IN THE COURT OF APPEALS OF IOWA

No. 1-277 / 90-1670

IN RE THE MARRIAGE OF TENA BEVERLIN and JOSEPH BEVERLIN

Upon the Petition of

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TENA BEVERLIN, n/k/a TENA PENISTON,

Appellant,

And Concerning

JOSEPH BEVERLIN,

Appellee.

FILED
AUG 27 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, Edward B. deSilva, Judge.

Petitioner appeals from the district court's modification of the parties' dissolution decree. **AFFIRMED**

Christine A. Dalton and Ronald D. Arispe of Muscatine Legal Services, Muscatine, for appellant.

Appellee, pro se.

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

OXBERGER, C.J.

Tena and Joseph Beverlin were married February 1, 1974. Their one child, Joseph, Jr., was born November 11, 1974. When the district court dissolved the parties' marriage on January 10, 1980, it awarded to Tena sole legal custody of Joseph, Jr., granted Joseph, Sr. visitation, and ordered Joseph, Sr. to pay child support.

On July 21, 1984, Tena married James Peniston. Tena and James have two children. Joseph, Jr. has continued to live with Tena and James. Tena has remained home with her children. James had been employed as a factory supervisor until January 1990, when he became unemployed. The family now receives AFDC until James finds new employment. They reside in a four-bedroom house.

Joseph, Sr. did not remarry. However, he lives with his fiance, Wanda, and her three children in a three-bedroom apartment. Wanda receives AFDC for her three children, while Joseph, Sr. occasionally works and earns between $5,000-$8,000 annually. Since the decree, Joseph, Sr. has not paid any court-ordered child support, but he has exercised visitation.

On April 25, 1990, Joseph, Sr. filed his application for modification, seeking to obtain joint custody of Joseph, Jr. and primary physical care of him. Joseph, Sr. alleged there had been a change in circumstances because: 1) his son wished to live with him; 2) his son had been

abused by his stepfather; and 3) his son had run away on several occasions. At the time the application was filed, Joseph, Jr. was age sixteen. He had lived with Tena for over ten years.

After hearing the testimony of the witnesses, the district court modified the parties' dissolution decree and ordered the parties be granted joint custody of Joseph, Jr. with primary physical care awarded to Joseph, Sr. The court specifically noted there was nothing in the record that would indicate any great necessity to change the custodial situation based on any fault of either party, nor had there been a substantial change of circumstances. But because the boy seemed to be less rebellious, and had improved his schooling situation because he believed he would be allowed to live with his father, the district court considered the boy's request to modify custody, and modified it. Tena appeals from the district court's ruling.

Our supreme court has set out the pertinent standard for modification of custody:

> To change a custodial provision of a dissolution decree, the 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 interest 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983); citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

The petitioner asserts the trial court erred in granting respondent's application for modification without finding a substantial change of circumstances.

The trial court, in considering the best interests of the child, considered the factors it determined were relevant to this particular case. Although the court referred to the absence of any substantial change of circumstances, the trial judge had the benefit over this court of evaluating the credibility of the parties in chambers with counsel and the child's therapist who testified. The child was one month short of his sixteenth birthday. As the court noted in its reasoning, a number of individuals believed and indicated the best interests of the child would be served by the change of physical care. The record indicates that physical abuse and instances of run away were present in this child's life while in the custody of his mother.

This court finds those factors the trial court determined to be relevant in this individual case amount to a substantial change in circumstances sufficient to support the court's action. The trial court's decree is affirmed.

AFFIRMED.