FILED
OCT 18 1979
IOWA SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JAMES BENNETT NICHOLSON II, and PAULA L. NICHOLSON

UPON THE PETITION OF	)	
JAMES BENNETT NICHOLSON II,	)	Filed October 18, 1979
Petitioner-Appellant,	)	
AND CONCERNING	)	
PAULA L. NICHOLSON,	)	233 3-62898
Respondent-Appellee.	)	

Appeal from Dubuque District Court - L. John Degnan, Judge.

Petitioner appeals from denial of his application for modification of custody provisions of a divorce decree. AFFIRMED.

Stephen W. Scott, Dubuque, Iowa, for petitioner-appellant.

Robert D. Klauer, Dubuque, Iowa, for respondent-appellee.

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

PER CURIAM

Petitioner James Nicholson, II, appeals from denial of his application for modification of custody provisions of a divorce decree. We affirm the decision of the trial court.

The parties were divorced in Illinois in April of 1976. Custody of the parties' two children, now ages 6 and 9, was awarded to respondent, Paula Nicholson. Both parties have since moved to Iowa where James filed his petition for modification of the custody provisions of the divorce decree in April of 1978. The trial court denied the application for modification finding there had been no substantial change in circumstances. This appeal followed.

Our review is **de novo.** Iowa R. App. P. 4. Once custody has been determined, it should not be interfered with except for the most cogent reasons. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). John, as the petitioning noncustodial parent, has the burden of showing by a preponderance of the evidence that conditions have so materially and substantially changed that the children's best interests make a modification awarding their custody to him expedient or necessary. Melton, 256 N.W.2d at 205; Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). To gain custody of the children from Paula, James must show some superior claim based on his ability to minister not equally but more effectively to the well being of the children. Melton, 256 N.W.2d at 205. The change in circumstances must be such that it was not within the contemplation of the parties and the trial court when the decree was entered. In re Marriage of Wagner, 262 N.W.2d 418, 421 (Iowa 1978).

Reviewing the evidence and applying the legal principles stated, we find that James has failed to sustain the burden of establishing a change in custody should be ordered. As a basis for finding the requisite change in circumstance, James places heavy emphasis on Paula's continuation of an intimate relationship with a married man. This is an ongoing relationship which has been in existence since before the divorce decree was entered. Although it is unclear from the record whether the relationship has intensified, it appears that this intimacy has been carried on discreetly and has not adversely affected Paula's ability to minister to the needs of the children. The evidence shows the Nicholson children to be normal, happy and well adjusted. Paula has shown

them love and affection while fulfilling her obligations as a custodial parent. She has given these children proper care and provided them with a suitable home. Although James has remarried and he and his present wife could also provide the children with a suitable custodial environment, his ability to minister to the needs of the children has not been shown to be superior to that of Paula's. Under these circumstances, we do not find a change of custody would be in the best interests of the children.

We find petitioner has failed to make the requisite showing of changed circumstances necessary for an order changing the custody provisions of the divorce decree. The decision of the trial court is therefore affirmed.

AFFIRMED.