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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MAGDALENE J. ACHENBACH and RICHARD A. ACHENBACH

Upon the Petition of	)	
MAGDALENE J. ACHENBACH,	)	Filed September 9, 1977
	)	
Appellant,	)	
	)	
And Concerning	)	
	)	247
RICHARD A. ACHENBACH,	)	<u>3-60226</u>
	)	
Appellee.	)	

Appeal from Jones District Court - Robert Osmundson, Judge.

Appeal from trial court's modification of custody award of dissolution decree.
Reversed.

John M. Cashman of the Hawkeye Legal Aid Society, Iowa City, for appellant.

C. J. Matthiessen, of Monticello, for appellee.

David Remley, of Anamosa, for the minor child.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This appeal presents the always difficult problem of child custody. The affected child is Jason Achenbach, whose custody was awarded to his mother, petitioner Magdalene Achenbach, in a July 2, 1974 decree dissolving her marriage to respondent, Richard Achenbach. On October 12, 1976, Richard petitioned the court to modify that decree and award Jason's custody to him. Following a trial of the issues his petition for modification was granted and the decree was modified on December 30, 1976, so as to place custody of Jason with Richard. Magdalene appeals from this order.

In order to sustain his petition for modification on our de novo review of the evidence, the burden is upon Richard to establish that there has been a substantial or material change of circumstances affecting Jason which now makes a change of custody in the child's best interests. In *re* Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976); *Hagen v. Hagen*, 226 N.W.2d 13, 15 (Iowa 1975). To establish the expediency of the requested change Richard must demonstrate not only that he is capable of providing for Jason's needs but that such needs will be better served by the proposed change of custody. *Hagen v. Hagen*, *supra*. As we apply the foregoing principles to the record before us we are convinced that the evidence fails to establish such a substantial or material change of circumstances affecting Jason's interests to justify the trial court's order of modification.

The parties lived together less than a month following the birth of Jason on July 6, 1973. The rest of the time Magdalene has been responsible for Jason's day-to-day care, except for visits with grandparents and a three-week period in September and October of 1976 when he resided with Richard and Richard's present wife while Magdalene was in the hospital. For a period of more than two and one-half years Richard was in the service and away from the area where Magdalene and Jason resided.

We have carefully considered the facts surrounding Magdalene's psychiatric treatment for severe depression and accompanying overdose of sleeping pills in September and October of 1976. We are not convinced that this condition was not temporary. It appears to have been corrected by Magdalene's cooperation and the professional help that she has received and has not been established as a matter adversely affecting her continuing wholesome and constructive relationship with Jason. See *In re* Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974).

We also consider with care the evidence of Magdalene's relationship with Gary Baker and are not convinced that this circumstance is of such a nature as to adversely affect Jason. See Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975); In re Marriage of Morton, supra at 821-22.

The decree of the trial court is reversed and the cause is remanded for an order dismissing the petition for modification. Costs here and below shall be assessed to Richard.

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

DONIELSON, J. (dissenting)

On September 28, 1976, Magdalene was involuntarily hospitalized for mental treatment by her mother who stated:

"Last night she threatened to kill herself and her 3 year old son, Jason. First at my place and then at the Gary Baker residence. At about 7 p.m. she took 20 sleeping pills.

Was running all over town irrational - Wanting her car keys and her son. I had her son so she couldn't hurt him."

Such behavior was apparently the result of domestic difficulty she was having with her boyfriend, Gary Baker, with whom she had been living for 2 1/2 years. Although he is unemployed, he is paying a portion of the living expenses from his unemployment compensation, while Magdalene pays the rest out of her ADC income. This living arrangement has been a disruptive one, as evidenced by the fact that Magdalene moved out two or three times and attempted suicide by taking an overdose of sleeping pills.

In this case, the trial court observed and evaluated all the witnesses and had the benefit of Department of Social Services reports on both parents. Such observations and evaluations were obviously of crucial importance in this case, and assuredly helped the trial court greatly in arriving at a just decision. See *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974); Rule 14(f)(7), Rules of Appellate Procedure.

In its report on Magdalene, the Department of Social Services stated:

"The conclusion of this worker based upon the above mentioned facts and the three interviews conducted with Maggie Achenbach would be as follows.

That Maggie Achenbach is and probably would continue to be an adequate mother to her child, Jason Jeffrey Achenbach." (emphasis added)

However, the Department made these observations about Richard:

"It is my conclusion from the study of the home of Sandra and Richard Achenbach that this couple could provide a very good physical, emotional and spiritual environment for a child. Should the Court see fit to award custody of Jason to Mr. Achenbach, I would be very optimistic that this child would receive excellent parenting." (emphasis added)

The assessment of Richard stands in sharp contrast to that of Magdalene. I believe that where, as here, the trial court held an extensive hearing and was in a

particularly good position to assess the credibility of the witnesses, we should give some deference to its findings and disposition.

A review of this record convinces me that a substantial and material change of circumstances occurred so as to justify the modification ordered below. See In re Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976). I feel that Richard has adequately demonstrated that the needs of Jason will be better served by this change of custody. Jason has been with his father since late 1976, and I would not disrupt his life again and remove him from what appears to be a healthy and desirable home environment. I would affirm the trial court.