

IN THE COURT OF APPEALS OF IOWA

No. 1-039 / 10-1335
Filed February 23, 2011

**IN RE THE MARRIAGE OF AMANDA HELEN HENSE
AND JAMES RICHARD HENSE**

**Upon the Petition of
AMANDA HELEN HENSE,**
Petitioner-Appellant,

**And Concerning
JAMES RICHARD HENSE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Delaware County, Michael J. Shubatt, Judge.

Amanda Hense appeals a district court modification of a dissolution decree granting James Hense physical care of the parties' two children.

AFFIRMED.

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

John M. Carr of Carr & Carr Attorneys, Manchester, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Amanda Hense appeals a modified decree granting James Hense physical care of the parties' two children. Approximately ten months before, the children had been removed from Amanda's home on a temporary basis by the Illinois Department of Children and Family Services (IDCFS) due to serious concerns about Amanda's live-in boyfriend. The children were placed with their father, James, with whom they continued to live at the time of the modification hearing. Amanda contends James failed to establish a substantial and material change in circumstances or the ability to provide superior care. We disagree with Amanda's contentions and therefore affirm.

I. Background Facts and Proceedings

Amanda and James dissolved their marriage on May 29, 2009. They had two children together, a daughter born in 2005 and a son born in 2007. Their dissolution decree incorporated a stipulation that granted the parties joint legal custody, with Amanda having physical care and James visitation. Although the dissolution decree was entered in Dubuque County, Amanda was living by then across the river in East Dubuque, Illinois, with her boyfriend, R.J. Reittinger.

On September 22, 2009, the IDCFS began a child protection investigation due to safety concerns related to Reittinger. According to the detailed IDCFS report admitted at trial, the investigation was prompted by serious issues that had arisen the day before at a family team meeting held by Iowa's Department of Human Services (DHS) in Dubuque in regards to Reittinger's two biological children. At that meeting, Reittinger admitted to daily drug use, threatened to kill his ex-girlfriend, and required six police officers to escort him from the premises.

It was also noted that Reitinger had been diagnosed as having an untreated bipolar disorder.

According to Amanda, on September 22, an IDCFS worker appeared at her home with two police officers and told her she could not pick up her children that afternoon from daycare. Amanda was advised she had to place the children with their biological father or else a removal order would be obtained. James was then notified and, with no advance notice, agreed to take the children into his care. No removal order was ever obtained, and no juvenile court proceedings were initiated.

Since that date, the children have remained in the physical care of James and his fiancée, Angi. When the children were first placed into James's care, they were behind on their immunizations; however, James brought them up to date. James and the children also participated in family services, most notably communication, anger management, and coping skills for the daughter. In addition, Angi has been very active in the children's care and often helps facilitate communication between James and Amanda.

On November 25, 2009, James filed an application to modify the custody provision of the decree, seeking an award of physical care of the children. The application was tried to the court on June 16, 2010.

At the hearing, Amanda testified that she no longer lived with Reitinger, but continued to be in a relationship with him and was seven months pregnant with his child. Amanda admitted that Reitinger has a substance abuse problem, smokes marijuana "[m]aybe twice a month," and has "an anger problem." Nonetheless, she stated that she believes the children are safe around him.

Amanda also minimized or denied several of the allegations made against Reittinger in the investigation report. Amanda did admit that Reittinger's parental rights to his own children were terminated in Iowa in December 2009.

On July 16, 2010, the district court filed an order modifying custody and awarding James physical care of the children. The court found:

In this case there has been a material and substantial change in circumstances. Shortly after entry of the decree, the children were removed from Amanda's care due to concerns about their safety. Amanda argues that the removal was unlawful. However, the lawfulness of that removal is not before this Court; Amanda's due process rights with regard to the removal presumably exist in the agencies and courts of the State of Illinois.

Whether IDCFS acted within its authority or not, the children *were* removed. That fact in and of itself is a substantial change in circumstances. It becomes a material change when the Court considers that the children have now been in James' care for the better part of a year and are doing very well by all reports. James has demonstrated an ability to administer more effectively (than Amanda) to the children's needs. It is undisputed that his home is clean and safe. The children have received appropriate medical and social services while in his care.

The character of the parties' respective companions is another issue that militates in James' favor. . . . James' fiancée is a capable and dedicated caregiver, whereas Amanda's fiancé has, by Amanda's admission, substance abuse and anger issues and has had his own parental rights terminated.

James has established a substantial and material change in circumstances, and has satisfied his burden of proof on the issue of his ability to offer superior care under the parties' respective circumstances. Accordingly, modification of the decree is warranted.

Amanda appeals.

II. Standard of Review

We review proceedings to modify a dissolution decree *de novo*. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). Because the trial court was present to listen to and observe the witnesses, we give weight to its factual

findings, but are not bound by them. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

III. Analysis

To change a 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

Amanda first asserts the removal of the children from her is not a permanent change because the children could have been returned to her care at any time. However, Amanda never challenged the children's removal. As a result, by the time of the modification hearing, the children had been out of her physical care for almost ten months. We find this change to be "more or less permanent, not temporary." *Id.*

Amanda further asserts there was no change in circumstances because she and Reitinger were living together prior to the entry of the dissolution decree. Although this may be true, the relevant change for modification purposes was not the relationship itself but the safety concerns that Reitinger presented to the children. Those safety concerns surfaced dramatically in September 2009, leading to IDCFS's decision to remove the children from

Amanda. In short, the change in circumstances was not contemplated by the court when the decree was entered.

If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children can become a significant factor in a custody dispute. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). The reason for this is that the companion will have an impact on the children's lives, and the type of relationship the parent has sought to establish may indicate the parent's priorities. *Malloy*, 687 N.W.2d at 113; *Decker*, 666 N.W.2d at 179. Even Amanda admitted at the modification hearing that Reitinger has substance abuse and anger problems, and his parental rights to his own two children were terminated in December 2009.¹ Despite these concerns, at the time of the modification hearing, Amanda was still in a relationship with Reitinger; they were engaged; and Amanda was seven months pregnant with his child. Overall, in her testimony, Amanda appeared to minimize the safety concerns that Reitinger presents. A family care coordinator also testified that she has "concerns regarding Amanda's recognition of safety concerns with respect to [Reitinger]."² Meanwhile, James's fiancée Angi has

¹ Reitinger did not appear or testify at the modification hearing.

² Amanda criticizes IDCFS and DHS for conducting a "minimal investigation" before removing the children from her. She argues that if the present modification is allowed to stand, parents will be able to contact DHS and make allegations in order to "do an end run around the requirements to modify custody." But that is not what happened here. James did not contact DHS. Rather, DHS contacted IDCFS which decided to remove the children. The detailed IDCFS report, which was admitted at trial, describes several categories of conduct that would be considered threats to the children. Amanda did not attempt to contest the action that IDCFS took based on that report.

been active in meeting the children's needs and has helped facilitate communication between James and Amanda.

Lastly, Amanda disputes whether James showed he could render superior care. We are not persuaded by Amanda's argument. James has a clean and appropriate home. Since the children have been placed into his care, they have been brought up to date on their vaccinations and have fully participated in social services. Most importantly, James has shown the ability to provide the children with a safe home, something Amanda cannot provide due to the continued concerns surrounding Reittinger.

For the foregoing reasons, we affirm the district court's modification order granting physical care to James.

AFFIRMED.