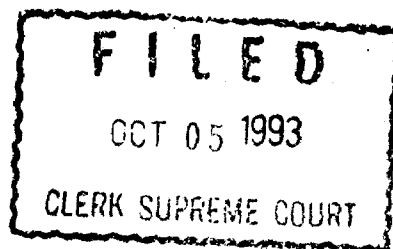


IN THE COURT OF APPEALS OF IOWA

No. 3-451 / 93-366



IN RE MARRIAGE OF MICHAEL K. HARVEY AND KRISTINA K. HARVEY

Upon the Petition of
MICHAEL K. HARVEY,

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Petitioner-Appellant,

And Concerning
KRISTINA K. HARVEY,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County,
Arthur E. Gamble, Judge.

Petitioner husband appeals from the custody provisions
of the parties' dissolution decree. **AFFIRMED.**

David S. Wiggins of Wiggins & Anderson, P.C., West Des
Moines, for appellant.

Craig S. Shannon of Grefe & Sidney, Des Moines, for
appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.,
but decided en banc.

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SACKETT, J.

Petitioner-appellant Michael K. Harvey appeals the trial court's refusal to modify his dissolution decree and award physical care of the parties' children to him. We affirm.

The marriage of Michael and respondent-appellee Kristina K. Harvey was dissolved in 1987 and physical care of the parties' two children, Matthew, born in 1980, and Brianne, born in 1987, was awarded to Kristina. Michael filed a petition in 1988 seeking modification to change physical care to him. His application for modification was heard in 1993, and denied by the trial court and this appeal follows. Michael contends he has met the burden of showing he is a superior custodian.

The trial court found both Michael and Kristina are good parents and either could assume care of the children. We agree with the trial court's assessment in this regard.

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id.; see also In re Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa App.

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985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Likelson, 299 N.W.2d 670, 671 (Iowa 1980).

The only question is whether Kristina's relationship with Mark has put the children at such risk that Michael should have physical care.

Mark had cohabited with Kristina from June 1, 1988 until November 1988. Mark left Kristina's home in November 1988 because an injunction issued on the complaint of Michael who feared possible sexual abuse of his children by Mark. See In re Marriage of Harvey, 466 N.W.2d 916, 917-18 (Iowa 1991).

In November 1988, the juvenile court issued an order forbidding Mark to have any contact with his child because he was accused of sexually molesting her. The molestation was alleged to have taken place in Kristina's home while Kristina was in the home. No claim is made that Kristina saw the molestation or participated in it. In August 1989, the juvenile court found, as a part of finding Mark's child to be a child in need of assistance, that Mark had molested her. On appeal to this court, that decision was affirmed.

Following this, it was agreed the children could stay with Kristina until the investigation was terminated or the charges disposed of if Mark not be in her home when the children were present. The order further provided an application could be made by either party to the court for a

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further order.

In 1992, Kristina sought to have the order lifted and Michael pursued this matter. Michael in turn sought a hearing on the petition for modification he had filed in 1988. Kristina then withdrew her application, but Michael's petition came on for hearing.

There has been a termination of Mark's rights to his children. Kristina does not believe Mark sexually abused his daughter and contends Mark's parental rights were terminated because he did not want to fight. Kristina has maintained a relationship with Mark outside the children's presence.

The trial court found Kristina may have exercised poor judgment in asking the court to allow contact between Mark and the children. The trial court found no evidence Kristina had ever violated the November 15, 1988 order preventing Mark from having any contact with the children. The court found it does not support Kristina's decision to reestablish her relationship with Mark. We; however, recognize this is her decision. The issue of whether she should establish a relationship with Mark is not for us to decide. Kristina's relationships are relevant to these proceedings only as they effect the children. The trial court was troubled by Mark's stubborn refusal to participate in sexual abuse therapy and found Kristina's relationship with Mark sends the wrong message to the children.

The court found Kristina had done an excellent job of

raising the children and they were well adjusted and wished to remain in their mother's care.

The trial court directed Michael to "monitor the situation" and the court would consider another modification if facts changed.

We recognize the fact is Mark was found to be the abuser and the abuse was found to have transpired in Kristina's home.

The children have a secure, loving relationship with the mother. It is a relationship the children wish to continue.

Michael has remarried. The record shows little about the children's relationship with their stepmother. If physical care was changed, the children would have to move to a new neighborhood, attend a different school, and make new friends.

The trial court found the children to be doing exceptionally well in Kristina's care. Kristina has devoted a large portion of her life to the children since Michael left the marriage to be with another woman. Michael testified the children are doing well. It is unknown how the children would fare under Michael's physical care. Michael has failed to show he could better minister to the needs of the children than Kristina. We affirm the trial court.

Obviously, it is bothersome to this court that Kristina would seek to have her custody order amended to allow a man

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who had sexually abused his own child to have contact with her children. Kristina does not believe Mark sexually abused his child. Mark has been found in a court proceeding of sexually abusing his child and, in deciding this case, we take the fact he did as a given. However, the courts have no magic formula for determining the truth of such allegations; courts are not infallible. Before the abuse charges surfaced, Mark had substantial contact with Kristina's children. There is absolutely no evidence Mark has ever been abusive to Michael and Kristina's children.

AFFIRMED.

Dissent by Donielson and Hayden, JJ.

I respectfully dissent. I would modify the dissolution decree to give physical care of the children to Michael. Kristina has expressed a strong desire to continue her relationship with Mark, who sexually abused his daughter and had his parental rights to his children terminated. Although there is no evidence yet that Kristina and Mark have violated the no contact order with regard to her children, I do not understand how she can continue the relationship with Mark or consider marrying him without either eventually violating the order or having it lifted. Michael should not have to monitor the situation so as to protect his children from Mark.

The juvenile court investigated allegations that Mark sexually abused his daughter. It found probable cause to believe a sexual offense occurred. It also found "that [his] presence in the immediate area of the chil[d] or [her] residence presents a danger to the child['s] life, physical, emotional or mental health." (Emphasis added.) I do not believe it is in the best interests of Michael and Kristina's children to expose them to Mark.

I believe Michael has demonstrated that conditions have materially and substantially changed since the decree was entered. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The court determined Michael would be a suitable physical care provider. Kristina's continued relationship with Mark evidences a lack of concern for the

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potential of harm to her children. Because of this, believe Michael is better able to minister to the needs of his children. Id.

The trial court does not support Kristina's decision to maintain a relationship with Mark. While her personal relationships are her decision, we are concerned with the welfare of her children. The potential for harm from this relationship is too great to allow the children to remain in her care.

Hayden, J., joins this dissent.