

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

BRENDA LOUISE SAWYER,
Petitioner,

vs.

BRENT ANTHONY SAWYER,
Respondent.

Case No. 20405

ORDER MODIFYING DECREE

DATE OF TRIAL: April 3-4, 2001.

DATE OF RENDITION: July 7, 2001.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301).

APPEARANCES:

For the petitioner: Jim K. McGough with petitioner.

For the respondent: Rodney J. Palmer with respondent.

SUBJECT OF HEARING: Respondent's amended application for modification of decree.

DECREE INVOLVED:

Date of original decree: May 4, 1998.

Date last modified: October 21, 1999.

FINDINGS: The court finds:

1. The court has devoted considerable study to the record in this case. One of the more time-consuming tasks has been to disregard the considerable amount of immaterial matters and innuendo not supported by competent, relevant, and material evidence. This case truly requires the court to "separate the wheat from the chaff."

2. Ordinarily, 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 child require such action. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). The party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child. *Id.*

3. In the context of marital dissolutions, 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. *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000).

4. In determining a child's best interests for purposes of custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Reissue 1998) provides that the factors to be considered shall include, but not be limited to, the relationship of the child to each parent; the desires and wishes of the child; the general health, welfare, and social behavior of the child; and credible evidence of abuse inflicted on any family or household member. *Carraher v. Carraher*, 9 Neb. App. 23, 607 N.W.2d 547 (2000). A court may consider such factors in determining a child's best interests in custody matters as the moral fitness of the child's parents and the parents' sexual conduct, the attitude and stability of each parent's character, and the parental capacity to provide physical care and satisfy educational needs of the child. *Id.*

5. In *Buchele v. Tuel*, 204 Neb. 641, 284 N.W.2d 564 (1979), the Nebraska Supreme Court reviewed principles controlling consideration of pre-decree matters in a subsequent modification proceeding. Where a decree has been entered following trial on the merits which awards custody of the minor children, it is ordinarily not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree. *Walters v. Walters*, 177 Neb. 731, 131 N.W.2d 166 (1964); *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974). When a party obtains a divorce by default and fails to bring to the court's attention existing matters which concern custody of the minor children, upon proper motion for modification the court will consider such factors in determining whether a change in circumstances has occurred. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975); *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977). Where one of the parties has induced the other party to permit an uncontested decree and custody award to be entered, facts establishing fraud, misrepresentation, or duress will constitute a material change of circumstances upon which a modification in custody may be based. *Cline v. Cline*, 200 Neb. 619, 264 N.W.2d 680 (1978). In *Buchele v. Tuel*, *supra*, the court extended the rule to situations in which there was not total disclosure to the court of all factors relating to the awarding of child custody. The judicial focus in such cases has been on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew

or should have known which was not produced at the time of trial. The Supreme Court has continually adhered to the principle that the best interests of the child are the governing considerations in determining custody. In *Buchele v. Tuel*, the court recognized that modern authority supports the view that where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody. The court also recognized that the rule is not restricted exclusively to default judgments.

6. The fact that the respondent may have achieved a more stable lifestyle and increased income through remarriage or otherwise does not alone justify a modification of custody without a showing that the petitioner's fitness or abilities have declined. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986). The evidence certainly shows, without significant dispute, that the respondent has remarried, has achieved a more stable lifestyle, and has accomplished a substantial and dramatic improvement in the behavior of the parties' other child after custody of that child was changed to the respondent by agreement in 1999. However, *Hicks* teaches that this alone is not sufficient to justify a change of custody of the other two children without a decline in the petitioner's fitness or abilities.

7. The petitioner has repeatedly moved under circumstances casting considerable doubt regarding her ability to provide a stable home for the children at issue here. She moved in and lived with a disreputable individual who admitted supplying her with marijuana. While she may not have consumed the marijuana directly in the children's presence, parents fool only themselves in believing that children cannot rapidly perceive what is going on in the environment in which the children reside daily. She abruptly uprooted the children in a move to Omaha, the sole purpose of which was to move in with a different man. Despite the petitioner's denials, the court finds the testimony of a neighbor and a grocery employee highly credible regarding lack of proper supervision and cleanliness of the children. The court concludes that the petitioner's abilities have declined, and that these factors, together with others appearing in the record, coupled with the improved situation of the respondent,

constitute a material change in circumstances showing that the best interests of the children require the change in custody.

8. The child support should be modified accordingly.

9. The monthly net incomes of the parties are set forth on Appendix "B" attached hereto and incorporated by reference. The child support amounts determined pursuant to the Nebraska Child Support Guidelines are computed on Appendix "B."

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

1. **RELIEF GRANTED/DENIED:** The amended application is granted to the extent of the relief set forth below and is otherwise denied.

2. **PRIOR DECREE OTHERWISE EFFECTIVE:** 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.

3. **CHILD CUSTODY:** The custody of the minor children, Tanner J. Sawyer, born October 2, 1996, and Ty N. Sawyer, born October 2, 1996, is changed from the petitioner to the respondent, to be implemented on Tuesday, July 31, 2001, at 7:00 p.m., subject to specific rights of visitation and correspondence in the petitioner as set forth on Appendix "C" attached hereto, except that the provision for extended summer visitation regarding Tanner J. Sawyer and Ty N. Sawyer shall not be applicable until the summer of 2002. The custody of the minor child, Dakota L. Sawyer, shall remain with the respondent, subject to specific rights of visitation and correspondence in the petitioner as set forth on Appendix "C" attached hereto. The provisions of Appendix "A" attached hereto are incorporated herein and the parties ordered to comply therewith.

4. **SUPPORT REDUCED:** The child support obligation of the respondent is reduced to zero dollars (\$0.00) per month until further order.

5. **SUPPORT REQUIRED:** The petitioner shall be required to pay child support, commencing on August 1, 2001, and a like payment on the first day of each month thereafter until the obligation of support as to particular child terminates, at the rate of:

- a. \$50.00 per month when there are three children to be supported;
- b. \$50.00 per month when there are two children to be supported;

c. \$50.00 per month when there is only one child to be supported.

6. **TERMINATION OF SUPPORT:** The support obligation for each child continues until such child reaches majority under Nebraska law (presently age 19), becomes emancipated, becomes self-supporting, marries, or dies, or until the further order of the court.

7. **PAYMENTS:** All payments of **child, medical, or spousal support** shall be paid to the **State Disbursement Unit** (and until the State Disbursement Unit is operative, to the Clerk of the District Court for this county) for disbursement to the person entitled thereto. All payments of **alimony, court costs, or attorneys' fees** shall be paid to the **Clerk of the District Court** for this county for disbursement to the person entitled thereto.

8. **INTEREST:** Delinquent support shall bear interest at the rate of 5.442% per annum from the time and in the manner provided by law.

9. **INCOME TAX EXEMPTIONS:** Because of the petitioner's low income and the limitation of child support by Guideline R, the respondent shall be entitled to claim all of the minor children for dependency exemption purposes for federal and state income taxes for tax year 2001 and until further order.

10. **INFORMATION REPORTING:** Each party shall be required to furnish the clerk of this court, in writing, with such party's address (including specific street address or other physical location, in addition to mailing address), telephone number, and social security number, the name and address of such party's employer, whether or not such person has access to employer-related health insurance coverage and, if so, the health insurance policy information, and any other information that the Court shall deem relevant until the judgment is paid in full. Each party shall also be required to advise the Clerk of any changes in such information between the time of entry of this order and payment of the judgment in full. Failure to comply with the provisions of this section shall be punishable by contempt.

11. **INCOME WITHHOLDING:** The income of any party obligated to pay support hereunder shall be subject to income withholding, which shall be implemented pursuant to the Income Withholding for Child Support Act.

12. **IDENTIFYING NUMBERS:** The social security numbers for the parties and children are: [deleted].

13. **SUPPORT ENFORCEMENT:** In the event that any such party obligated to pay support fails to pay any child, medical, or spousal support payments, as such failure is certified each month by the State Disbursement Unit (and until the State Disbursement Unit is operative, by the District Court Clerk) in cases where court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, such party may be required to appear before this Court on a date to be determined by the Court and show cause why such payment was not made. In the event such party fails to pay and appear as so ordered, a warrant shall be issued for such party's arrest.

14. **JUDGMENT:** Judgment is hereby rendered accordingly. Each party shall be required to pay their own respective costs and attorney fees.

Signed in chambers at Ainsworth, Nebraska, on July 7, 2001.
DEEMED ENTERED upon the date of filing by the court clerk.

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 _____, 20____ by _____.
- : Enter judgment on the judgment record.
Done on _____, 20____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- : Note the decision on the trial docket as: [date of filing] Signed "Order Modifying Decree" entered.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge