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IN THE COURT OF APPEALS OF IOWA
SUPREME COURT

IN RE MARRIAGE OF NANICE M. OSWEILER & KENNETH W. OSWEILER

Upon the Petition of	)	
JANICE M. OSWEILER,	)	Filed February 5, 1980
Petitioner-Appellee,	)	
And Concerning	)	
KENNETH W. OSWEILER,	)	333
Respondent-Appellant.	)	3-63133

Appeal from Pottawattamie District Court - Keith E. Burgett, Judge.

Respondent-father appeals dismissal of application for modification of custody provisions of dissolution decree. - Reversed.

F. J. Kraschel, of Kraschel & Comes, Council Bluffs, for respondent-appellant.

Michael D'Angelo, of Hogzett & D'Angelo, Oakland, for petitioner-appellee.

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

PER CURIAM

Respondent-father, Kenneth "Bud" Osweiler, appeals from the dismissal of his application for modification of the custody provisions of the dissolution decree that awarded the parties' two minor children, Michelle, twelve, and Richard, ten, to petitioner-mother, Janice Osweiler. Bud contends that substantial and material changes in the home environment that Janice has provided for the children require that custody be transferred to him. We agree and reverse.

The most notable incident relevant to a material and substantial change in the circumstances regarding the children's best interests involved Bob Lee, who had shared living quarters with Janice prior to the dissolution, and, subsequent to the dissolution, had moved in with Janice and the children. According to an official police officer's report recording an interview with Bob Lee subsequent to the incident, Lee, Janice, and an acquaintance had been out drinking on New Year's Eve. The report further stated that after returning home, Lee loaded a handgun he kept in the house with one round, aimed the gun at his abdomen, and played Russian roulette. On the third squeeze of the trigger, the gun fired and Lee was struck in the abdomen. The trial court concluded that since the children were absent from the home at the time of the incident, and since the incident had no apparent adverse effect on the children, the incident was not evidence of a sufficient change of circumstances to warrant a change of custody.

Our review is de novo. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); Iowa R. App. P. 4. While we give weight to the fact findings of the trial court, we will not abandon our responsibility to review de novo and determine issues presented upon facts disclosed of record. In re Hobson, 248 N.W.2d 137, 139 (Iowa 1976); Iowa R. App. P. 14(f)(7).

In addressing the issue of the modification of the child custody provisions of a dissolution decree, our first and foremost consideration is the long-range best interests of the children. Melton, 256 N.W.2d at 205; Iowa R. App. P. 14(f)(15). The burden is on the noncustodial parent to prove by a preponderance of the evidence that conditions relating to the welfare of the children have so materially and substantially changed since the court decree that the children's best interests require a change of custody. In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979); Melton, 256 N.W.2d at 205. The

change of circumstances must not have been within the contemplation of the court when the decree was entered. Hobson, 248 N.W.2d at 139. The noncustodial parent must show an ability to minister more effectively to the children's well-being. Snyder, 276 N.W.2d at 404. A proper determination of child custody requires a consideration of the factors listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

In applying the Winter criteria to the case at bar, we note two of particular pertinence. The first is "[t]he nature of each proposed environment, including its stability and wholesomeness." Winter, 223 N.W.2d at 166. We note the evidence shows a living arrangement on the part of Janice and Bob Lee that is inimical to the children's best interest, and some doubt is cast on Bud's living arrangements. However, of more serious import is the shooting incident involving Bob Lee in Janice's house. While it is true that the children were not present at the time of the incident, and while it may be true that the incident has had no apparent adverse effect on the children, we conclude that Lee's unstable conduct and continued presence in Janice's house creates a potential risk of harm to the children. We cannot conclude that the best interests of these children will be served by subjecting them to this potential risk of harm. We are not required to wait until it is too late. "Courts must act to prevent wounds from being inflicted on children and should not wait until injury occurs. They act on probabilities, not on certainties, and they must put the rights of children ahead of competing custodial claims of parents." Zaerr v. Zaerr, 222 N.W.2d 476, 478 (Iowa 1974). Even though Janice cannot be charged specifically with the responsibility for the violent shooting incident, it is clear that by allowing Bob Lee to remain a part of her household, she has adopted a pattern of living that exposes the children to a serious risk of harm. We conclude that this is a sufficient material change of circumstances to warrant the granting of custody of the children to Bud. In re Marriage of McCreary, 276 N.W.2d 399 (Iowa 1979). We think Bud would provide a safer environment for the children, and thus would be able to minister more effectively to their well-being.

The second pertinent Winter criterion is "[t]he report and recommendation of the attorney for the child or other independent investigator." Winter, 223 N.W.2d at 167. Especially in cases such as this, in which both parties had numerous character witnesses creating conflicting testimony about the ability of each parent to care for the children,

testimony and evidence from an independent source, while by no means binding on the trial court, can prove to be invaluable to a court in the Solomonian task of determining child custody. In this case, Nancy Brown, a deputy probation officer for the county, was such an independent source. She conducted a thorough investigation, and submitted a report to the court, recommending that custody be modified and granted to Bud. She reaffirmed that recommendation in her testimony at trial. In its order dismissing Bud's application for modification, however, the trial court did not mention the recommendation of the independent investigator, Nancy Brown. We think the recommendation of Nancy Brown adds further support to our conclusion that the best interests of the children require that custody be given to Bud.

In accordance with our reversal of the trial court, we need to address some further provisions in the decree. We vacate the provision requiring Bud to pay \$150 per month as child support, and conclude that Janice shall not be required to pay child support. Regarding the occupancy of the homestead, we must note that property divisions are not subject to modification. Knipfer v. Knipfer, 259 Iowa 347, 355-56, 144 N.W.2d 140, 144-45 (1966). All other parts of the decree shall retain their original effect.

We are called on by an order of the supreme court dated August 29, 1979, to determine whether costs should be taxed to either party for including unnecessary matter in the appendix. Our review of the appendix reveals no grounds for assessing costs on that basis. Irrespective of that determination, we tax the costs one-half to Bud and one-half to Janice.

REVERSED.

Oxberger, C.J., and Carter, J., dissent.

OXBERGER, C.J. (dissenting)

A change in circumstances sufficient for modification of child custody provisions of a dissolution decree must consist of changes not contemplated by the trial court and the parties when the original decree was entered. In re Hobson, 248 N.W.2d 137, 139-40 (Iowa 1976). The changes "must be more or less permanent or continuous, not merely transitory, variable or temporary. . . ." In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977).

The factors on which the majority based its decision, for the most part, were present or contemplated at the time of the original decree. Janice's living arrangement with Bob Lee existed when the decree was entered. The recommendation of the children's attorney at the modification hearing reached the same conclusions as the one at the time of the original decree. The only changed circumstance not contemplated was the incident on New Year's Eve. Yet, the evidence shows that was an isolated incident. Given Lee's vow to abstain from alcohol consumption, that incident is unlikely to recur. Thus, I would find the incident, at most, constituted a change in circumstances that was transitory or temporary and therefore inadequate to support modification of the dissolution decree.

I would hold Bud's modification petition, filed only six months after entry of the original decree, did not show by a preponderance of the evidence changed circumstances warranting modification. Therefore, I dissent from the majority's decision.

Carter, J., joins this dissent.