FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DORIS WAUNITA NEBINGER AND TERRY LEE REES

Upon the Petition of	)	**103**
DORIS WAUNITA NEBINGER, f/k/a **DORIS WAUNITA REES**,	)	
Petitioner-Appellant,	)	Filed April 27, 1982
vs.	)	
TERRY LEE REES,	)	2-35 / 67108
Respondent-Appellee.	)	

Appeal from Mahaska District Court - Richard J. Vogel, Judge.

Petitioner-wife appeals from trial court's modification of the parties' dissolution decree transferring custody of the parties' eight-year-old daughter to respondent-husband asserting: 1) that there had not been a substantial change of circumstances since the decree was entered, which warranted the custody transfer; and 2) that trial court erred in not allowing the parties' daughter to testify. REVERSED.

Kathleen S. Bean, Des Moines, Iowa, for petitioner-appellant.

Randy S. DeGeest, Oskaloosa, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Petitioner-wife, Doris Waunita Rees, appeals from trial court's modification of the parties' dissolution decree transferring custody of the parties' eight-year-old daughter to respondent-husband, Terry Lee Rees. She asserts: 1) that there had not been a substantial change of circumstances since the decree was entered, which warranted the custody transfer; and 2) that trial court erred in not allowing the parties' daughter to testify. We reverse.

The parties were married in 1970; their only child, Misty, was born in 1972. The marriage was dissolved in 1975 and Doris was awarded custody of Misty. Terry was allowed reasonable visitation.

On April 6, 1981, Terry filed an application for modification of the dissolution decree requesting that custody of Misty be transferred to him. He alleged, as the requisite change of circumstances: 1) visitation problems caused in part by Doris's frequent moves without telling him; 2) Doris's drug use; 3) Doris's remarriage to Bruce Nebinger; and 4) Terry's own remarriage. Doris resisted the application on May 22, 1981.

There was testimony at the June 16, 1981, modification hearing concerning all of Terry's allegations, as well as Doris's lack of steady employment, her emotional problems, and Bruce Nebinger's drug use and prison record. There was further testimony concerning Terry's stable lifestyle, including his cessation of drinking and gambling. At the hearing, Doris attempted to call Misty as a witness to show that Misty was well adjusted. Trial court, however, refused to allow Misty to testify, stating that, since she was eight years old, any benefit from her testimony would be outweighed by the harm to her.

On August 3, 1981, trial court granted the application for modification and transferred Misty's custody to Terry. Doris filed a timely notice of appeal; on August 18, 1981, the supreme court granted Doris a stay of custody transfer pending appeal.

I. **Scope of Review.** Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law to determine the rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

II. **Modification of Custody.** We will first review those principles important to our resolution of this issue. Principles governing appeals of this nature are well established; it is their application which causes the court difficulty. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). In child custody cases, our first and governing consideration is the best interests of the child. Iowa R. App. P. 14(f)(15). When a party seeks modification of a decree involving custody, we must look for material and substantial changes that warrant such transfer in a child's best interests. Melton, 256 N.W.2d at 205. The parent requesting the change of custody must show an ability to administer to the needs of the child not equally, but more effectively than the custodial parent. In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976). The change of circumstances must be such as was not within the contemplation of the parties at the time of the decree. Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). The changes must be more or less permanent or continuous, not merely transitory, variable, or temporary. McDonald v. McDonald, 183 N.W.2d 186, 188 (Iowa 1971). Remarriage of one or both divorced parents may or may not be a sufficient basis for a custody change. Spotts v. Spotts, 197 N.W.2d 370, 371 (Iowa 1972). The supreme court has consistently taken the position it is highly desirable the status of children should

be fixed as quickly as possible, be thereafter disturbed as little as possible, and then only for the most cogent reasons." In re Marriage of Carrico, 284 N.W.2d 251, 254 (Iowa 1979), quoting Halstead v. Halstead, 259 Iowa 526, 531, 144 N.W.2d 861, 864 (1966) "[The] noncustodial parent seeking custody must establish by a preponderance of the evidence that the conditions since the court decree have so materially and substantially changed that the child's best interests make the change in custody expedient." In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979)

Terry asserts that trial court's findings in regard to the development of the parties' lives since the dissolution decree suppport a finding of material change of circumstances such that it is in Misty's best interests to change custody. We disagree Trial court's findings in this regard were as follows:

> The evidence presented shows, and the court finds, that petitioner has lived many different places since the decree of dissolution of marriage was entered. Most of the time respondent was unaware of petitioner's residence. She married Bruce Nebinger of April, 1976. Bruce was convicted in 1974 or 1976 of attempted burglary of a medical office and was again convicted in 1979 of a burglary and sentenced to ten years imprisonment at Fort Madison. At the time of the hearing he was at Riverview Release Center and evidently just a few days from parole. Most of Bruce's problems involve drug usage and he has been a heroin addict. Petitioner has used marijuana in the past on an infrequent basis and has never tried to hide that fact from Misty Dawn.
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> Petitioner has not had any steady employment since the dissolution of marriage and has lived on what Bruce earned or on ADC. She has had some emotional problems and has sought professional help on a couple of occasions. Petitioner has no particular job skills and though her employment and life style since the dissolution was granted leave much to be desired, there was no showing of any specific detriment to Misty Dawn. Petitioner and Bruce have a child from this marriage, Tanya, age two and a half at the time of this hearing.
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> Respondent, prior to and at the time of the dissolution, was drinking excessively, gambling and is alleged to have struck his former wife, which allegation is denied by respondent. To do his

drinking and gambling, he has been in trouble with the law prior to the dissolution and, in fact, it was at or about the time he was married the first time in 1970 or 71 when he was sentenced to ten years in Anamosa. He evidently did not serve any time, and the conviction is not shown.

Since his second marriage in 1976 he has quit drinking, quit gambling and has evidently pretty well straightened his life out. Respondent now lives in Rosehill with his present wife and son, Eric, born Christmas Day, 1976. The house is an older home being remodeled by respondent and would adequately house Misty Dawn if custody is transferred.

Respondent works at Clow Corporation in Oskaloosa. He has worked there for about four years and missed a total of about ten days' work during that time. His wife also works at Clow and together they have an income of around $21,000 per year take home pay. Respondent's hobbies include trapping, fishing and hunting. While respondent and his wife are at work, Eric attends kiddie college in Oskaloosa.

* * *

It is the finding of the court on the record made that there has been material and substantial changes in circumstances since the dissolution of marriage was entered which was not contemplated by the court at the time and could not have been foreseen by the court or parties at that time and that said changes dictate that it is in the best interests of Misty Dawn that custody be changed. (emphasis in original).

We do not believe the circumstances relied on by trial court were sufficient to change custody at this time. First, Terry's maturing, remarriage, and stabilization, were not so unforeseeable as to be outside trial court's contemplation at the time of the dissolution decree. Nor was his increased financial ability to minister to Misty's needs. Second, we do not regard Doris's emotional problems as sufficient to warrant change of custody. Indeed, the record reflects that she has prudently sought help in dealing with these problems, and has been successful in overcoming them. Further, while Bruce Nebinger's criminal conduct is far from being a suitable influence on Misty, we do not regard it as determinative of Doris's

ability to administer to the needs of her daughter. The record reflects that Bruce Nebinger is successfully working towards rehabilitation, and that Doris is actively supportive of those efforts. Far from being careless in her association, Doris has entered the rehabilitation center with Bruce Nebinger, affording her guidance and supervision over her attempts to establish a healthy family relationship. While we are concerned with the continuing visitation of the noncustodial parent, we regard Doris's frequent moves as a product of her unfortunate financial condition, search for employment, and her need for her family's support. In this regard, we recognize that, despite Terry's increased financial position, he refused to make child support payments as required by the dissolution decree. While we do not determine an award of custody for the purpose of punishing a parent, this fact is relevant insofar as it indicates why Doris's financial position forced her to move to various dwellings, the consequence of which frustrated Terry's visitation. Finally, while we do not condone Doris's use of marijuana, we do not find that it justifies a change in custody. Finding no substantial and material changes sufficient to justify a change in custody, we reverse trial court's judgment on this issue.

III. The Child's Testimony. Since we reverse trial court's judgment on the custody issue, we need not consider Doris's contention that trial court erred in refusing to allow Misty to testify.

REVERSED AND REMANDED.

All judges concur except Donielson and Snell, JJ., who dissent.

DONIELSON, J. (dissenting)

Iowa R. App. P. 14(f)(15) states, "In child custody cases, our first and governing consideration is the best interests of the child." The majority is quick to reach the conclusion that Terry has failed to show a substantial and material change of circumstances to justify a change of custody, however, I fail to see where they have actually discussed or shown how the best interests of Misty Dawn will be served by remaining in Doris's custody.

The majority focuses its analysis upon the problems of the mother and her current husband, a twice convicted felon. Despite the majority's attempts to minimize the impact of Doris's personal problems on Misty Dawn, I firmly believe a change of custody is in the best interests of this child. The record shows that Terry's ability to administer to the needs of Misty Dawn has steadily improved since the time of the original decree, while Doris's ability has been lessened by her emotional, financial, and marital problems. The child should not be required to wait for Doris to get her own life reordered so that she can provide a stable home. Furthermore, "Courts must act to prevent wounds from being inflicted on children and should not wait until the injury occurs." In re Marriage of McCreary, 276 N W.2d 399, 402 (Iowa 1979); Zaerr v. Zaerr, 222 N.W.2d 476, 478 (Iowa 1974). I believe Terry has proven he could administer to the child's needs more effectively than Doris, therefore, the trial court should be affirmed.

Snell, J., joins this dissent.