen, 219 N.W.2d at 688. Factors relevant to the custody determination are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), with the ultimate question being, based on the entire record, which of the parents can minister more effectively to the long-range best interests of the children. Id.; Iowa R. App. P. 14(f)(15). We are also guided by the principle that if a person having lawful care of a child has properly provided for the child's social, moral and educational needs for a substantial period of time and the child has become attached to that environment and those responsible for his welfare and happiness, a court is not justified in transferring custody to another except for the most cogent reasons. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517-18 (Iowa 1976). We believe cogent reasons exist in this case to justify a modification of custody and affirm the trial court.

The parties' daughter does not appear to have a good relationship with the petitioner's new husband or the husband's minor child. She has at times expressed a desire to live with her father. The petitioner and her new husband have smoked marijuana in the child's presence and disrupted her schooling for six weeks by suddenly moving to Michigan for a brief period of time. Based upon these facts, and the record in general, we find that the petitioner has not properly provided for the moral and educational needs of the child and the child has definitely not become attached to the family environment which petitioner has provided. It is in the child's best interest to be transferred to the custody of the respondent.

This is a classic case where neither parent can be awarded a prize for parenting ability. The award of custody here is an evaluation based more upon the parties' corres-

poncing negative attributes as parents rather than their positive attributes. Only time will tell whether the custody award affirmed here is correct. It is yet to be determined whether either the father or the mother can and will put forth the time and effort required to change their respective lifestyles and be good role models for their daughter. In the meantime, we believe the trial judge's experience and judgment should be accorded particular weight in this most difficult case.

III.

We note that on May 28, 1981, Supreme Court Justice Larson filed an order requiring respondent to pay child support of twenty-five dollars per week so long as the mother had custody under the stay order issued by the Supreme Court. On July 20, 1981, petitioner filed an application for contempt alleging that respondent has failed to make such child support payments. We remand this matter to the trial court to take evidence and make findings of fact regarding the alleged contempt of Justice Larson's order.

The costs of respondent's appendix are taxed to respondent and the costs of petitioner's supplemental appendix are taxed to petitioner. All other costs are to be equally assessed against the parties.

AFFIRMED AND REMANDED FOR A CONTEMPT HEARING.