IN THE COURT OF APPEALS OF IOWA

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

Upon the Petition of	)	
MARY SUE OSWALT,	)	
Petitioner-Appellant,	)	Filed June 29, 1988
And Concerning	)	
WARREN LEVI OSWALT,	)	8-89 / 87-871
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Warren County (No. DM 6-392), James W. Brown, Judge.

Petitioner appeals from the decree of dissolution entered in the district court which grants physical care of the parties' minor child to respondent. **AFFIRMED.**

Griff Wodtke and Emil Trott, Jr. of Barrett & Trott, Des Moines, for petitioner-appellant.

Luis Herrera, Des Moines, for respondent-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Petitioner, Mary Sue Oswalt, and respondent, Warren Levi Oswalt, were married in 1979. They have one child, Nicole, born on January 23, 1982.

A dissolution action was initiated April 25, 1986. In its dissolution decree, the district court awarded joint custody to both parents with the respondent having physical care of Nicole. Petitioner appeals and in doing so challenges the physical care provision of the decree. In addition, petitioner raises certain procedural questions. We affirm.

I.

The petitioner first asserts that the trial court abused its discretion when it declined her request to reopen the evidence. We disagree and affirm the trial court in this respect.

The trial court filed its "Findings of Fact, Conclusions of Law and Ruling" on April 14, 1987. In its findings the court concluded that the petitioner and respondent should have joint custody of their minor child and that the respondent is to have her physical custody. The respondent was then directed to prepare a decree consistent with the court's ruling for the court's signature.

On May 8, 1987, petitioner filed a rule 244 motion for new trial and a rule 179(b) motion to enlarge findings. As a part of the motion for new trial, petitioner, for the first time, asked the court to appoint an attorney for the child.

On May 12, a hearing was held concerning petitioner's request to reopen the evidence. Testimony was taken and a complete record was made. The court, on May 21, ruled that the two motions were not timely filed, therefore, it declined to rule on the merits of the request.

There were certainly extenuating circumstances concerning the reason for the delay in filing the two motions. However, neither the petitioner nor the respondent challenge the court's timeliness ruling on appeal. Therefore, we will not address that issue.

The petitioner secured new counsel and on June 1, 1987, filed a motion asking the court to reconsider its May 21, 1987, ruling. In this motion, she requested the court to treat her motion for new trial as a motion to reopen the case for the reception of additional evidence. Alternatively, she asked that the court consider her June 1 motion to reconsider as a motion to reopen.

The court on June 19, 1987, ruled on the "pending motion and applications." After recognizing the request of the petitioner that her motion for new trial and to enlarge be treated as a motion to reopen the record to allow additional evidence the court stated, "Even conceding the court has inherent authority to reopen the record after filing its Findings, Conclusions, and Ruling, it would not be appropriate to do so in this case."

The trial court further stated:

> In the court's view, the May 12 testimony, even standing unrebutted, would not change the result. The tenuous conclusions drawn by the minimally qualified expert are not too convincing. The witness, although a mandatory abuse reporter, did not feel compelled to make such a report. However, there is a suggestion that there was then an ongoing abuse investigation instigated by another source, but there is no indication, then or now, that the respondent, or his family, is adversely implicated. Of course, if those accusations should turn out to have some basis, the judicial process would be available. The petitioner was fully aware of the drawings made by Nicole before trial. After consulting with experts about them she concluded they were of no significance. Even if they did have significance, laying it at respondent's door, rather than petitioner's, would be yet another matter.

The evidence the court had reference to and which was presented by petitioner to support her position for a new trial (or petition to reopen) is before us by the record. In our de novo review, we concur with the decision of the trial court.

It is clearly the law in Iowa that motions should be decided on the basis of their substance, not their labels. Davenport Bank and Trust Co. v. City of Davenport, 318 N.W.2d 451, 454 (Iowa 1982). But here we need not decide whether petitioner's motion for new trial and to enlarge are in reality motions to reopen, for the trial court determined that even if it had the right to hear these motions as motions to reopen it would not be appropriate to do so under the facts of this case. In either event, the significance of converting or treating the two motions in dispute into a motion to reopen loses its importance for the petitioner requested, in the alternative, that her June 1 motion to reconsider be treated as a motion to reopen.

What is significant here is that the trial court had before it, as we do, the record on which petitioner relied as the grounds to reopen. The trial court considered that evidence and concluded that it would not change the result of its findings.

We too have that evidence before us. The newly-discovered evidence relied on by the petitioner was known before and during the course of the trial. The petitioner was aware of the drawing before trial and after consulting with experts concluded they were of no significance. The trial court found that the conclusion reached by petitioner's expert at the posttrial hearing was not convincing and that the expert's testimony standing unrebutted would not change the results. Even with the material the expert had before her, she did not, as a mandatory abuse reporter, feel compelled to file a report. We do not find that the court abused its discretion when it did not reopen the record to permit additional testimony.

In reaching this result, we note that trial courts have "broad discretion to reopen the evidence." In re J.R.H., 358 N.W.2d at 318. The court, under the particular facts of Mealy v. Scott, 242 Iowa 787, 48 N.W.2d 262 (1951), approved reopening after the trial court filed its finding to allow additional testimony relating to damages. In addition, there are circumstances under which a trial court may change its ruling before final judgment is entered. Avoca State Bank v. Merchants Mut. Bonding Co., 251 N.W.2d 533, 539 (Iowa 1977). But in light of the trial court's method of ruling and after our de novo review of the record we conclude that the trial court did not abuse its discretion when it declined to reopen the record to permit additional testimony.

II.

We turn next to the petitioner's charge that the court abused its discretion when it failed to appoint an attorney under Iowa Code section 598.12 (1987) to represent the interest of the minor child. This request was made after the court filed its findings and conclusions and procedurally was a part of petitioner's motion for new trial.

The appendix contains only the request for the appointment of counsel and the court's ruling. The petitioner's motion for new trial and request for appointment of counsel insofar as it is pertinent to this divison reads: "Petitioner prays that the Court order a mistrial and that an attorney be appointed to represent the interest of the minor child." The court overruled the motion on the ground of timeliness of filing.

We find that the trial court did not, under the circumstances here, abuse its discretion in declining the petitioner's request. Section 598.12 provides the court may appoint an attorney to represent the interests of the minor child or children of the parties. The provisions of this section are directory only and not mandatory. Boyer v. Boyer, 247 N.W.2d 265 (Iowa 1976). Our de novo review of the record brings us to the conclusion that the trial court acted within the latitude of permissible discretion in refusing to appoint counsel. This is particularly true in this case for the trial court had denied the request for a new trial and had by its findings given custody of Nicole to the respondent.

Under the circumstances here, we find no necessity to decide whether the trial court committed error when it determined that the request was not timely made. The trial court was otherwise correct. We affirm in this respect.

III.

We turn finally to the question whether the trial court erred in awarding primary physical care of the minor child to the respondent. Each case is different. The court's decision depends on the particular facts of each case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

Our review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). In deciding upon physical custody, we review many factors. See In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). However, the focus of a child custody determination is, of course, on the long-range best interest of the child. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986); In re Marriage of Ertmann, 376 N.W.2d 918, 921 (Iowa App. 1985). Iowa R. App. P. 14(f)(15).

The record before us reveals a number of reasons why respondent should be delegated the responsibility of being the primary custodian of Nicole. At trial, he testified that he felt he could and would make a more extensive physical and emotional commitment to the child's education and development than would petitioner. He has demonstrated that he is well able to physically take care of Nicole. He reads to and with her. He attended to her needs when she was younger, prepared meals for her, and spent more time with her than petitioner. The trial court stated that respondent had an intense desire to continue as Nicole's custodian. Considering the record in its entirety, we concur.

One of the objections petitioner raises to respondent being awarded the physical custody of Nicole is that she would be living at the farm with Warren, his twin brother, and parents. Although she complains that there would be a lack of discipline, she admits no harmful activity would be permitted. There is nothing in the record which would support even an inference that the farm and family environment of the respondent's farm would be harmful. Actually, it appears that Nicole likes the farm and has adapted well to its surroundings.

Respondent has demonstrated a concern for Nicole's development and has displayed an ability to carry this out in terms of available time and effort. He recognizes Nicole's need for extensive contact with both parents and expresses a willingness to allow liberal visitation privileges to the petitioner.

In reaching this result, like the trial court, we do not denigrate petitioner's parental role and contribution. She, too, is devoted to Nicole. There are, however, the several circumstances on her part that strengthen the finding that respondent should be granted physical care of Nicole.

To detail each of these incidents would serve little, if any, purpose. Insofar as this ruling is concerned, we will but touch on them in passing. There is the trip to Peru with Mr. Barret that resulted in sexual activity at a time when Nicole was close by, although the claim is made that Nicole was asleep; because of petitioner's relationship with Mr. Barret, she gave false testimony while under oath in, as the trial court described it, "a misguided effort to protect Mr. Barret." Petitioner either forged, or participated in forging with Barret, respondent's name to a false lost baggage claim, and she spent considerable money on Mr. Barret when, as the trial court stated, "the Oswalts could ill afford it."

We conclude that the trial court was correct in naming respondent as the primary physical custodian of Nicole. We affirm on this issue.

AFFIRMED.