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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LAURA LYNNE BAILEY AND DAVID LEE BAILEY

Upon the Petition of)
LAURA LYNNE BAILEY,) Filed April 26, 1983
Petitioner-Appellant,)
And Concerning)
DAVID LEE BAILEY,) 2-510 / 3-68807
Respondent-Appellee.)

Appeal from Johnson District Court - Robert E. Ford, Judge.

Petitioner wife appeals from the trial court's ruling modifying the custody provisions of the parties' dissolution decree and transferring custody of their two sons to respondent husband. AFFIRMED.

Steve St. Clair, Mason City, for petitioner-appellant.

Margaret T. Lainson of Meardon, Sueppel, Downer & Hayes, Iowa City, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

DONIELSON, J.

Petitioner wife appeals from the trial court's ruling modifying the custody provisions of the parties' dissolution decree and transferring custody of their two sons to respondent husband. On appeal, she asserts there was no material and substantial change of circumstances to support the modification. We affirm.

Our scope of review is de novo. Iowa R. App. P. 4; Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972).

I.

The marriage of petitioner, Laura Lynne Bailey, and respondent, David Lee Bailey, was dissolved in March, 1979. The dissolution decree incorporated the parties' stipulation that Laura was to have custody of the parties' two sons, David, Jr., born in 1976, and Chad, born in 1977. Shortly after the decree was entered, David moved to Minnesota. After moving, David married his present wife, Denise. They now have a two-year-old son.

David did not see David, Jr. or Chad from April, 1979, to April, 1982, when he learned that Laura had sent the boys to Arizona to stay with her family while she worked through some personal problems. David went to Arizona and, with the apparent approval of Laura's family members, took the boys back to Minnesota with him. There is no question that the boys were well cared for while staying with their father. Laura retrieved the boys with the assistance of Minnesota law enforcement officials and took them back to Iowa City. David then filed an application for modification of the decree, requesting that permanent custody of the boys be transferred to him.

A hearing was held on David's application during which there was testimony concerning the parties' parenting abilities, their current home situations, and the reasons for David's failure to visit the boys for the three-year period. The district court found that there had been a substantial and material change of

circumstances since the decree which warranted transferring custody from Laura to David. It modified the decree accordingly and Laura then instituted this appeal.

II.

A request for modification of a dissolution decree is governed by Iowa Code section 598.21(8) (1981). "A party seeking a change of custody must show a superior claim, based upon an ability to minister to the child's needs more effectively than the custodial parent." In re Marriage of Ivins, 308 N.W.2d 75, 78 (Iowa 1981) (citing In re Marriage of Gutermunth, 246 N.W.2d 272, 274 (Iowa 1976)). "The best interests of the children involved remain here as in all cases involving the question of custody, the first and governing consideration." Hagen v. Hagen, 226 N.W.2d 13, 15 (Iowa 1975). The principal question for us is whether David has carried his burden of proving "that conditions since the dissolution decree was entered have so materially and substantially changed that the childrens' best interest makes it expedient to award their custody to him." In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980). In considering this issue, we are guided by the following principles:

> The changed circumstances must not have been contemplated by the trial court when the decree was entered. They must be more or less permanent or continuous, not temporary, and must relate to the welfare of the children. Hobson v. Hobson, 248 N.W.2d 137, 139-40 (Iowa 1976). This heavy burden stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons. See In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977).

Id.

David introduced evidence of his remarriage to Denise and of his new home and lifestyle in Minnesota. He contends that his new home environment is a more suitable one in which to raise David, Jr. and Chad. However, remarriage and a new home are deemed to be matters which are forseeable when the decree is

entered and do not establish a basis for changing custody. Mikelson, 299 N.W.2d at 673. However, on the record before us, we believe a material change of circumstances not forseeable by the court is demonstrated by the change in Laura's lifestyle since the dissolution decree was filed. We thus examine whether, under these changed circumstances, David has a superior ability to minister to the children's needs.

From the record it appears that David had made various attempts to keep in touch with the boys following his move to Minnesota. Laura failed to notify David of the children's whereabouts and inhibited his attempts to develop a relationship with his sons. David communicated with Laura's mother on several occasions to keep informed about the children. Under these circumstances, we do not believe David acted indifferently toward David, Jr. and Chad for the approximate three-year period. On the contrary, David tried to develop a relationship with his sons but his efforts were thwarted by Laura's attempts to keep the children from him.

Other evidence shows that Laura has been employed periodically, but has received ADC benefits most of the time since the dissolution. She left the children with a babysitter a good deal of the time, not only for the workday hours, but well into the evening. The babysitter would often feed the children all of their daily meals. Even on one Christmas day, Laura spent only a few hours with the children and then left them with the sitter while she went to a party. On a few occasions, Laura left the children with the sitter for over a week without making prior arrangements with the babysitter for such extended services. It is also apparent that, while Laura was working in a bar, she would leave the children at the babysitter's house from Friday morning until Sunday or Monday evening.

The record suggests that Laura spends a great deal of time with her boyfriend. They both consume alcohol on a daily basis. While she denies it, there is evidence that Laura has a drinking problem.

Laura has moved many times to different apartments in Iowa City. At one point, she and the children moved into her boyfriend's mobile home. They lived there for three months before Laura rented another apartment. Nevertheless, it is clear that she continued to spend a great deal of time at her boyfriend's mobile home while the children were at the babysitter's home. While the boys are apparently developing normally, the record shows that David, Jr. has missed a great deal of school.

In sum, respondent introduced evidence of Laura's moral misconduct and lack of concern for the children. He asserts that Laura has adopted this lifestyle and attitude since the decree of dissolution was filed. We have noted that moral misconduct may be a factor in determining a parent's fitness to have custody. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). As the court in Dawson noted, misconduct cannot be viewed in isolation:

> Other factors include the age and sex of the child, the environment in which the child shall live, the other characteristics of the one seeking custody, the ability to provide for the material, social, moral and emotional needs of the child, and whatever other matters the evidence in the particular case may disclose.

Id.

We believe the evidence here discloses that Laura's present lifestyle has affected her ability to minister to the best interests of David, Jr. and Chad. David has demonstrated that he and his new family are eager to accept the boys into their home and provide them a stable family life. The trial court, which had the opportunity to hear all the evidence found that there had been a substantial change of circumstances and that David "is the fit and proper person to have their custody and that he can best serve the long-range needs and best interests of the children." Based on our de novo review, we reach the same conclusion. Accordingly, we affirm modification of the dissolution decree awarding custody to David with Laura to have reasonable visitation rights.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.