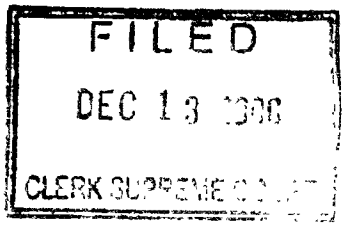
IN THE COURT OF APPEALS OF IOWA

No. 0-642 / 00-0190
Filed December 13, 2000



IN RE THE MARRIAGE OF PENNY MARIE HAMMER AND RAYMOND GARTH HAMMER

Upon the Petition of
PENNY MARIE HAMMER,
Petitioner-Appellant,

And Concerning
RAYMOND GARTH HAMMER,
Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, Kurt L. Wilke, Judge.

Penny Hammer appeals a district court order granting Raymond Hammer's petition to modify child custody. **AFFIRMED.**

James R. Cook of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines, for appellant.

Leonard R. Holland, Dayton, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

HUITINK, P.J.

Penny Hammer appeals from a district court decree granting Ray Hammer's petition for modification of the physical care provisions of the parties' divorce decree. We affirm.

I. Background Facts and Proceedings.

Penny and Ray Hammer's marriage was dissolved in March 1997. They were awarded joint legal custody of their four daughters. Penny was granted primary physical care, subject to Ray's right to liberal visitation.

On July 28, 1999, law enforcement officers raided Penny's residence and discovered a methamphetamine lab located in an appurtenant building. Penny's cohabiting boyfriend, David Stormer, was arrested and charged with manufacturing methamphetamine.

Based on these events and allegations of Penny's drug abuse, Ray filed this modification action seeking physical care of the parties' children. At trial Ray's evidence supporting these allegations included the entire criminal court file and minutes of testimony attached to the trial information charging Stormer with manufacturing methamphetamine. These minutes included testimony contradicting Penny's trial testimony denying knowledge of Stormer's activities and that she had not used drugs since 1998.

In granting Ray's petition the court found:

> This court does not believe that the operation of a meth lab on Penny's property was a one-time happening. This court does believe that Penny's boyfriend was operating the lab over an extended period of time with Penny's knowledge and likely assistance. The meth lab was operated in an outbuilding only feet from the residence housing the children, and the outbuilding itself contained toys used by the children to which they had easy access.

> The court finds that no matter how conscientious a mother Penny outwardly appears to be to her friends, she has completely shirked her parental responsibilities to her children by allowing the meth lab to exist on her premises. That situation constitutes a material and substantial change in circumstances not contemplated by the parties or by the court at the time of the divorce decree . . . .

Penny subsequently filed a motion for new trial pursuant to Iowa Rule of Civil Procedure 179(b), arguing that the court erred in admitting the confidential minutes of testimony into evidence and alleging Ray committed and attempted to suborn perjury. In denying this motion, the court stated:

> As an aside, this court is uneasy about either of these parties having custody of the children. As stated in the December 15 order, the Respondent showed little fatherly responsibility prior to August 1999. It is this court's hope that he has dramatically improved. If not, there will no doubt be other changes in custody for these young children in the future. As for the Petitioner, she needs to learn that truth is essential in these proceedings. In her affidavit she states, "David Stormer had his trial last week and the prosecuting attorney as well as his own attorney both asked the judge for a deferred sentence." Finding that quite amazing in light of the charges against him this court contacted the Boone County Attorney and learned that Petitioner's sworn statement is quite false. Mr. Stormer has yet to be sentenced and the prosecuting attorney has no intention of recommending a deferred sentence. . . .

On appeal Penny maintains that the trial court erred in reviewing and considering the confidential minutes of testimony from Stormer's criminal case and in making an ex parte inquiry of the county attorney who prosecuted Stormer concerning a factual matter raised in Penny's motion for a new trial. Penny seeks a remand for a new trial without this evidence or, alternatively, reversal of the district court's decision on the merits.

II. Standard of Review.

In equity actions our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value; we must base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. The Merits.

First, we note that trial court took judicial notice of the confidential minutes of testimony subject to Penny's objection. This was in accordance with the usual equity practice in Iowa. The rule of evidence in equity cases is that the trial judge, while noting objections, may not exclude offered evidence. *O'Dell v. O'Dell*, 238 Iowa 434, 465, 26 N.W.2d 401, 417 (1947); *United Props, Inc., v. Walsmith*, 312 N.W.2d 66, 73-74 (Iowa App. 1981). Furthermore, since the evidence was taken subject to the objection, there is no ruling for us to review. *O'Dell*, 238 Iowa at 465, 26 N.W.2d at 417 (citing *Baadte v. Walgenbach*, 185 Iowa 773, 780-81, 171 N.W. 146, 148-49 (1919)). The purpose of this practice is to preserve a complete record for the trial and appellate courts, leaving to them the rejection of inadmissible evidence when deciding an issue and, upon the appellate court's review de novo, it thus may decide the case without remand. *Id.* at 465-66.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. *Smiley*, 518 N.W.2d at 378-79. The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983); *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987).

We, following our de novo review, reach the same decision as the district court with or without consideration of the minutes of testimony from Stormer's criminal case. The presence of the methamphetamine lab near Penny's home and her cohabitation with its operator are not disputed. There is also evidence of Penny's drug abuse and her less than truthful testimony denying that fact. The presumptive risk these activities pose to the Hammers' children clearly outweighs the district court's concerns for Ray's parental failures. We affirm on this issue.

We also reject Penny's claims concerning the court's ex parte communication with the county attorney. The results of this communication are not dispositive, nor do they necessitate a remand. The propriety or impropriety of this inquiry is not for us to decide. We affirm.

AFFIRMED.