

IN THE COURT OF APPEALS OF IOWA

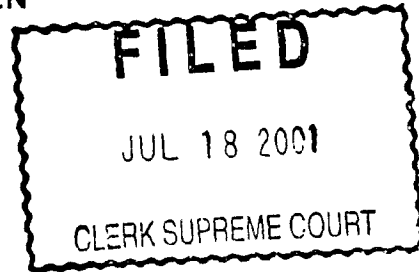
No. 1-383 / 00-1665

Filed July 18, 2001

IN RE THE MARRIAGE OF JANELL L. HENNINGSEN
AND CURTIS NORRIS HENNINGSEN

Upon the Petition of
JANELL L. HENNINGSEN,
Petitioner-Appellant,

And Concerning
CURTIS NORRIS HENNINGSEN,
Respondent-Appellee.



Appeal from the Iowa District Court for Palo Alto County, Joseph J. Straub, Judge.

Janell Henningsen appeals from the district court's ruling on petition to modify provisions of a prior modification decree. **AFFIRMED.**

Michael J. Houchins of Zenor & Houchins Law Office, Spencer, for appellant.

Scot L. Bauermeister of Fitzgibbons Law Firm, Estherville, for appellee.

Considered by R. Peterson, C. Peterson, and Harris, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

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C. PETERSON, S.J.

This is an appeal from an order of the trial court denying the application for modification of the decree of dissolution as it relates to physical care of four children of the marriage. Janell and Curt Henningsen were married on February 14, 1988. Four children were born of the union. A decree of dissolution of the marriage was entered on April 17, 1998, incorporating the stipulation and agreement of the parties which provided that Janell and Curt would have joint legal and divided physical care of the children. The parties were living in the same community at the time.

In a modification proceeding in October 1999 the court modified the decree of dissolution by granting primary physical care of the children to Curt. The court determined there had been a substantial change of circumstances because Janell had moved her residence to a location in Illinois more than 150 miles from the residence of the children at the time of the award of custody. The court further determined that Janell had engaged in inappropriate conduct in the presence of the children warranting a change in the physical custodial arrangement.

On March 8, 2000, Janell filed a new application for modification of the decree requesting physical custody of the children alleging a substantial change of circumstances based on an incident in which Curt is alleged to have struck one of the children with a yardstick leaving a bruise. She also asserted that her move back to the area of the children's residence represented a substantial change of circumstances.

The standard of review in these proceedings is de novo. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). We give weight to the findings of the trial court, which had the opportunity to view the demeanor of the witnesses when testifying, but are not bound by the findings. Iowa R. App. P. 14(f)(7); *In re Marriage of Sjulín*, 431 N.W.2d 773, 776 (Iowa 1988).

Janell is a joint legal custodian of the children pursuant to the modification order entered in October 1999 and is now seeking a change of physical care. She benefits from the inference she has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). However, in seeking a change of physical care, she carries a burden similar to that imposed on a parent seeking a change of custody. *In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). This court, on several prior occasions, has provided a comprehensive discussion of the concepts that govern the issue of change of physical care of children. They are applicable in these proceedings. The question is not which home is better, but whether Janell has demonstrated she can offer the children superior care. See *In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Janell must show an ability to minister to the children's needs, superior to Curt. See *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985). If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa Ct. App. 1992). The burden for a party petitioning for a change in a dissolution is heavy. See *In re Marriage*

of *Downing*, 432 N.W.2d 692, 693 (Iowa Ct. App. 1988). Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa Ct. App. 1988). Janell has the burden to show by a preponderance of evidence that conditions since the last modification of the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award custody to her. See *In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa Ct. App. 1985). Only four months elapsed after the modification order granting Curt primary care of the children when Janell filed this new application for modification of the decree to award primary physical care of the children to her. The primary issue is whether the occurrence of the use of a yardstick on the posterior of a child in the form of discipline by Curt is sufficient to warrant a change of physical care. Janell has also returned to the geographical vicinity of the children and requests the court to take that move into consideration in determining the existence of a substantial change of circumstances.

The alleged abusive use of the yardstick occurred on February 29, 2000. Curt acknowledges that he used a yardstick on the occasion as a punishment tool. There does not appear to be any dispute in the evidence that some type of discipline of the child was warranted under the circumstances. The child had pushed her younger sister into a piece of furniture causing a laceration on her

head. When the complaint was filed the Iowa Department of Human Services temporarily removed the children from Curt's physical care. After investigation the complaint was determined to be founded. Curt consented to counseling. The children were returned to Curt's home shortly thereafter when it was determined there was no risk of harm to the children in the home.

There is conflicting testimony concerning the incident and the size of the mark left on the child. The child's description of the incident varies substantially from Curt's explanation and the physical evidence. The child has expressed a willingness to do anything to be allowed to live with her mother, and the testimony she provides is highly suspect. The trial court discounted her testimony, and this court supports that conclusion. The trial court has had the opportunity to observe the witnesses and evaluate their credibility.

The examining doctor described the mark as a bruise approximately one centimeter by three centimeters. The emergency room report defined it as a red mark without tenderness. While there was evidence to the contrary concerning the nature of the bruise, this court is satisfied the trial court is correct in concluding the description by the doctor and the emergency room report is accurate. This is an isolated occurrence. Every adverse event should not be considered to be a basis for initiating a modification of a decree relating to the physical care of children. It is critical that stability be established and maintained for children after a dissolution action affecting their welfare. In this case only four months had elapsed since the order assigning physical care to Curt before Janell commenced another modification action.

It is difficult for a parent to accept the conclusion of a court that awards physical care of children to the other parent in a proceeding affecting children, but it is essential for the welfare of the children that the noncustodial parent use restraint in returning to court to revisit the issue of physical care unless the necessary elements are present to justify such action.

If other facts exist to bolster a conclusion warranting a change of physical care of the children a return to the geographic area of the children would enhance the basis for the change of care request by a petitioning party, but it would ordinarily not be a concluding factor in a modification of primary physical care proceedings. Janell has not established the prerequisite substantial change of circumstances warranting a change of physical care of the children. The decision of the trial court should be affirmed.

Appeal costs are assessed to the Janell. Each party shall pay his or her own attorney fees incurred in this appeal proceeding.

AFFIRMED.