

IN THE DISTRICT COURT OF ROCK COUNTY, NEBRASKA

WESLEY L. HEIN,

Petitioner,

vs.

**KIMBERLY M. HEIN, now known as
KIMBERLY M. BARTAK,**

Respondent.

Case No. 4642

**ORDER DENYING
APPLICATION**

DATE OF HEARING: September 13, 1999.

DATE OF DECISION: October 21, 1999.

APPEARANCES:

For the petitioner: James D. Gotschall with petitioner.

For the respondent: Robert D. Coupland with respondent.

SUBJECT OF HEARING: respondent's application for modification of decree filed on June 7, 1999.

DECREE INVOLVED:

Date of original decree: November 13, 1989.

Date last modified: March 17, 1999.

FINDINGS: The court finds:

1. The first, and most difficult, issue is whether there has been a material change of circumstances since the decree was entered or last modified.

a. Custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action. *Hoins v. Hoins*, 7 Neb. App. 564, 584 N.W.2d 480 (1998).

b. The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred. *Id.*

c. A material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have

persuaded the court to decree differently. *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998).

2. The court only significant evidence supporting the claim that there has been a material change is the petitioner's acquiescence in the plan to have the child reside with the respondent for an extended trial period and the child's unambiguous expression of a preference for a change. However, when analyzed in the light of the factors specified by statute and case law, the court is not persuaded that a material change has been established.

3. Section 42-364(1) specifies that "[c]ustody and time spent with each parent shall be determined on the basis of the best interests of the minor child with the objective of maintaining the ongoing involvement of both parents in the minor child's life." NEB. REV. STAT. § 42-364(1) (Reissue 1998). Subsection 2 specifies the following factors to be considered:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
- (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
- (c) The general health, welfare, and social behavior of the minor child; and
- (d) Credible evidence of abuse inflicted on any family or household member. For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903.

NEB. REV. STAT. § 42-364(2) (Reissue 1998). Subsection 3 directs that the court "shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit or suitable than the other." NEB. REV. STAT. § 42-364(3) (Reissue 1998).

4. In addition to the statutory factors, the Nebraska Supreme Court has identified additional factors to be considered, including:

the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child.

McDougall v. McDougall, 236 Neb. 873, 877, 464 N.W.2d 189 (1991).

5. In addition, the Nebraska Supreme Court has also considered:

a. The definiteness of a proposed child care plan. *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974).

b. Which parent is the primary caretaker. *Applegate v. Applegate*, 236 Neb. 418, 461 N.W.2d 419 (1990).

c. The amount of time spent with baby-sitters. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

d. Which parent can devote the most time to the child. *Ritter v. Ritter, supra*.

e. Which parent shows the most concern for the child's education. *Trimble v. Trimble*, 218 Neb. 188, 352 N.W.2d 599 (1984).

f. The closeness of the relationship between the parent and child. *Brooke v. Brooke*, 234 Neb. 968, 453 N.W.2d 438 (1990).

g. The emotional impact on the child. *Sikes v. Sikes*, 205 Neb. 441, 288 N.W.2d 43 (1980).

h. Frustration of the non-custodial parent's visitation. *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988).

6. After consideration of all of these factors, the court concludes that there has not been a material change in circumstances such that the best interests of the child require that custody be changed. While the child's wishes are important, and to some degree, appear to be based on sound reasoning, such wishes are not controlling.

7. The matter which has delayed this decision for some time concerns the child's testimony regarding the petitioner's wife's efforts to encourage the child to change religious affiliation, and indeed, to alter religious beliefs.

a. The court recognizes that parents have a constitutionally protected liberty interest to control the religious training of their children.

b. However, both parents, i.e. the petitioner *and* the respondent, initially agreed that the child should be baptized into and trained in the Lutheran faith. Recently, the petitioner has, at least according to the child, converted to the Mormon religion at the urging of his wife. The child also relates that the petitioner and his wife have encouraged, and

perhaps more than encouraged, the child to convert. She describes her unwillingness to do so. There is no evidence or suggestion that the respondent concurs in these efforts.

c. The court concludes that this matter was not raised by the pleadings. The pro se application filed by the respondent before appearance of her counsel states no facts or claims regarding this issue. The due process rights of the petitioner preclude this court from considering this as a basis for a material change in circumstances.

d. The court simply observes that, once parents have started a child in a particular religious faith or with a particular set of religious beliefs, unless an entire family willingly adopts a change, attempts to unilaterally impose such change on a child are quite likely to be counterproductive, and may in certain circumstances rise to the level of a material change in circumstances. Because the matter was not raised by the pleadings, the court cannot consider the matter.

8. The custody order should not be changed.

9. The respondent's application (filed pro se before entry of appearance by her attorney) did not assert a material change in circumstances on the issue of child support independently of the claimed change regarding custody. The pleadings do not support a finding of a material change of circumstances solely on the issue of child support.

ORDER: IT IS THEREFORE ORDERED, ADJUDGED, AND
DECREED that:

1. The application is denied.

2. The decree previously entered in this case (and as previously modified, if applicable) shall remain in full force and effect except as expressly modified by this order.

a. The provision of the order of October 21, 1998, setting respondent's child support obligation at \$216.00 per month effective September 1, 1999, remains fully effective.

b. The provisions of the orders of October 21, 1998, and March 17, 1999, reducing the petitioner's child support obligation to \$0.00 per month effective September 1, 1999, remain fully effective.

3. Each party shall be required to pay their own respective costs and attorney fees.

ENTERED: October 21, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.
- 9** Enter judgment on the judgment record.
Done on _____, 19____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days, stating “respondent’s application for modification of decree denied.”
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: [date from order] Signed
“Order Denying Application” entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge