FILED.
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF STERLING EDD SILVER AND MARY LOU SILVER

Upon the Petition of)

STERLING EDD SILVER,)

Petitioner-Appellee.)

And Concerning)

MARY LOU SILVER, n/k/a)
MARY LOU KIMBALL,

Respondent-Appellant.)

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FILED JUNE 4, 1986

Appeal from the Iowa District Court for Buchanan County (No. CD 771-1181)

T. H. Nelson, Judge.

Respondent wife appeals the trial court's modification of a joint custody arrangement. **AFFIRMED.**

Gary F. McClintock, of Hoeger, McClintock & Sauer, Independence, Iowa, for appellant.

R. L. Van Veldhuizen, Oelwein, Iowa, for appellee.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Respondent wife appeals the trial court's modification of a joint custody arrangement. She asserts the trial court should not have transferred physical care of the parties' three children to petitioner husband. We affirm.

Sterling Edd Silver and Mary Lou Silver have three children: Heidi, born in 1974; Alice, born in 1977; and Sterling Jr., born in 1980. The Silvers' marriage was dissolved by decree in 1982. The district court set up a joint custody arrangement, with Mary Lou having physical care of the children.

In 1985, Sterling applied for modification of the dissolution decree requesting that he be awarded sole custody of the children. He asserted that since the dissolution decree was entered, Mary Lou had remarried, she had been convicted of theft, and she and her new husband had physically, emotionally, and mentally abused the children. It was alleged that these factors constituted a substantial change in circumstances and warranted modification of the decree.

Following a trial, the district court determined that the award of joint custody should remain intact. However, physical care of the children was transferred to Sterling. Mary Lou has appealed.

Our review is de novo. Iowa R. App. P.4. While we give deference to the findings of the trial court, we are not bound by them. Iowa. R. App. P. 14 (f) (7).

The first and governing consideration in modifying a child custody order is the best interest of the child. Iowa R. App. P. 14(f)(15). The noncustodial parent has the burden of establishing by a preponderance of the evidence that conditions since the court decree have so materially and substantially changed that the child's best interests make it expedient to award such parent custody

of the child. Iowa Code § 598.21(8) (1985). The changed circumstances must not have been contemplated by the trial court when the decree was entered. They must be more or less permanent or continuous, not temporary, and must relate to the welfare of the children. Hobson v. Hobson, 248 N.W. 2d 137, 139-40 Iowa (1976). This heavy burden stems from the principle that once custody of the children has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980). The parent seeking custody must show a superior claim based upon an ability to minister, not equally, but more effectively to the child's well-being. In re Marriage of Ivins, 308 N.W.2d 75, 78 (Iowa 1981).

Sterling's primary complaints with the home environment are that Mary Lou uses excessive discipline with her children, and that she and her present husband frequently argue in front of the children. The trial court determined this stressful environment has caused "psychological maladjustments" with the children, evidenced by thumb sucking, bedwetting, incontinence and difficulties in school work.

We are troubled by the unsupported assumption that thumbsucking, bedwetting, etc., should be characterized as psychological maladjustments. There is no evidence in the record that these characteristics are a manifestation of some psychological or emotional problem. Nor is there any evidence linking the childrens' difficulties to the home environment provided by Mary Lou. Such difficulties are not uncommon with young children and cannot, without some basis, be viewed as a serious maladjustment.

We find, however, that evidence of the disruptive home environment warrants modification. At trial, Sterling and his wife cited several examples of what would be best characterized as overly severe discipline. On one occasion, they claim Heidi had marks and welts on her back, buttocks, and legs.

Fingerprints and handprints were also apparent. On another occasion, Sterling and his present wife testified that Alice was beat with a belt by Mary Lou to the point that her back looked as if she was sunburned. It is also claimed that Alice was once hit over the head with the hand set of a telephone, leaving a large bump which was still noticeable days later.

Mary Lou testified that she has spanked her children and her handprint may have been on them, but she claims that she has not been abusive.

Due to the nature of an appeal, we are not in the position to observe the character and demeanor of the witnesses. As such, we defer to the trial court's determination that Sterling's allegations of excessive discipline are credible. These allegations, if accepted as true, warrant a modification.

Furthermore, it is apparent from the record that Sterling and his present wife are willing and able to provide the children with a suitable home environment.

Accordingly, we conclude that the best interests of the children require a transfer of physical custody. The decision of the trial court is therefore affirmed.

AFFIRMED.