

LEXSEE

Jennifer Elaine Behunin, Plaintiff and Appellant, v. Dean Farlan Behunin, Defendant and Appellee

Case No. 20040874-CA

COURT OF APPEALS OF UTAH*2005 UT App 459; 2005 Utah App. LEXIS 440***October 27, 2005, Filed****NOTICE:** [*1] NOT FOR OFFICIAL PUBLICATION**PRIOR HISTORY:** Third District, Salt Lake Department, 004907012. The Honorable Stephen L. Henriod**DISPOSITION:** Affirmed.**COUNSEL:** John R. Bucher, Salt Lake City, for Appellant

Marsha M. Lang, Salt Lake City, for Appellee

JUDGES: James Z. Davis, Judge, Carolyn B. McHugh, Judge, Gregory K. Orme, Judge**OPINION**

MEMORANDUM DECISION

Before Judges Davis, McHugh, and Orme.

PER CURIAM:

Jennifer Behunin (Mother) appeals the decision on a petition to modify child custody. A default divorce decree ordered joint legal custody with physical custody awarded to Mother. The modification left joint legal custody in place, but changed physical custody from Mother to Dean Behunin (Father).

A court considering a petition to modify custody conducts a bifurcated inquiry, determining "if there has been a substantial and material change in the circumstances upon which the award was based, and, if so, whether a modification is in the best interests of the child." *Hudema v. Carpenter*, 1999 UT App 290, P 22, 989 P.2d 491. If the initial custody award is based upon a default decree, the inquiry into changed circumstances "is necessarily less rigid because the trial court has not previously had [*2] an opportunity to make a thorough

examination of the child's best interests." *Maughan v. Maughan*, 770 P.2d 156, 160 (Utah Ct. App. 1989). Thus, the trial court "may properly focus its inquiry into the effects on the child of the established custodial relationship as it has developed over time." *Id.* (citation omitted). "The court may accept a greater range of evidence . . . regarding the initial custody arrangement, the events that have transpired, and the resulting effects on the child." *Id.* The factual findings underlying the determinations of material change of circumstances and the children's best interests "may not be disturbed unless clearly erroneous." *Hudema*, 1999 UT App 290 at P 21. The legal conclusion "as to whether a material change in circumstances has occurred that would warrant reconsidering the divorce decree is reviewed for an abuse of discretion." *Id.* Finally, the award of custody is "reviewed for abuse of discretion." *Id.*

Mother challenges the district court's determination that there has been a substantial change of circumstance to support reopening the custody determination. The district court found that "since [*3] the Decree of Divorce, [Mother] has moved five times and has had relationships with multiple men, two of which are convicted felons." Mother does not dispute that she and the children had five residences during the period between the entry of the initial decree in November 2000 and the trial on the petition to modify in July 2004. However, she argues that she did not move during the year prior to the trial. Mother challenges the remainder of the factual finding, i.e., that she had relationships with "multiple men including two convicted felons." The evidence established that Mother had relationships with two convicted felons and remains married to one of those men. Although the term "multiple" may be hyperbolic, its impact is negligible. The factual findings concerning Mother's five changes of residence and her relationship with two convicted felons are not clearly erroneous.

Mother's challenge to the determination of a substantial and material change of circumstances argues that those changes either were not significant or they had abated by the time of trial. She contends that her "short-lived relationships" with two convicted felons are in her past, although she admitted that [*4] she remains married to Larry Steely. While Mother challenges only isolated portions of the findings of fact, the district court supported its determination of a material change of circumstances with factual findings on the impact of the original stipulated physical custody award on the children since the divorce. The court found that the parents had engaged in a significant amount of conflict since their separation, and that the oldest child was too aware of this conflict. The court found that the level of conflict placed the children at risk for behavioral problems. The court further found that while Mother met the children's basic needs, she has been less attentive to the children since the divorce and has not provided stability for the children, principally as a result of her relationships with men. Since the separation, Father had maintained consistent visitation, except for a period when the parents did not cooperate on transportation issues. Father had exhibited better disciplinary skills and his life had been more

stable since the parties' separation. On the basis of the evidence, including a custody evaluation, the court determined that a substantial change of circumstances [*5] had occurred and that it was in the best interests of the children that Father be granted the primary physical custody within the joint legal custody arrangement.

The court made specific findings on each of the rule 4-903 considerations for child custody awards, which are not specifically challenged. *See* Utah R. Jud. Admin. 4-903. The court found that the children were more closely bonded to their father, they have had less stability in their mother's home than if they had been with their father, and the mother's relationships since the divorce "have been ill-advised and have contributed to [the] lack of stability."

Based upon the foregoing, we affirm the decision of the district court on the petition to modify.

James Z. Davis, Judge

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge