FILED
JUN 30 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHRYN R. JOHNSON (WOLVERTON) & VIRGIL J. JOHNSON

Upon the Petition of)
KATHRYN R. JOHNSON (WOLVERTON),) Filed June 30, 1978
Appellee,)
And Concerning)
VIRGIL J. JOHNSON,) 549 / 3-60962
Appellant.)

Appeal from Polk District Court - Harry Perkins, Judge.

Appeal by the father from an order which modified a dissolution of marriage decree by changing custody to the child's mother. - Affirmed.

Alfredo G. Parrish, Des Moines, for Appellant.

Patrick H. Payton, of Payton & Hearn, Des Moines, for Appellee.

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

PER CURIAM

Respondent Virgil Johnson appeals the trial court order modifying the dissolution of marriage decree which changes custody of the parties' nine year old son Joey, from respondent to petitioner Kathryn Johnson (Wolverton). The original decree gave Kathryn custody of Joey at the time of the dissolution in 1970. In 1971, Kathryn placed the child with respondent's mother because she was ill and suffering from an undiagnosed illness. Early in January of 1972, the illness was diagnosed as Hodgkin's disease and Kathryn underwent treatment including radiation therapy.

In 1974, while her disease was in temporary remission, Kathryn filed an application for modification in order to regain physical custody of her son. The trial court found her life was still somewhat unstable and therefore formal custody of Joey was changed from Kathryn to Virgil on the condition physical custody remained with the paternal grandmother, Mrs. Van Devier. The ruling further provided that when Mrs. Van Devier was no longer able or willing to assume the responsibility of custody, both parties were to apply to the court for consideration of custody based on the then existing circumstances. Mrs. Van Devier died in October, 1976, and this proceeding is the result of the parties' applications for a reconsideration of custody pursuant to the 1975 order of the court.

Our review is de novo. Rule 4, Rules of Appellate Procedure. In resolving these custody questions, we are guided by the criteria set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-7 (Iowa 1974). The status of children should be fixed as soon as possible and thereafter seldom disturbed and then, only for the most cogent reasons. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). In custody cases, the first and governing consideration of the courts is the best interest of the child. Rule 14(f)(15), R. App. P.

Generally, the non-custodial 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 interest makes it expedient to change custody. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). The subsequent change of circumstances necessary to justify a modification of the original decree pursuant

to § 598.21, The Code, is a substantial and material, not trivial, change. Hobson, supra at 139-40; Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974); In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973). Additionally, the changed circumstances must be such as were not within the contemplation of the parties or the court when the former decree was entered. Melton, supra; Hobson, supra; Pucci v. Pucci, 259 Iowa 427, 433, 143 N.W.2d 353, 357 (1966).

Our de novo review of the evidence leads us to the same conclusion reached by the trial court -- that the best interest of the child is served by placing custody with Kathryn. The evidence discloses the Hodgkin's disease is in remission and Kathryn has regained her health to the point where she can adequately care for Joey. Many of Virgil's relatives are in Des Moines and they have taken an interest in him. Although Kathryn's new marriage is of a short duration, it is preferable to Virgil's home and marriage which was still in the planning stage at the time of the hearing. The fact that Joey is a product of a mixed racial marriage, has spent most of his life in a black community and is easily identifiable as being black, is but one factor to consider in awarding custody to his white mother instead of his black father. See Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956); Tucker v. Tucker, 14 Wash. App. 454, 542 P.2d 789 (1975).

The decree of the trial court awarding formal as well as physical custody of Joey to Kathryn is affirmed.

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

OXBERGER, J. (dissenting)

Joey is nine and black. His father is black. Joey's mother is white. During most of Joey's first three years he lived with his mother and her parents. However, since the age of three Joey has lived with his father and his family. Joey told the court appointed investigator he preferred to live with his father. The trial court found his father to be a fit parent. He is a draftsman engineer, he is stable and would provide a good environment to raise Joey. I believe Joey's request to live in a black culture should be honored. There is no reason to modify the 1974 court decree awarding the father Joey's legal custody.