

IN THE COURT OF APPEALS OF IOWA

No. 1-783 / 11-1322
Filed October 19, 2011

**IN THE INTEREST OF E.M. and T.L.,
Minor Children,**

**A.B.M., Mother,
Appellant.**

Appeal from the Iowa District Court for Story County, Victor G. Lathrop,
Associate Juvenile Judge.

A mother appeals from the order modifying the placement of her children
in their children-in-need-of-assistance case. **AFFIRMED.**

Nicole S. Facio of Newbrough Law Firm, L.L.P., Ames, for appellant
mother.

Mark J. Olberding, Nevada, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Stephen Holmes, County Attorney, and Jessica Reynolds, Assistant
County Attorney, for appellee State.

Shannon M. Leighty, Assistant Public Defender, Nevada, for minor
children.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

A mother appeals from the dispositional order transferring custody to the children's father. She contends there is insufficient evidence to show a material and substantial change in circumstances justifying modification of custody. She further contends the children's best interests are not met by a change in custody. She also alleges she received ineffective assistance from her trial counsel. She seeks to have the children returned to her custody or, in the alternative, placed in foster care. We review these claims de novo. See *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997).

The mother, A.M., has four children. The mother and father of the two children at issue were divorced in November 2008. Sole legal custody and physical care of E.M. and T.L. was placed with the mother. The oldest child, age seventeen, is not at issue here. Nor is the youngest child, who was born in the spring of 2011. E.M., eight years old at the time of trial, and T.L., six years old at the time of trial, came to the attention of the Iowa Department of Human Services in November 2009 because the mother's oldest child had mental health needs that were not being met. The children were voluntarily placed out of the home for a period because the mother became suicidal. She was hospitalized for overdosing on her medication. The mother was to attend intensive out-patient treatment but had to be hospitalized again because of wanting to hurt herself. Due to her mental health needs, the children's needs were not being met.

In February 2010, the children were adjudicated in need of assistance (CINA). The children remained in placement with a family friend. Pursuant to a stipulation of the parties, the children were returned to the mother's care in June

2010, with the understanding the mother would participate in services and receiving counseling and substance abuse treatment. However, the mother's financial struggles and her involvement in an abusive relationship led to her living at a domestic violence shelter beginning in January 2011.

In January 2011, the father filed a motion to modify disposition, seeking additional visitation. The following month, the guardian ad litem filed a motion to modify disposition, seeking to have the children placed in foster care.

Hearing on the father's "Application to Modify the Existing Dispositional Order" as to visitation was scheduled for March 14, 2011. The order entered stated:

The guardian ad litem had previously filed a Motion to Modify Disposition requesting that the children be placed in foster care. This Motion was filed late but was filed to comply with the original recommendation of the Department of Human Services. At this time the parties are in agreement that the children can remain with the Mother under a safety plan developed this date. Based thereon the Public Defender withdraws her Motion to Modify the existing dispositional order.

IT IS THEREFORE ORDERED that by agreement of all parties, the custody of the minor children . . . shall remain with the Mother pursuant to 232.101, Code of Iowa. The Mother will continue to remain at the ACCESS program until such time as she can obtain suitable housing for herself and the children. She will contact the Department of Human Services prior to any change in her current living arrangement. The Mother is also currently due to give birth to another child in the next three to four weeks. When she commences labor, she is to call Crises Care immediately for placement of the minor children and the Department of Human Services. While in the care of the Mother, the Mother will assure that the children attend school on a daily basis and appear for scheduled medical appointments. The Father shall have visitation with the children no less than two hours per week on a semi-supervised basis.

The father filed another motion to modify the dispositional order on May 10, 2011, seeking "an alternate suitable placement" for the children. On

July 8, 2011, the State filed a motion to modify the dispositional order to allow visits to be at the discretion of the DHS and not be limited to semi supervised visitation. Trial on the modification motions was held in July 2011. The father was unable to personally appear, but requested through his attorney the children be placed with him. The DHS worker recommended the children be placed in foster care. In its August 8, 2011 order, the juvenile court modified the dispositional order to place custody of T.L. and E.M. with the father.

The mother first argues there is insufficient evidence to show a substantial change in circumstances warranting modification. Custody or placement may only be modified if there is a material and substantial change in circumstances. *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991). We find a material and substantial change of circumstances has been shown. Since the entry of the dispositional order, the mother has moved to a shelter with her children where she has allowed unknown persons to supervise the children. She has also engaged in a troubling practice of accusing the father's wife of being a "baby raper," an allegation made known to the children. The stress the mother has placed the children under by vehemently opposing their contact with the father and his wife has caused E.M. to become physically ill.

The mother also contends modification of custody is not in the children's best interests. In modification of a dispositional order relating to child custody, the focal point is the best interests of the children. *In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993). The children's best interests are to be determined by looking at their long-range as well as immediate interests. *Id.* at 511-12. A parent's past performance provides insight into this determination. *Id.*

We conclude modification of custody is in the children's best interests. The mother suffers from post-traumatic stress disorder, mood disorder NOS, and borderline personality disorder. Although she testified she was taking an anti-depressant and had twice seen a nurse practitioner for counseling over a month before trial, there is no evidence she has adequately addressed her mental health needs. Although a year had passed since the children were returned to her care, at the time of trial the mother had not taken T.L. for medical treatment for his speech and vision problems. The mother also continued to associate with men who presented a threat to her and her children, had inadequate housing, and lacked stable employment.

The mother's opposition to the children's contact with their father has caused them emotional damage. She alleges the father is physically abusive with his wife, a charge that is unsubstantiated. The mother also makes much of the fact the father's wife was on the sex-offender registry at the start of this case. However, the actions that placed her on the registry occurred when she was eleven years old; she was twenty-seven at the time of trial. She received treatment for a period of a year and a half while a teenager and was removed from the registry in June 2011. The mother's complaints seem especially disingenuous when the mother has allowed the children to be around a man currently on the sex-offender registry and one who grabbed E.M. by his throat.

The mother alleges she received ineffective assistance of counsel because her trial counsel failed to object or seek a continuance based on the father's absence at trial. She also alleges counsel was ineffective in failing to call witnesses on her behalf. In order to succeed on her claim, the mother must

demonstrate her counsel's inadequate representation. See *In re S.D.*, 671 N.W.2d 522, 530 (Iowa 2003). To do so, the mother must prove both a deficiency in counsel's performance and actual prejudice. *In re T.P.*, 757 N.W.2d 267m 273 (Iowa 2008). We conclude the mother has failed to prove she was prejudiced by counsel's failure. She does not outline how the father's testimony would have added anything to the testimony of his wife. In her brief, the mother alleges:

The mother was getting a great deal of counseling and support from ACCESS shelter, and in-home providers from Early Head Start and Promise Jobs. Any of these people could have supported [the mother]'s claim that she was adequately meeting the needs of her children.

However, the mother would not give the names of anyone at the shelter, citing confidentiality. The mother does not illustrate how testimony of an Early Head Start worker would bolster her case when she failed to obtain assistance from anyone in Early Head Start until just before trial although she had a year to do so. Nor is it clear how testimony of a Promise Jobs worker would benefit her when the mother's failure to comply with the Promise Jobs requirements resulted in her losing public assistance through the FIP program and the mother was on the verge of losing it again due to noncompliance at the time of trial. Because the mother has failed to demonstrate she was prejudiced by any failure of counsel, we affirm the juvenile court order modifying the dispositional order to place custody of the children with the father.

AFFIRMED.