

IN THE COURT OF APPEALS OF IOWA

No. 3-280 / 92-1796

FILED

SEP 02 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF STEVEN MARK NUSS AND  
SUSAN MARIE NUSS

Upon the Petition of

STEVEN MARK NUSS,

Appellant,

And Concerning

SUSAN MARIE NUSS,

Appellee.

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Appeal from the Iowa District Court for Des Moines  
County, William S. Cahill, Judge.

Steven Mark Nuss appeals from the district court's  
judgment awarding primary physical care of the parties  
minor child to Susan Marie Nuss. **AFFIRMED.**

Timothy McCarthy II of Cook, Gotsdiner, McEnroe &  
McCarthy, Des Moines, and Peter W. Hansen, Burlington, for  
appellant.

Steven R. Hahn of Bauer, Schulte, Hahn & Swanson,  
Burlington, for appellee.

Heard by Schlegel, P.J., and Hayden, J., and McCartney,  
S.J.\*

\*Senior judge from the 2nd Judicial District serving on  
this court by order of the Iowa Supreme court.

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**MCCARTNEY, S.J.**

The petitioner, Steven Mark Nuss, appeals from the order of the district court overruling a petition for modification filed by the appellant seeking custody of the minor child of the parties.

We affirm.

The appellant and appellee, Susan Marie Nuss, were married, which marriage was dissolved by decree of court on August 5, 1986. The parties had one minor child, Melissa Marie Nuss, who was born in March, 1985. Melissa is the subject of the petition to modify the decree of dissolution.

The decree of dissolution gave the parties joint legal custody of their minor daughter, with physical placement of the child given to the appellee. The decree further directed the appellant to pay \$45 per week as child support.

On April 6, 1992, the appellant filed his petition seeking modification of the decree by requesting that not only the physical placement of Melissa be transferred from the appellee to the appellant, but also seeking her legal custody as well, subject to reasonable visitation of the child by her mother, the appellee herein. Appellant further sought child support from the appellee.

The root of the matter was the alleged abuse and neglect that the child had suffered while in the physical care of the appellee, which the appellant alleged endangered the child's health and welfare.

The appellee in turn not only denied these allegations but sought increased child support from the appellant.

Although our review is de novo, we do give weight to the fact findings of the district court though not bound by the same. In re S.J., 451 N.W.2d 827 (Iowa 1990).

The appellant has the burden of proof since he is the party seeking a custodial change of the child. In re Marriage of Hubbard, 315 N.W.2d 75 (Iowa 1982). The evidence must show that the conditions have so materially changed since the dissolution that the best interests of the child require a change of physical placement.

In support of his allegations that the child is so abused and neglected by her mother, he adduced his own testimony, that of his mother, testimony of the little girl, the testimony of a clinical psychiatrist, and the testimony of two women who had occasion to observe the appellee with her daughter. Several other witnesses testified as to the child being tardy in school attendance and standing on a street corner on a number of occasions waiting for a ride and being upset by that fact.

A great deal of the testimony regarding the abuse of the child by her mother consists of recitals by the father, the child's paternal grandmother, and the psychiatrist as to what the child has told them.

The psychiatrist testified that appellant told him that the appellee, within five or six days of the child's birth, was pinching the child and yelling at her, and when the

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child was a week old, began slapping the child with an open hand; that when the child was eleven months old, the appellee commenced striking the child with her fist. In spite of this purported conduct commencing when the child was five days old, almost eighteen months later the appellant concurred in an apparent stipulated dissolution that the little girl would have primary physical placement with the appellee.

In April 1990, there was a child abuse investigation made of the little girl by her mother which investigation was founded. This incident occurred when the appellee discovered the little girl had cut off a great deal of the hair of her younger half-sister and then proceeded to cut large portions of her own hair. The mother at that time, and upon discovery of the incident, grabbed the child by the arm, leaving bruise marks.

A great deal of the evidence is based upon what the child has told her father and paternal grandmother. The little girl attends school and lives with her mother and younger half-sister in a mobile home. They have nearby neighbors. There is a scarcity of testimony from teachers and other school officials or from neighbors as to any abuse visited upon the little girl by her mother. It is further significant that although the founded abuse occurred in April 1990, two years elapsed before the appellant bestirred himself to seek a modification. His testimony was that the little girl suffered no

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unaccounted-for bruising since the summer of 1991, some nine months before he filed his petition for modification in April of 1992.

Although the appellant argues that "numerous witnesses . . . have observed [appellee's] abusive behavior" a review of the record finds only two other witnesses who have observed behavior of the appellee to the child. Those related to two separate instances occurring in a grocery store when the mother disciplined the child in ways not altogether proper.

The appellant argues that the trial court did not give credence to testimony offered by him and ignored the testimony of the clinical psychiatrist. The trial court observed the witnesses, their demeanor, and interest or lack of interest in the outcome of the proceedings. It reviewed the psychiatrist's testimony and expressed grave concern about the child being coached by the appellant. The child was told by her father not to tell the mother of the appointments with the psychiatrist. The child did not. The psychiatrist's testimony was a recital, in large part, of what the child told him, and as described above, these visits to the doctor were done without the knowledge of the mother. In re Marriage of Sheffert, 492 N.W.2d 203 (Iowa App. 1992).

We agree with the trial court that the decision in this matter "has not been one which has been easy . . . to reach."

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We further agree with the trial court that the appellant has not shown by competent disinterested testimony, rising to the level of a preponderance thereof, that the circumstances surrounding the child's care have materially and substantially changed. We further find it unusual that the appellant, in an apparent stipulated dissolution, agreed to the physical placement of his daughter with the mother if the mother had been as abusive towards the child as a baby in the manner he described to the psychiatrist.

The appellant further argues that he is able to better minister to the best interests of the child than the mother, applying the teachings of Neubauer v. Newcomb, 423 N.W.2d 26 (Iowa App. 1988), and In re Marriage of Mickelson, 299 N.W.2d 670 (Iowa 1980). A great deal of his argument in support of that proposition consists of reiteration of the evidence and testimony he uses in arguing that there has been a substantial change in circumstances with respect to the placement of the child. Since like the trial court, we are not persuaded that the appellant has borne his burden of proof showing the necessary change of circumstance, we do not find that the appellant is necessarily better able to administer to the child's needs. His good home and his earnings record permitting him to provide for the child do not suffice in this instance. In re Marriage of Phipps, 379 N.W.2d 26 (Iowa App. 1985). We therefore concur with the holding of

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the trial court that the child should remain with the mother.

Although we note that the increased child support ordered by the trial court may be higher than the amount authorized under the support guidelines, that issue is not before us.

The appellee requests attorney fees to be paid by the appellant. Such fees are allowed in the sum of \$500 together with the costs of this appeal, which are similarly taxed to the appellant.

For the reasons stated, we affirm the holdings and decision of the trial court.

**AFFIRMED.**