

IN THE COURT OF APPEALS OF IOWA

No. 2-223 / 11-0168
Filed May 9, 2012

ABIGAIL MONSON,
Petitioner-Appellant,

vs.

KELLY ECKENROD,
Respondent-Appellee.

Appeal from the Iowa District Court for Kossuth County, Nancy L. Whittenburg, Judge.

Abigail Monson appeals from the district court order modifying physical care of the parties' daughter to Kelly Eckenrod. **AFFIRMED.**

Abigail Monson, Emmetsburg, appellant pro se.

David H. Skilton of Cronin, Skilton & Skilton, Charles City, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Abigail Monson appeals from the district court order modifying physical care of the parties' daughter to Kelly Eckenrod. She contends the court erred in finding a substantial change in circumstance warranting modification. She also argues the denial of her motion to recuse the judge was an abuse of discretion and claims the court abused its discretion in several other respects regarding the trial.

On our de novo review, we conclude the record shows a substantial change in circumstance warranting modification of the child's physical care. We affirm the modification order's grant of physical care to Kelly.

I. Background Facts and Proceedings.

Abigail Monson and Kelly Eckenrod are the unmarried parents of Claire, who was born in December 2004. In January 2006, they entered into an agreement for joint legal custody of Claire with her physical care placed with Abigail. Kelly received visitation on alternating weekends and paid child support.

In the fall of 2006, Kelly suspected Abigail was using methamphetamine and reported her to the Department of Human Services. Claire's custody was transferred to him until February 2007 when she was returned to Abigail. The juvenile case was closed in July 2007.

In the summer of 2009, Abigail's family began to suspect she had relapsed and informed Kelly of their suspicions. Based on these suspicions, Kelly filed a petition seeking to modify the provisions of the parties' January 2006 agreement. He sought physical care of the child.

Trial began on September 15, 2010. One of the witnesses was Abigail's boyfriend, Brian Stowe, an attorney. At the conclusion of Kelly's evidence, the trial judge met with counsel for both parties to inform them she was aware that Stowe had recently been arrested for possession of methamphetamine. Due to this information and scheduling issues, the trial was continued one month. During this time, Abigail filed a motion for recusal, which was denied. When trial resumed, Kelly's counsel questioned Stowe regarding the arrest over Abigail's objection.

The district court entered its order modifying custody on October 19, 2010. The court found Kelly carried his burden of proving a substantial change in circumstance. Specifically, the court found Abigail had relapsed on methamphetamine. The court's finding was partially based on Abigail's demeanor during trial. It noted:

She offered little eye contact with anyone, including witnesses, but instead demonstrated a fixed stare on nothing in particular. She was inordinately thin and drawn with a continual twitch on the left side of her mouth and a repetitive head bobbing motion, neither of which she seemed to have an awareness of. The court concludes on the evidence presented and observations made of the petitioner, that [Abigail]'s sobriety has relapsed and her renewed involvement with controlled substances and/or alcohol is a change in circumstances.

The court then found Kelly to be "more attuned to Claire's emotional, physical, and spiritual needs" than Abigail and "better equipped than [Abigail] to meet those needs." Finding Kelly had the superior ability to parent Claire, the court granted him physical care.

II. Analysis.

We first consider Abigail's arguments that the trial court abused its discretion in failing to recuse itself, continuing the trial one month, and allowing Kelly's counsel to cross-examine Stowe beyond the scope of re-direct. We review these rulings for an abuse of discretion. See *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997) ("We generally review evidentiary rulings for abuse of discretion and do so here."); *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998) (holding we only reverse a ruling on recusal where the court is found to have abused its discretion); *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 167 (Iowa Ct. App. 1993) (holding our standard of review in ruling on a motion for continuance is abuse of discretion).

The party seeking recusal of a judge has the burden of showing grounds for the recusal. *Campbell v. Quad Cities Times*, 547 N.W.2d 608, 611 (Iowa Ct. App. 1996). The pertinent rule concerning recusal is found in Iowa Court Rule 51, Canon 3(C)(1), which provides, "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" While there is a constitutional right to a neutral and detached judge, mere speculation as to judicial bias is not sufficient to prove grounds for recusal. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). A party must show actual prejudice before recusal is necessary. *McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 827 (Iowa 1996).

In determining whether to recuse him or herself, a judge must consider "whether reasonable persons with knowledge of all facts would conclude that the

judge's impartiality might be questioned." *Mann*, 512 N.W.2d at 532. A judge has as much of an obligation not to recuse when there is no occasion to do so, as to recuse when there is cause for recusal. *McKinley*, 542 N.W.2d at 827. The determination of whether to recuse himself or herself is committed to the judge's discretion. *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998). We will not interfere unless there has been an abuse of discretion. *Id.*

We find no abuse of discretion. Although Abigail speculates Judge Whittenburg had "undoubtedly" formed opinions on Stowe's credibility based on information outside of the record, her claim is based on nothing more than speculation. The court's ruling makes only one mention (two sentences) of Stowe's arrest in its thirteen-page ruling and decree. Abigail's attorney stated his opinion that "any judge who eventually tries this case, if indeed you don't, would . . . have the same type of knowledge." We find a reasonable person with knowledge of all the facts would not question the judge's impartiality.

We then turn to the court's grant of the motion to continue, which allowed Kelly to investigate the criminal charges pending against Stowe, and the cross-examination regarding those charges when trial resumed. In considering the ruling modifying physical care, our review of the record is de novo. See Iowa R. App. P. 6.907. Because we can consider the custody question without considering evidence of Stowe's arrest, we need not address the issue. See *Wilker v. Wilker*, 630 N.W.2d 590, 598 (Iowa 2001) (holding the court need not pass judgment on admissibility of evidence where the court chooses not to incorporate that evidence into its determination).

Modification is appropriate only when there has been a substantial and material change of circumstance since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *Id.* The applicant also must carry the heavy burden of showing an ability to offer superior care. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). “[O]nce 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).

Abigail only challenges the sufficiency of the evidence showing a substantial and material change in circumstance. We find Kelly has met this burden. The record shows Abigail has likely relapsed on methamphetamine. This finding is made based on the district court’s personal observation of Abigail as well as evidence regarding a break-in at her parents’ home when they were away. Abigail had asked her parents if she and Stowe could stay at the home and was told no. When the parents returned home, they found someone had been staying in the home in their absence. It appeared the desk had been rifled through. It was later discovered that unauthorized credit card charges were made to Abigail’s father’s credit card during the same time period. The observations described by the district court and the theft or attempted theft of money from Abigail’s parents is behavior consistent with that of a substance abuser.

Additionally, Abigail has been living an itinerant lifestyle and has been unable to maintain a stable residence for Claire. Abigail has often resorted to staying with friends or sleeping on the floor of hotel rooms. Abigail sleeps excessively and during odd hours, which has caused Claire to frequently be tardy from school. Claire's teacher reported that Claire was tardy "nearly every day," arriving "anywhere from 8:30-11:00 a.m." and one day coming as late as 11:40 a.m. Claire missed the first day of school because Abigail did not know the date on which school began.

Finally, Abigail was arrested shortly before trial in this matter for speeding seventy-three mph in a fifty-five mph zone, having no proof of insurance, and an open container of beer in the vehicle. Claire was in the backseat of the car at the time. Abigail was then issued fourteen citations for separate acts of forgery connected to writing unauthorized checks.

Because Kelly met his burden of showing a substantial change in circumstance warranting modification, we affirm the district court order granting him physical care of Claire.

AFFIRMED.