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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MOON

Upon the Petition of)
THERESA KAY MOON,) 143
Petitioner-Appellant,)
And Concerning)
DAVID MAX MOON,) 8-655
88-724
Respondent-Appellee.)

Appeal from the Iowa District Court for Polk County (CD41-24385), Joel D. Novak, Judge.

Petitioner appeals from the modification decree entered in district court which transferred physical care of the parties' minor child to respondent. **AFFIRMED.**

Dale A. Knoshaug, Des Moines, for petitioner-appellant.

Lylea Dodson Critelli, Des Moines, and Mark S. Pennington, Des Moines, for respondent-appellee.

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

HAYDEN, J.

The petitioner mother appeals from the modification decree entered in the district court which transferred physical care of the parties' minor child to the father. The mother claims district court erred in finding there had been a material and substantial change in circumstances since the original decree justifying the transfer of primary care of the child.

Theresa Moon, now Theresa Sturm, and David Moon were married in June of 1979. They had one child, Melissa Ann Moon, born in April of 1981. A decree of dissolution was entered for the parties in August of 1983. Theresa was granted custody of Melissa. Theresa married Donald Sturm in 1985. The Sturms had one child, Sara Jo Sturm, born in April of 1987. David also remarried in August of 1987, and he and his new wife, Jill, were expecting a child in October of 1988. Theresa is currently employed by Jester Insurance as a claims manager and earns about $17,500 per year. David works with computers for the Principal Financial Group and earns approximately $20,000 per year.

Theresa filed a petition for dissolution from Donald Sturm in September of 1987. During those proceedings, Donald Sturm allegedly planned on seeking custody of his daughter, Sara, and relayed information to David about Theresa's problems with drug and alcohol use, apparently out of his concern for Melissa. David then filed a

petition for modification, seeking joint custody and physical care of Melissa. Donald Sturm has since abandoned any action seeking physical custody of Sara. In its modification action, the district court determined David and Theresa should have joint custody of Melissa while David should have primary physical care. The district court noted both parties admitted to their continued use of marijuana, but David was more likely to acknowledge he had a problem. The district court went on to determine there had been a substantial change in circumstances since the original decree in that Theresa had a serious drug and alcohol problem and it affected her parenting ability. Theresa was given visitation rights and ordered to pay $100 per month in child support.

As grounds for appeal, Theresa argues there has not been a material and substantial change in circumstances since the time of the dissolution decree to warrant modification. She supports her claim by arguing there is no evidence in the record of increased use of drugs or alcohol and she argues, in fact, her problem has been improving. She also argues David has not shown he could minister more effectively to Melissa's well being.

Our scope of review is de novo. Iowa R. App. P. 4. Discussing the rationale behind rule four, our supreme court has stated:

> There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding

> dissolution cases is greatly helped in making a wise decision about the parties by listening to them and watching them in person. In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974). In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented. [Citations omitted.]

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). Prior cases have little precedential value. We must base our decision primarily on the particular circumstances of the parties in each case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Our paramount consideration in determining custody is the best interests of the child. Id. The moving party in a modification action carries a heavy burden when seeking a change in custodial provisions of a dissolution decree. This burden 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 Michaelson, 299 N.W.2d 670, 671 (Iowa 1980).

Our supreme court has outlined the requirements which the moving party must meet to gain a modification, stating:

> To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered has 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. The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). In this case the court is faced with two primary problems. It is clear the child, Melissa, loves both of her parents while it is equally as clear both parents love Melissa very much. There is little doubt Melissa would be happy living with either Theresa or David. The second problem which we face deals with the problem surrounding both parents' continuing use of marijuana.

The evidence of David and Theresa's use of illegal drugs is startling. Evidence indicates they both are habitual users of marijuana since their early teens. Theresa has also developed an alcohol problem near the end of her marriage with Donald Sturm. Testimony suggested she has, on a number of occasions, driven intoxicated while Melissa and Sara were with her in the car. Theresa has recently begun to attend Alcoholics Anonymous meetings, but we have no evidence before us to indicate she has taken steps to curtail her marijuana abuse, nor has she admitted the abuse is a problem. David, on the other hand, has shown some understanding his marijuana use is a problem and has magnanimously promised he will not smoke marijuana in Melissa's presence. Our main concern with Theresa and David's substance abuse problem is the adverse affects it is starting to have and will continue to have on Melissa, and David and Theresa's apparent inability to completely grasp these long-term implications. The district court

ordered both parents to seek drug counseling as part of the modification decree. We have no benefit of any evidence regarding the results of such counseling, but determine it is imperative both David and Theresa submit to and continue counseling as the trial court ordered.

A passage from the Iowa Supreme Court's decision in Zaerr v. Zaerr, 222 N.W.2d 476, 478 (Iowa 1974), sums up our predicament here:

> The choice is uncertain and unsatisfactory. Considering the alternatives, giving deference to the trial court's superior position from which to judge credibility of the witnesses, we believe the court made the right decision.

Id.

The factors we look to in determining which parent is given physical care are set forth in Iowa Code section 598.41(3) (1987).

Janice J. Hill, a clinical social worker, testified that she conducted extensive evaluations regarding the proper placement of Melissa's custody. Ms. Hill, overall, found Theresa's parenting skills to be lacking. Among her findings were numerous instances which demonstrated a negative parenting style which Ms. Hill believes damages Melissa's self-esteem. Her evaluation also included a finding Theresa lacks emotional stability and maturity.

On the other hand, Ms. Hill determined David takes parenting seriously, he understands the needs for rules and structure, and he also understands the need to allow

Melissa to be a child. Ms. Hill was also impressed with David's present wife, Jill. She was impressed with Jill and David's ability to work out problems through communication and Jill's ability as a stepmother to parent Melissa. The evaluation found Jill to be mature, patient, nurturing, and stable.

Ms. Hill's "bottom line" in her evaluation is the best interests of Melissa would be better served by placing physical custody with her father and stepmother. We agree.

We conclude the evidence reflects there has been a substantial change in circumstances since the date of the original decree of dissolution which justifies a change of physical care. It is clear Theresa has a serious drug and alcohol problem, a condition which has worsened since entry of the original decree. There is little doubt, as the trial court determined, her present condition affects her parenting ability and this is to the detriment of Melissa. We determine, under the present circumstances, David is the parent who can minister most effectively to Melissa's current needs.

AFFIRMED.