

IN THE COURT OF APPEALS OF IOWA

No. 3-458 / 13-0377
Filed May 15, 2013

**IN THE INTEREST OF J.R.,
Minor Child,**

**E.H., Mother,
Appellant.**

Appeal from the Iowa District Court for Dallas County, Virginia Cobb,
District Associate Judge.

A mother seeks reversal of an order transferring custody. **AFFIRMED.**

Yvonne C. Naanep, Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Wayne Reisetter, County Attorney, and Sean Weiser, Assistant County
Attorney, for appellee State.

Daniel Tungesvik, Boone, for appellee father.

Kayla Stratton of Des Moines Juvenile Public Defender, Des Moines,
attorney and guardian ad litem for minor child.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

A mother, Erin, seeks reversal of the district court order transferring custody of her child, J.R. (born 2003) to his father, Tim.¹ She argues the State did not prove by clear and convincing evidence there was a substantial change warranting modification of the disposition order. She also argues modification of custody was not in the child's best interests.

Our review of an action arising from a child in need of assistance (CINA) proceeding is de novo. Iowa R. App. P. 6.907. We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by these findings. *In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993). "Before a dispositional order in a juvenile proceeding can be modified, the party seeking modification must first prove a substantial change in material circumstances, and that under the new conditions, a change is in the best interests of the child or children." *In re D.G.*, 704 N.W.2d 454, 458 (Iowa Ct. App. 2005).

The Department of Human Services (DHS) became involved with this family in February 2012, due to a founded report of denial of critical care after Erin drove erratically while under the influence of prescription medication with J.R. in the car. The child was adjudicated in need of assistance in an April 26 order, pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2011). The July 18, 2012 dispositional order continued custody with Erin under DHS supervision with visitation to Tim.

¹ The parties do not have an order regarding custody of the child outside of juvenile court. They had an agreement regarding custody, but never a court order.

Tim and Erin were never married and it is apparent from the record they have a difficult time co-parenting. In mid-October, in preparation for a review hearing to be held at the end of the month, DHS prepared a report to the court suggesting custody be transferred to Tim because Erin “has not addressed her mental health or substance abuse issues to the point that [J.R.] would continue to be safe in her care.” A modification hearing started on November 27 and resumed on December 11 and January 8, to allow the parties ample time to present evidence. The district court specifically found:

It is clear to the court that [J.R.’s] mother, Erin, is desperate to maintain her possession and control of [J.R.], and that the desperation is escalating in her behavior. The relationship between Erin and Tim lacks communication, and Erin’s feelings toward Tim are fairly toxic. [J.R.] is increasingly suffering emotional distress from the stress of being part of his father’s home, and his bond and loyalty to his mother, primarily caused by Erin’s behavior.

The Family Safety, Risk, and Permanency (FSRP) service provider testified she thought J.R.’s best interests would be served living with Tim because Erin has not taken responsibility for the incident that initiated the involvement of DHS. The service provider also testified about an incident that occurred at Tim’s house in which J.R. witnessed Erin and Tim’s wife arguing over whether J.R. would stay the night as previously agreed upon. Police arrived at Erin’s request, calmed Erin down and had to ask her to leave. According to the service provider’s testimony J.R. was “extremely upset” by this situation and Erin had not considered the stress she caused her child.

The DHS worker also recommended transferring custody to Tim because of Erin’s unwillingness to give any more than lip service to changing her ways. Erin has not been dedicated to consistent compliance with the recommendations

for substance abuse treatment and individual therapy. She has also chosen to have a relationship with a man with an extensive criminal history, including violent assaults, but has no understanding of how this may be a danger to J.R.

The DHS worker has no concerns over the safety of Tim's home, nor does she have any concerns of an unfounded claim of sexual abuse of J.R. by another child. It was the DHS worker's opinion this accusation was perpetuated by Erin in part to keep J.R. in Erin's care.

Pursuant to Iowa Code section 232.102(5)(b), in order to transfer custody of a child, the court must make a determination that continuation of the child in the child's home would be contrary to the welfare of the child and shall identify the reasonable efforts that have been made. We agree with the district court the stress Erin is putting on J.R. by her poor decisions, with no realization of the severity, makes continuation of the child in her home contrary to his welfare. Since the dispositional order, Erin's increasing inability to co-parent with Tim has caused harm to J.R. There has been a material and substantial change of circumstances warranting the modification of custody. See *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991). While there is a close bond between Erin and J.R., his best interests are served by being in a safe home that will facilitate a relationship with both parents. Tim is more likely than Erin to provide that environment. We therefore affirm the district court.

AFFIRMED.