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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-660 / 90-567

IN RE THE MARRIAGE OF MARY SUE OSWALT AND WARREN LEVI OSWALT

Upon the Petition of
MARY SUE OSWALT, n/k/a MARY SUE TRUJILLO,

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Appellee,

And Concerning
WARREN LEVI OSWALT,

Appellant.

Appeal from the Iowa District Court for Warren County, J. W. Jordan, Judge.

Father appeals modification of dissolution decree custody provision and placement of child in the physical care of the mother. **AFFIRMED.**

Gary J. Shea of the Shea Law Office, Cedar Rapids, for appellant.

Emil Trott Jr., Des Moines, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Respondent, Warren L. Oswalt, father of nine-year-old daughter Nicole, appeals a district court ruling modifying his marriage dissolution decree custody provision. The original decree, as affirmed by this court in In re Oswalt, 432 N.W.2d 167 (Iowa App. No. 8-89/87-871, filed June 29, 1988) (table), ordered joint custody and placed the child in his primary physical care. On a motion for modification made by petitioner, Mary Sue Oswalt (now known as Mary Sue Trujillo), mother of Nicole, the district court modified the decree and ordered the child be placed in her mother's primary physical care. We affirm the order modifying the decree.

I. Nicole's parents have been battling over who should have primary physical care and custody of her for nearly half of her life. The district court dissolved the Oswalts' eight-year marriage in 1987. The decree granted joint custody but placed Nicole in the primary care of her father. On appeal we agreed with the district court's placement and noted that Warren apparently was willing and better able to fulfill his daughter's physical and emotional needs. Oswalt, slip op. at 6-7. We also stated, "He recognizes Nicole's need for extensive contact with both parents and expresses a willingness to allow liberal visitation privileges to the petitioner." Oswalt, slip op. at 7. We, like the district court, were concerned about Mary Sue's relationship with a Peruvian resident alien. Oswalt, slip op. at 7.

After several days of hearings, the district court filed extensive findings in support of its conclusion that Mary Sue had established a substantial and material change of circumstances. The court noted that Mary Sue had married Fred Trujillo and had established a stable home environment. Although Mr. Trujillo is a recovered alcoholic who had a "stormy" prior marriage in which he may have physically abused his own children, the court recognized that he "shares a positive relationship with Nicole." Nicole prefers to live with her mother and views her as the primary caretaker notwithstanding the dissolution decree. The court also found that Nicole had entered a formative stage in which she needs a positive female role model and family structure which she did not have in her present living arrangement with her paternal grandparents, an uncle, and her father. The court expressed concern that Warren failed to provide timely medical care for Nicole's colds and allergies and that her father fails to provide adequate sleeping quarters.

The district court also found that Warren and his family consistently denigrate Mary Sue and her new husband within the child's hearing. While we cannot fault Warren for limiting visitation to the barest minimum provided by the decree, he has prevented Nicole from participating in church events with her mother. He also failed to inform Nicole's school of Mary Sue and, consequently, prevented Mary Sue from knowing about school events. He refuses to

discuss with or allow Mary Sue to participate in raising Nicole, especially in the areas of school activities and medical needs.

The district court received much psychological evidence. Warren has expressed both open and repressed hostility toward Mary Sue, her new husband, and her family. This has included active opposition to allowing Nicole contact with her maternal grandparents and Mr. Trujillo. The district court also found that an incident which resulted in two physical abuse allegations against Warren contributed to the change of circumstances. In that incident, Warren picked up the child and threw her against a couch. Although it left her physically uninjured, she was considerably scared by it. All of this has had a negative effect on Nicole.

II. As in all cases involving the custody of a child, our primary and abiding concern is the best interests of the child. Iowa R. App. P. 14(f)(15). This action is in equity and our review is de novo. Iowa R. App. P. 4. In equity cases we give weight to the fact findings of the district court, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Iowa Code section 598.21(8) permits the district court to modify orders when there is a substantial change of circumstances. The supreme court has held that one who seeks a change in the custodial provision of a dissolution decree "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." In re Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). The supreme court has further stated:

> The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

Id.

III. Our de novo review of the record leads us to the same conclusion reached by the trial court. Warren devotes most of his argument not to refuting the findings of the district court, but to attacking the fitness of Mary Sue's new husband. The district court specifically found the allegations were "not substantiated by credible testimony." The court further stated: "Judging from Fred's demeanor and the corroborating testimony of [a clinical psychologist], Fred is now a productive and stable individual who behaves appropriately to Nicole in his role as stepfather." The record demonstrates that Mary Sue's personal life has changed substantially for the better. In fact, the record shows that the marriage appears to be stable and the home environment is suitable. It also shows

that Mary Sue has more quarters available for Nicole while Warren has less. These changes are anticipated in Iowa Code section 598.21(8), subsections (a), (f), and (g).

The record also shows that Warren's mental and emotional state as it relates to the dissolution and child custody matters has changed since the original dissolution decree. See Iowa Code § 598.21(8)(e). Clearly, his hostility, both expressed and repressed, has an adverse impact on and prevents growth in the relationship each party has with the child. This is in stark contrast to our previous findings.

Warren contends that the court's finding that Nicole needs a mother figure is discriminatory. We disagree. The court is obligated under Iowa Code section 598.21(8)(i) to consider the physical, emotional, and educational needs of the child. Thus, it was not unreasonable or inappropriate for the court to cite this as one of many factors it considered. Nor do we find that the court relied upon this for reasons clearly untenable or to an extent which was unreasonable. While certainly not controlling, Nicole's preference for which parent with whom she wishes to live also is entitled to some consideration, In re Jones, 309 N.W.2d 457, 461 (Iowa 1981) (citing In re Burham, 238 N.W.2d 269, 276 (Iowa 1979)), as is the fact that she identifies her mother as the primary caregiver.

We do not seek to degrade either party. It is evident that both parents love Nicole and have a strong desire to

be her full-time caretaker. Nevertheless, we must make our decision based upon the evidence presented. Upon de novo review, we conclude that petitioner has carried her burden to prove a substantial change of circumstances not contemplated by the dissolution court and bearing on the welfare of the child. Frederici, 338 N.W.2d at 158. We hold that the interests of Nicole are best served by allowing her mother Mary Sue Oswalt, now known as Mary Sue Trujillo, to have primary physical care of Nicole consistent with the order entered by the district court which we now affirm.

IV. Respondent, Warren Oswalt, further complains that the trial court erred in awarding $4,000 toward legal fees to the petitioner. He apparently argues that he is unable to pay these fees and that it was an abuse of discretion to make the award. Petitioner argues that we should refuse to consider this assignment of error because the issue was added after a designation of appendix and statement of issues were filed. Respondent contends that the issue is adequately raised and presented in the appendix.

Assuming the issue to have been properly raised, we find that the award of attorney fees was proper and not an abuse of discretion. An abuse of discretion generally is characterized as being exercised "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140

(1974)). It is well recognized that Iowa trial courts have considerable discretion in awarding attorney fees. In re Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Awards of attorney fees must be for fair and reasonable amounts, In re Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We reject respondent's contentions that this is an unfair or unreasonable amount and that it is outside his ability to pay. We, like the district court, find that he is able to fulfill this obligation. His intransigence during discovery and prolonging the district court proceedings increased her attorney fees and further justifies this award.

V. Upon de novo review we hold that Mary Sue Trujillo should have primary physical care of Nicole. We further hold that the district court did not abuse its discretion in ordering Warren Oswalt to pay part of Mary Sue's attorney fees.

AFFIRMED.