FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF RICHARD CLEMENT HLUBEK AND DEBRA KAY HLUBEK

Upon the Petition of	)	
RICHARD CLEMENT HLUBEK,	)	Filed March 31, 1986
Petitioner-Appellant,	)	**109**
And Concerning	)	6-51 85-1394
DEBRA KAY HLUBEK,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County (31004) - L. John Degnan, Judge.

Former husband appeals trial court's modification decree awarding change of custody of their 12-year-old son to former wife. **REVERSED.**

John S. Allen, Legal Services Corporation, Waterloo, Iowa, for petitioner-appellant.

Patricia A. McGivern of Clark, Butler, Walsh & McGivern, Waterloo, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

The former wife sought a modification of the parties' 1982 dissolution decree asking that the custody of the parties' one child be transferred from the former husband to her. The district court granted the wife's request.

The parties' marriage was dissolved in January 1982. The dissolution decree placed the parties' one child, a boy born in December 1972, in Richard's custody.

In 1984 Debra filed the present petition for a modification of the dissolution decree asking that the child's custody be transferred to her. After a hearing, the district court granted Debra's request and modified the decree to place the child in Debra's custody.

Richard has appealed from the modification order. He contends Debra did not establish changes of circumstances warranting a transfer of custody. He argues Debra did not establish that his custody of the child is deficient in any way or that she can minister better than Richard to the child's needs. We agree and reverse.

Our review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, this court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

The evidence at trial shows when the parties were granted a dissolution of marriage in January 1982 that Richard was laid off from employment at John Deere & Company and Debra was employed at a supermarket. Debra was at "a very mixed up point" in her life and was concerned about her ability to support their child, Dustin. Debra's extramarital affairs with other men were a contributing factor to the breakup of the parties' marriage. She believed that Richard could provide more stability for Dustin at that time than she could.

Since the dissolution Debra asserts that her life has stabilized. She is working as a cashier for Food-4-Less food store from midnight to 8:30 a.m. She resides

in Waterloo with her boyfriend, John. John works nights also. She would provide someone to be with Dustin when she or John could not be with him. Debra is not ready for marriage to John or to make a permanent commitment.

Dustin has suffered from a condition known as functional enuresis or bed wetting at night. This was most frustrating to Debra. She hollered at Dustin and slapped him in the face during these times. Dustin has not recovered from this condition. He is an above-average student, however, he received an "unsatisfactory" in a science/health class.

Richard resides in Waterloo and is attending a two-year course at Hawkeye Institute of Technology. He has not been employed since the dissolution. He testified that after school he and Dustin discuss Dustin's homework and Dustin generally watches a couple of his favorite television programs. Supper is served between 6:00 and 7:00 p.m., although Debra disputes this. Dustin completes his homework after supper. Richard further testified that he and Dustin get along quite well together, that Dustin is well behaved and helps around the house, but that they do have disagreements. Richard believes some of their problems stem from the conflict between him and Debra. He stated that Dustin is frequently moody and is reluctant to help around the house when he returns from visits with Debra. After a day or two these problems dissipate.

A social history report, a psychological evaluation, and a psychiatric evaluation were prepared by Child and Family Mental Health Consultants and admitted as joint exhibits. Clinical social worker Carol Cook-Roberts' ACSW impressions and recommendations from the report of her study are as follows:

> IMPRESSIONS:
>
> This seems to be a situation in which Dustin is caught in the middle between his parents' continuing battles. There was difficulties within the marriage but the divorce was not a solution in that the parents continued to have difficulties adjusting. There has been disagreements over

money, how it is spent, Rich going to school while Debbie has to work full time, and how Dustin is raised. Dustin has no doubt developed some manipulative features in response to the tension and anger expressed by his parents. At this point, the parents claim that they do not function very well as a diad when it comes to making decisions about Dustin. Therefore, each parent appears unwilling at this point to support the other's role with Dustin.

RECOMMENDATIONS:

1. Refer Dustin to Dan Ekstrom for psychological testing.

2. Refer Dustin to Dr. Augspurger for a psychiatric evaluation with recommendations towards his future living arrangements.

3. Set up a joint session for the parents to see if they can start to develop a more positive communication style with each other for the benefit of Dustin.

We set out the discussion/summary of psychologist Daniel Ekstrom's evaluation as follows:

DISCUSSION/SUMMARY:

Dustin appears to be an intellectually competent individual. There has been no evidence of learning difficulty based on school achievement measures. Within the school and community, there have been no indications of behavioral or emotional difficulty. The results from this evaluation would indicate a child who is largely emotionally intact but has some feelings of anxiety, sadness, and anger stemming from relationships with the family domain. Reports indicate there to have been significant family stress and marital discord since sometime in 1980. Continuing to this point, the parents have had difficulty having a workable relationship. It appears that Dustin has frequently been caught in the middle as a result of the parents conflict and hostility towards each other. This has affected his perception of a "family unit" and made him insecure and anxious about his own acceptance and personal relationships. There was evidence that Dustin feels distanced and emotionally shut off from his father. He sees father as being critical and unyielding. Dustin could be specific and cite conflicts and problems with his relationship with his father. With respect to the relationship with his mother, he was much more vague. He could not be specific as to why living with her would be better. I suspect that Dustin continues to have needs to identify with and continue the relationship with his father, but due to his dissatisfaction with the relationship,

he considers establishing a regular relationship with his mother. There are factors which make him ambivalent and apprehensive. He would need to change schools and this would alter his peer group. He also is apprehensive of the relationship with his mother's boyfriend. This may represent a psychological abandonment of his father and evoke an increased amount of separation and anxiety. *If he could control* all aspects of his life, he would likely choose to stay with his father and change their relationship into one which is supportive, loving, mutual, and with sincere investment. *Because he is discouraged* with this prospect, he verbalizes that he wants to live with his mother who, during their visits, he sees as more involved and having less conflict. *Not having evaluated the father/* mother or observed any parent-child interaction, it is difficult to assess their apparent love and interest for the child. It is also impossible for me to assess their capacity to change or meet Dustin's needs. Whatever the court's decision, it will be important that the parties recognize and help Dustin deal with these feelings and adjustment.

Psychiatrist, Dr. Terry L. Augsburger, M.D., performed a psychiatric evaluation *of Dustin and prepared a* report identified as Exhibit B. His diagnostic impressions and recommendations are set forth as follows:

DIAGNOSTIC IMPRESSIONS:

Axis I - 1) Adjustment Disorder *with Mixed Disturbance* of Emotions and Conduct (309.40). I am still of the opinion, as have been my colleagues in the past and currently, that most or all of this boy's problems are a result of the parental separation, and even more importantly the continuing bitterness and disharmony between the parental figures. This continues to create stress upon this boy. He obviously wants to be a part of both his parents' lives but feels hopelessly caught in the middle between two enemies, he is unable to share things *between* them and himself, there simply is no opportunity for peace, sharing, deeper understanding or more meaningful relationship. Both the parents seem to *have their own individual problems* which perhaps contribute to their inability to resolve their differences, even for the sake of their son, but it would seem that they both love *their son.*

2) Functional Enuresis (307.60).

Axis II - No Diagnosis.

Axis III - No Diagnosis. 111

RECOMMENDATIONS:

1 At the present time I have no strong personal feelings or recommendations regarding custody of this boy. I find no reason to believe that he is currently being neglected or abused in his father's home. Even though the father would seem to have some faults of his own, he has consistently been responsible for staying with the boy and taking care of him and, in the final analysis, I feel this degree of stability must be acknowledged. While the mother has apparently been making efforts to provide an appropriate home for this boy and express love for him and wants the best possible for him, it must be remembered that some four years ago she left this boy with his father for whatever reasons, but obviously placing her own priorities above those of her son. Overall, I can see no good or compelling reason to change custody at this time. I view the major problem effecting this boy as the ongoing feud between his parents that will not change simply by altering the custody.

2. Whatever the decision regarding custody of this boy, I feel the judge should admonish the parents to take a close look at and admit what the primary problem is and how it is effecting their child. If they both love the child as much as they say and are generally interested in his well-being, they should agree to couple's therapy focusing on their current relationship, how it effects the boy, honestly identifying and admitting particular points of stress, and working on changing them.

3 If the boy remains with his father, I feel that there would be benefit from family therapy with the boy and his father. Dustin does acknowledge that their relationship is not as good as it could be and he would definitely like to improve it, whatever the result of the custody battle.

4 Regarding the bed wetting situation, by father's description, perhaps the current bell and pad method is not being used to its maximum capacity and I might suggest that if Dustin and his father do seek future family therapy to work on their relationship, that the therapist specifically discuss using the Azrin and Fox Overcorrection Bed Wetting Method. I could provide a copy of their article upon request.

In child custody cases the first and governing consideration of the courts is the best interest of the child. Iowa R. App. P. 14(f)(15).

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. The custody of children who are receiving proper care should not be disturbed in absence of cogent or compelling reasons. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa Ct. App. 1985) (citation omitted).

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 interests 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) (citation omitted).

The record shows that Debra is hostile and antagonistic toward Richard. She testified that she "can't stand" Richard. The parties have argued in Dustin's presence. Debra would become angry because she was the one paying child support and he (Richard) is the one not working. He could afford new things and she couldn't buy anything.

Debra is to be commended for having stabilized her life and for what appears to be a good home, but those circumstances do not demonstrate a compelling basis for changing custody. See In re Marriage of Mikelson, 299 N.W.2d 6770, 673-74 (Iowa 1980).

In applying the basic principles above set forth to our de novo review of the record impels us to the conclusion that Debra failed to establish by a preponderance of the evidence that conditions in the home of Richard had so materially, substantially, and permanently changed that the best interests of Dustin dictated the trial court award his permanent custody to her We therefore reverse the trial court and direct that Richard Hlubek continue to have custody of Dustin as provided in the original dissolution of marriage See Davis v. Davis, 237 N.W.2d 455, 458 (Iowa 1976).

REVERSED.