IN THE COURT OF APPEALS OF IOWA

No. 8-117 / 97-1389

000305

IN RE THE MARRIAGE OF LYNNE L. POTHAST AND DOUGLAS A. POTHAST

Upon the Petition of
LYNNE L. POTHAST,

Petitioner-Appellant,

And Concerning
DOUGLAS A. POTHAST,

Respondent-Appellee.

FILED
MAR 27 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Petitioner appeals from the denial of her modification petition. **AFFIRMED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown, for appellant.

William J. Lorenz of Harrison, Brennecke, Moore, Smaha & McKibben, Marshalltown, for appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

SACKETT, P.J.

Petitioner-appellant Lynne L. Pothast appeals following the trial court's denial of her petition seeking modification of the December 1996 dissolution decree to grant her physical care of Jed, born to Lynne and respondent-appellee Douglas A. Pothast in September 1987. We affirm.

Physical care of Jed was contested in the dissolution. *See In re Marriage of Pothast*, 539 N.W.2d 199, 202-03 (Iowa App. 1995). The trial court placed primary physical care with Douglas, finding among other things Douglas had been the primary caretaker in the prior two years; he had developed a positive and stable relationship with his son; Lynne's mother and sister testified Jed should be placed with Douglas; and Douglas would provide an environment most likely to bring Jed to a healthy physical, mental, and social maturity. *Id.* at 202.

Lynne sought this modification after Douglas pled guilty of OWI Second Offense in June 1997. Jed was not in the car when Douglas was arrested.

The trial court, while recognizing the seriousness of the OWI Second Offense, found, in leaving primary physical care with Douglas, Jed was a happy, respectful child doing well in school and getting along with his peers. The trial court found Jed comfortable in his present living situation. The trial court further found Douglas actively involved with Jed's physical and emotional needs. The trial court found Jed had a close relationship with his paternal grandparents.

The trial court also found Lynne's home was not without problems. She was cohabiting with a man on probation after serving a prison term following an embezzlement conviction who had been through three marriages and did not have a strong relationship with any of his own children.

We review de novo Lynne's claim custodial care should be changed. Iowa R. App. P. 4. We review the facts and the law and determine the parties' rights anew. *In re Marriage of Havran*, 406 N.W.2d 450, 451 (Iowa App. 1987). Although we are not bound by the trial court's findings, we give them weight looking at the particular circumstances of the parties in this case. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa App. 1993).

To change a custodial provision of a dissolution decree, Lynne must establish by a preponderance of evidence conditions since the decree was entered have so materially and substantially changed that Jed's interests make it expedient to allow the requested change. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). 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. *Id.* They must relate to the welfare of Jed. *Id.* A parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well being. *In re Marriage of LeGrand*, 495 N.W.2d 118, 119-20 (Iowa App. 1992).

The heavy burden upon a party seeking to modify custody stems from the principle that once custody of a child 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).

We give credence to the factual findings of the trial court because the trial court has listened to and seen the witnesses. *See In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

As did the trial court, we have concern about Douglas's use of alcohol. Douglas admits he is an alcoholic. He has sought counseling on his own volition. After his arrest in March 1997, he went to Listening Post, an alcohol and drug counseling service. He started attending Alcoholics Anonymous in May 1997 and testified he has not had a drink since. There was no evidence he has. The director of Listening Post testified Douglas is not chemically dependant on alcohol or drugs. We respect Douglas's recognition of his problem and the fact he is aware he needs assistance and seeks it.

The evidence shows Jed is extremely well adjusted in his current living arrangement. Jed has a close relationship with Douglas, who is very involved in his care. There is no evidence Douglas is not supportive of Lynne's relationship with the child. We affirm the trial court.

AFFIRMED.