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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROSEANNE LAMPKIN AND JEFFREY STEVEN LAMPKIN

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Upon the Petition of)
ROSEANNE LAMPKIN,) Filed October 28, 1982
Petitioner-Appellee,)
And Concerning)
JEFFREY STEVEN LAMPKIN,) 2-359 / 68111
Respondent-Appellant.)

Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Respondent-husband appeals from trial court's denial of his application for modification of the custody provisions of the dissolution decree asserting that the evidence did not support trial court's conclusions. AFFIRMED.

Timothy G. Pearson of Hyland, Laden & Pearson, Des Moines, Iowa, for respondent-appellant.

Davis Foster, Iowa City, Iowa, for petitioner-appellee.

Heard en banc.

PER CURIAM

Respondent, Jeffrey Steven Lampkin, appeals from trial court's denial of his application for modification of the custody provisions of the dissolution decree dissolving his marriage to petitioner, Roseanne Lampkin. Respondent contends that the evidence did not support the trial court's conclusions. We affirm.

The parties' marriage was dissolved in April 1981. The dissolution decree awarded petitioner custody of the parties' two children, boys born in 1975 and 1978. In December 1981, respondent sought a modification of the decree seeking transfer of the children to his custody. Trial court refused to modify the decree and concluded respondent had failed to prove his allegations that petitioner had neglected the children. The court also concluded the evidence did not establish that petitioner's sexual conduct since the dissolution had adversely affected the children. From this disposition respondent appeals.

I. Scope of Review. Our review is **de novo.** Iowa R. App. P. 4; Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972).

II. Change of Circumstances. A request for modification of a dissolution decree is governed by Iowa Code section 598.21(8) (1981). "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." In re Marriage of Ivins, 308 N.W.2d 75, 78 (Iowa 1981) (citing In re Marriage of Gutermunth, 246 N.W.2d 272, 274 (Iowa 1976)). "The best interests of the children involved remain here as in all cases involving the question of custody, the first and governing consideration." Hagen v. Hagen, 226 N.W.2d 13, 15 (Iowa 1975).

The major issues of contention in this modification proceeding are petitioner's general quality of care and supervision of the children and the alleged moral misconduct of petitioner. The record reveals that the petitioner and the children lived with her parents for approximately a year during the separation and after entry of the decree. She moved into an apartment in Tiffin, Iowa, during the early fall of 1981 and continues to live there at the present time. After the

dissolution she received training as a dental technician in a government CETA program and obtained employment in that field in Iowa City when she completed the course. She has advanced to a department head and earns $10,000 a year. Since the dissolution respondent has remarried, is a bakery manager for the Hy-Vee grocery chain with whom he has been employed since he has been in high school, and has established a good home in Des Moines with his new wife.

On December 3, 1981, at petitioner's request, respondent picked up the child, Patrick, to take him to Des Moines with respondent for a week. Chad stayed in Tiffin because he was enrolled in school. On December 7th, respondent received a call from one of the tenants in the apartment complex where petitioner resided which caused him some concern about the repeated conduct of petitioner. That evening he went to Iowa City, picked up Chad, who was with the baby-sitter, and returned with Chad to Des Moines. He refused to return the children to petitioner and filed the present application for modification.

One of respondent's serious complaints involves petitioner's conduct with other men since the dissolution. On two occassions individuals have spent the night in her apartment, but the most serious charge involved her relationship with another tenant in the apartment complex, which has gone on since October of 1981. Since that time she has spent the night with the tenant on a number of occassions during four of which it appears the boys were present in the apartment.

The resolution of this issue turns on the weight given to alleged moral misconduct.

> Assuredly . . . misconduct is a factor to be considered; but it is not the only factor. Similar issues have been before us on numerous occasions and it is difficult to reconcile all of our pronouncements on the significance to be given moral misconduct. However, if these past decisions teach us anything, it is that each case must be decided on its own peculiar facts--all of them--and that other cases under other circumstances are of small help in reaching a decision. [citations] The overal effect of these

> decisions is to formulate a rule that moral misconduct is a circumstance to be given serious consideration in determining a parent's fitness to have custody of minor children. Other factors include the age and sex of the child, the environment in which the child shall live, the other characteristics of the one seeking custody, the ability to provide for the material, social, moral and emotional needs of the child, and whatever other matters the evidence in the particular case may disclose. In addition, of course, there is always the vexing problem of available alternatives.

In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). Respondent cites to this court as authority for his proposed modification the case of Hobson v. Hobson, 248 N.W.2d 137 (Iowa 1976). Hobson is readily distinguishable on its facts from the present case. In Hobson, there was evidence of physical abuse and of considerable promiscuity affecting the custodial parent's ability to minister to the needs of the children. The trial court found that petitioner's relationship with the tenant did not affect, nor result in any neglect of, the children. We believe that any moral misconduct which may have occurred has not affected her ability to minister to the best interests of the children as a concerned parent, excluding the psosible effect of the conduct itself as an example for the children.

Respondent also attempted to show that petitioner neglected the children by leaving them unattended, or without adequate supervision, and by failing to care properly for their personal hygiene and nutrition. Trial court, which had the opportunity to hear all the evidence, concluded that petitioner had taken good care of the children and had been a good mother. The court also found that the children had not been "ill-clothed, ill-fed, unloved, uncared for or left alone to fend for themselves." We see no reason on this record to reach a contrary conclusion.

Based upon our **de novo** review, we find that the trial court properly denied respondent's application for modification of the dissolution decree awarding custody to petitioner.

AFFIRMED.

All judges concur except Donielson, J., who dissents.

I dissent.

While I agree with the authority cited by the majority, I disagree that resolution of the modification issue turns on the weight to be given to the custodial parent's alleged moral misconduct. The real issue is whether the best interests of the children involved dictate that there should be a change of custody. Respondent's challenge focuses more on the quality of care that the children are receiving from petitioner than on her sexual conduct.

The record reflects that petitioner often had her 6 year old son watch her 4 year old son while she left the apartment to visit a man with whom she was having a sexual relationship. While he lived in the same apartment complex, the children did not know where she was and on a few occasions left their apartment to go looking for their mother. She has also allowed a 14 year old boy to babysit the children at night without giving him any child care instructions or pajamas for the children to sleep in. On other occasions, when respondent picked up the children for visitation, he found them dirty and wearing dirty clothes and no underwear. A woman who babysat for the children during the day testified that she would have to serve the children dinner because petitioner would often come home late at night, without explanation. The babysitter also testified that she often saw petitioner leaving the apartment complex at night and that the children would walk down to her apartment looking for their mother. On one other occasion, petitioner was worried that one of the children had eaten a marijuana cookie that she had in her purse. Petitioner was investigated by the Department of Social Services after a child abuse report was filed alleging that the children were being left alone and were not being properly fed. The investigator found the evidence to be inconclusive to support the abuse charge, but did opine that the children should not be left alone for extended periods of time. The babysitter called respondent

expressing her concern that the children were not receiving proper care and it was on this information that respondent acted to remove the children from petitioner's custody. Based on the de novo review of the record, I disagree with the trial court and the majority that "petitioner had taken good care of the children and had been a good mother."

The foregoing are factors that the majority failed to address in detail but which I believe are extremely important in determining whether custody should be changed. These factors should be considered in addition to the allegations of moral misconduct. The tenant with whom petitioner was having a sexual relationship was not the only man that the children have been exposed to. She also had a relationship with one man who, on one occasion, went to her house in a drunken state and had to be taken away by police. Another time, when the children were with their father for the weekend, she met a hitchiker on Friday and invited him to stay with her for the rest of the weekend.

It is the gravity of the moral misconduct which we are to consider to determine to what extent it will affect the children. I believe that the petitioner's conduct in the instant case demonstrates extremely poor judgment which has affected her ability to minister to the best interests of the children. How can she be ministering to the best interests of the children when, while she pursues her relationships, her children are left alone? I would reverse and award custody to the respondent who has established a home life which, I believe, would provide a better environment for the children and be in their best interests. For these reasons, I dissent.