FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ANNA MARIE BLANK and BERNARD A. BLANK

Upon the Petition of)
ANNA MARIE BLANK,)
Petitioner-Appellee,)
And Concerning)
BERNARD A. BLANK,)
Respondent-Appellant,)

Filed September 23, 1980

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Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Father appeals trial court's dismissal of his application for modification of the child custody provisions of the parties' dissolution decree alleging trial court erred 1) in finding insufficient evidence of a material and substantial change of circumstances, 2) in applying a clear and convincing standard of proof, and 3) in considering matters occurring prior to the original decree. He also challenges sufficiency of the evidence to support several of trial court's findings of fact. AFFIRMED.

John G. Sorensen of Boyle, Schuler, Stanton & Grabinski, Clear Lake, Iowa, for respondent-appellant.

Ronald Baybayan, Des Moines, Iowa, for petitioner-appellee.

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

Respondent-father, Bernard Blank, appeals trial court's dismissal of his application for modification of the child custody provisions of the parties' September 28, 1977 dissolution decree. He alleges the trial court erred 1) in finding insufficient evidence of a material and substantial change of circumstances, 2) in applying a clear and convincing standard of proof, and 3) in considering matters occurring prior to the original decree. He also challenges sufficiency of the evidence to support several of trial court's findings of fact. We affirm.

Pursuant to the parties' stipulation, which was incorporated in the final decree, custody of the parties' minor child, Angela Dawn, born March 11, 1971, was awarded to petitioner-mother, Anna Marie Blank. Respondent was awarded liberal visitation rights. On November 22, 1978, respondent filed his application for modification alleging that petitioner had neglected the child's physical health, had left the child unsupervised, and had disrupted the stability of the child's home environment through frequent changes of residence. Trial court denied respondent's application on July 27, 1979, finding there had been some changes in circumstances since entry of the decree, but the changes were not material.

I. Scope of Review. Appellate review of a proceeding to modify custody provisions of a dissolution decree is **de novo.** Iowa R. App. P. 4; In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977).

II. Modification of Custody. The principles governing custody modifications are well established. The best interests of the child are our governing concern. Id. Respondent has the burden of establishing by a preponderance of the evidence there has been a material and substantial change of circumstances since entry of the original decree, not within the contemplation of trial court at that time, that make it expedient to change custody to him. In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979). Where the custodial parent has properly provided for the child's social, moral, and educational needs, and the child has become attached to his or her environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). A parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the child's well being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors catalogued in In re Marriage of Winter, 223

N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979); In re Marriage of McCreary, 276 N.W.2d 399, 400-01 (Iowa 1979).

At the modification hearing, respondent introduced expert medical testimony that the child suffered from a duodenal ulcer in August, 1978, although the condition had improved by November, 1978. Respondent testified to petitioner's failure to feed the child properly and to her neglect of the child's hygiene. He further elicited testimony in an attempt to show petitioner's lack of concern for the child's diagnosed ulcer condition and her failure to administer prescribed medication therefor. He also introduced testimony in an attempt to demonstrate that the petitioner left the young child unsupervised and that petitioner's housekeeping habits were poor. Additionally, the record establishes that the petitioner lived in four different localities during the period of February, 1977, through November, 1978. In November, 1978, petitioner moved to Shawnee Mission, Kansas, where she currently resides with her second husband and the minor child. It is undisputed that petitioner moved from the State of Iowa without court approval.

In support of his superior parenting abilities, respondent asserts his remarriage, his living accommodations, his in-town employment, and the proximity to both paternal and maternal relatives. These, he argues, in combination with petitioner's deficiencies, warrant modification.

Trial court found, however, that the child has adjusted very well under the circumstances. Considering this record, we conclude trial court properly found that respondent failed to show sufficient evidence warranting a modification of custody. We further find that trial court properly could conclude that a change from her home in Shawnee Mission, Kansas, would be a traumatic experience and would not be in her best interests.

III. Standard of Proof. Respondent alleges trial court improperly required him to meet a clear and convincing standard of proof. Trial court's remarks in opening colloquy at the July 19, 1979 hearing were: "I think you have to do it by more than a preponderance of the evidence; I think you must do it by clear, convincing evidence." This is clearly erroneous. Snyder, 276 N.W.2d at 404. However, in light of our **de novo** review, respondent has not been prejudiced.

IV. Consideration of Pre-Decree Matters. Respondent also challenges trial court's apparent reliance on a pre-decree report in finding "respondent has acted many

times as an irrational person." Our consideration of the record produced solely at the modification hearing adequately addresses this issue.

V. Insufficient Evidence to Support Findings of Fact. Respondent also claims trial court erroneously concluded that respondent's job change one month prior to hearing was of questionable permanence and that this change should have been considered as part of the positive change of circumstances. We have considered the relevance of respondent's employment in light of all the facts and find no error.

Finally, we conclude there is sufficient evidence to show that petitioner has honored the liberal visitation provisions of the decree and that, with reasonable cooperation between the parties, respondent will be able to exercise these rights in the future.

Judgment of trial court is affirmed.

AFFIRMED.