IN THE COURT OF APPEALS OF IOWA

No. 7-663 / 07-0376
Filed December 12, 2007

Upon the Petition of
STEVEN D. MELSHA,
Petitioner-Appellee,

And Concerning
MARY C. WEGMULLER,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Mary Wegmuller appeals the district court order denying her writ of habeas corpus and temporarily modifying the parties' child custody decree. **AFFIRMED IN PART, REVERSED IN PART.**

Thomas F. Ochs of Gray, Stefani & Mitvalsky, P.L.C., Cedar Rapids, for appellant.

Sheree L. Smith, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Mary Wegmuller appeals the district court order denying her writ of habeas corpus and temporarily placing custody of her son, Hunter Melsha, with his father, Steven Melsha. She contends the district court did not have personal jurisdiction to enter the temporary modification of the existing custody order. She further contends the court erred in determining emergency orders were necessary.

I. Background Facts and Proceedings. Mary and Steven are the never-married parents of Hunter, born in December of 1996. In 1997, they stipulated to joint physical care of Hunter. Since then, many actions have been filed regarding Hunter's care. In 2004, the parties stipulated that Mary should have physical care of Hunter.

In March 2006, Steven assumed care of Hunter. On November 2, 2006, Mary filed a petition for writ of habeas corpus (No. CVCV 056313), seeking an order compelling Steven to produce Hunter before the court. Following a November 14, 2006 hearing, the court entered a temporary order requiring Hunter to remain in Steven's care.

On November 17, 2006, Steven filed a petition to modify the child custody provisions of the March 2004 decree (No. EQCV 030406), which was served on Mary in February 2007. However, in a November 30, 2006 order, based on the hearing held on November 14, the district court denied Mary's writ of habeas corpus and placed physical care of Hunter with Steven "[b]y way of temporary orders in EQCV 030406."

On December 8, 2006, Mary filed a motion to enlarge, alleging the district court did not have personal jurisdiction to temporarily modify custody because she had not been served with the modification petition at the time the court's order was entered. The court denied the motion, finding "it had authority to render the decision it did because the relevant parties were before the Court and there was opportunity for a sufficient record to be made." Mary appeals.

II. Scope and Standard of Review. Habeas corpus proceedings, when involving the custody of children, are equitable in nature and are reviewed de novo. *Eddards v. Suhr*, 193 N.W.2d 113, 116 (Iowa 1971).

III. Analysis. Mary first contends the district court erred in finding it had personal jurisdiction sufficient to temporarily modify child custody. She alleges she did not have notice prior to the November 14, 2006 hearing that Steven was seeking modification of the existing custodial order.

An equity court retains jurisdiction over proceedings to make such modifications as are warranted by future change of circumstances. *See In re Marriage of Meyer,* 285 N.W.2d 10, 11-12 (Iowa 1979). However, parties are entitled to notice and an opportunity to be heard before changes in the original decree are made. *In re Marriage of Garretson*, 487 N.W.2d 366, 367 (Iowa Ct. App. 1992). The notice given must apprise the party to be notified of the proceedings filed and afford that party a reasonable opportunity to appear and be heard on the issue. *See Catholic Charities of Archdiocese of Dubuque v. Zalesky,* 232 N.W.2d 539, 547 (Iowa 1975).

Here, Mary was not provided with notice of the modification action. Accordingly, the trial court did not have jurisdiction over the matter. *See Gray v.*

Lukowski, 241 N.W.2d 35, 39 (Iowa 1976). The fact that Mary had notice of the habeas corpus action does not cure this defect. *See Garretson*, 487 N.W.2d at 369 (finding notice of contempt proceedings did not confer jurisdiction over a party for purposes of modifying a dissolution decree). Even if we are to assume Mary had personal knowledge of the action without having been served, the modification action was not filed until three days after the habeas corpus hearing, denying Mary a reasonable opportunity to be heard on the matter. *See id.*

Notwithstanding the district court's error in granting Steven temporary physical care in the modification action, we conclude the court had the power to grant temporary custody to him under its general habeas corpus powers. *See Lamar v. Zimmerman*, 169 N.W.2d 819, 822-23 (Iowa 1969) (determining in a habeas corpus action to whom custody of a child should be granted following the death of the parents). In such cases, the best interest of the child is determinative. *Id.* at 822. Because our review is de novo, we find the child's best interests are served by temporarily granting Steven physical care of Hunter. We are mindful that the modification action is still pending and should be decided soon. However, the record made at the habeas corpus hearing supports the temporary modification of physical care. Hunter has been out of Mary's care since March 14, 2006, when she left him alone in order to drink at a bar. Since that time, Mary has not had regular contact with her son. Conversely, Steven has provided Hunter with needed stability while Mary has struggled with her alcohol abuse issues. Furthermore, Mary did not take steps to have Hunter returned to her care. *See Eddards*, 193 N.W.2d at 117 (denying a habeas

corpus request and holding a parent's apparent indifference or acquiescence to the child's placement with the other parent is entitled to consideration).

We reverse the portion of the district court order modifying temporary physical care of the child under the modification action, but affirm the district court's actions under the habeas corpus action.

AFFIRMED IN PART, REVERSED IN PART.