

IN THE COURT OF APPEALS OF IOWA

No. 0-594 / 10-0398
Filed September 9, 2010

RONALD J. MUELLER,
Petitioner-Appellee,

vs.

SHARON M. SPLINTER,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubbatt, Judge.

Mother appeals a district court order modifying physical care. **AFFIRMED.**

Matthew J. Noel of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

John T. Nemmers of Reynolds & Kenline, L.L.P., Dubuque, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer and Danilson, JJ.

EISENHAUER, J.

Sharon Splinter appeals the district court's order modifying the custody decree to award physical care of the parties' daughter to Ronald Mueller. We affirm.

I. Background Facts and Proceedings.

Sharon and Ron are the unmarried parents of eight-year-old Kylee. After Kylee was born the parties informally agreed Ron would have visitation every other weekend. Sharon also has a teenage daughter, Emily, who lives with her. Ron has two daughters, ages fourteen and ten, who visit Ron the same weekend as Kylee. Ron and his live-in fiancée have been together for four years.

Both Ron and Sharon have been involved in substance abuse. Ron testified and the court found he has been drug free for the past six years. Ron has been employed with the same employer during that time.

Sharon has not had the same success in dealing with drug abuse. In 2003, Kylee was removed from Sharon's care by the Department of Human Services (DHS) after a drug test revealed Kylee had been exposed to methamphetamine. Kylee was eventually returned to Sharon's care.

In September 2005, Ron petitioned for joint custody and visitation. In November 2005, the court granted Ron and Sharon joint custody of Kylee, with physical care to Sharon and visitation for Ron.

In August 2008, the DHS commenced "a child protective investigation involving domestic abuse issues and [Sharon's] use of methamphetamine." Sharon is currently attending Batterer's Education Classes.

In November 2008, Sharon, Kylee, and Emily were living with Sharon's parents when the DHS removed Kylee (and Emily) from Sharon's care "due to [Sharon's] failure to maintain sobriety." Kylee and Emily remained in the grandparents' home. In December 2008, Sharon was allowed to return to her parents' home

On January 13, 2009, Sharon tested positive for methamphetamine and the DHS again sought her removal from her parents' home. On January 20, 2009, the juvenile court ordered Sharon to vacate the residence and found "Sharon continues to deny that she is using, and has tested positive for Meth three times since September this year." The juvenile court placed Kylee and Emily in the custody of their grandparents with the DHS "given care and control." In February 2009, Sharon was involuntarily committed for substance abuse treatment and tested positive upon her admission to the program.

In May 2009, Sharon again tested positive for methamphetamine. Sharon has acknowledged this test is correct but has denied any use relating to all other testing. In June 2009, the juvenile court adjudicated Kylee to be a child in need of assistance. A home study prepared by Dane County Human Services in Wisconsin was presented to the court. It indicated Ron's home was appropriate and would provide a safe environment for Kylee. The court ordered Kylee to remain in the custody of DHS and transferred her care to Ron. The court also granted Ron's request for concurrent jurisdiction "for purposes of litigating Kylee's long term placement and related issues in District Court."

In July 2009, Ron filed a petition in district court to modify the custody order and sought physical care of Kylee. Kylee remained with Ron during the pendency of the litigation. In August 2009, Sharon again tested positive for drugs, but subsequent testing has been negative. At the time of the modification hearing, the DHS was recommending custody of Kylee remain with Ron. In February 2010, the district court modified the decree and awarded Ron physical care. Sharon now appeals.

II. Modification of Physical Care.

Sharon seeks review of the court's modification order. We review the trial court's decision *de novo*. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our *de novo* review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968).

In seeking to modify Kylee's physical care arrangement, Ron must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [the] requested modification." *See In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, Ron must prove an "ability to minister more effectively to the well-being" of Kylee. *See id.* at 237. The best interests of Kylee are the controlling considerations. *See id.* at 235.

In our de novo review, “we give considerable deference to the district court’s credibility determinations because the court has firsthand opportunity to hear the evidence and view the witnesses.” *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). We recognize the district court has “reasonable discretion” in determining whether modification of physical care is warranted and its “discretion will not be disturbed on appeal unless there is a failure to do equity.” *McKenzie*, 709 N.W.2d at 531. We also have the benefit of the juvenile court’s assessment of the appropriate home for Kylee. The district court ruled:

There has been a material and substantial change of circumstances since the original decree was entered in this matter. Ron has become clean and has built a life in Madison—one that includes a healthy relationship, a home and steady employment. Sharon, on the other hand, has suffered relapses, been involved in an unhealthy relationship, and has had Kylee removed from her care through CINA proceedings. Not only is this a material change in circumstances, but it is one that was not contemplated by the Court at the time the Decree was entered.

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Under the facts of this case, the Court determines that Kylee’s best interest is served by awarding joint custody to Ron and Sharon, and primary placement with Ron. Ron has a stable home and has created a routine for Kylee under which she has been able to thrive. Kylee gets along well with the other girls who live in the house. She has formed a bond with Ron’s fiancée. . . . Kylee has good attendance at school, is doing well academically, and is involved with a myriad of activities.

Sharon is to be commended for the determination she has showed of late in her recovery, but her present period of sobriety measures in months compared to the years Ron has experienced. . . . Kylee is better served by remaining with Ron rather than being pulled out of school and activities and returned to Sharon’s care in Dubuque.

We agree Ron has proven by a preponderance of the evidence a substantial change in circumstances justifying modification and Kylee’s best

interests require physical care be modified. Accordingly, we affirm the court's placement with Ron. Costs are taxed to Sharon.

AFFIRMED.