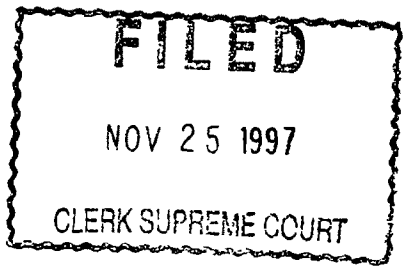
IN THE COURT OF APPEALS OF IOWA

No. 7-512 / 97-217

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IN RE THE MARRIAGE OF PAUL T. CROMWELL, JR. AND CASSANDRA L. CROMWELL



Upon the Petition of
PAUL T. CROMWELL, JR.,
Appellee,

And Concerning
CASSANDRA L. CROMWELL,
Appellant.

Appeal from the Iowa District Court for Cherokee County, James D. Scott, Judge.

Cassandra Cromwell appeals the modification of the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Daniel A. Meloy, Cherokee, for appellant.

David Wm. Patton, Storm Lake, for appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

This appeal involves our determination of whether, in a modification action, substantial evidence of a material change of circumstances was presented by the father to warrant a change in the primary physical care of two children. A complicating factor is that Paul Cromwell is the biological father of only one of the children transferred to his care. The mother, Cassandra Cromwell, appeals.

Background facts. At the time of their marriage in 1990, Paul was 21 and Cassandra was 16 and pregnant with a daughter, Christine. There has never been any dispute that Paul was not the biological father. The parties had one daughter, Stephanie, during the marriage.

Both Paul and Cassandra sought physical care of Christine and Stephanie in the dissolution proceedings. In the decree, the court noted that Cassandra had an advantage with respect to Christine in that Paul was not her biological parent. The court found that the children should not be separated, and accordingly, Paul would have to overcome the presumption that it was in Christine's best interests to remain with Cassandra in order for the court to grant him physical care of either child. Although the court found Cassandra to have some "bad points" as a parent, it determined that both parties would make suitable caretakers for the children. The court also noted that Cassandra had been the primary caretaker for the children for

most of their lives. The court granted the parties joint custody of both children, physical care with Cassandra, and liberal visitation to Paul.

On April 1, 1996, Paul filed an application for modification of the physical care provisions of the decree. The district court granted the application on January 21, 1997. Paul was given primary physical care of both children, and Cassandra was ordered to pay $50.00 each month per child in support, with the same visitation privileges originally given Paul.

Cassandra appeals.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

Primary physical care. It is this court's task to determine whether Paul showed a material and substantial change in circumstances warranting transfer of physical care to him. We must further consider Paul's position as a non-biological parent seeking primary physical care of Christine.

In a modification action, the changed circumstances must be permanent in nature and relate principally to the welfare of the children. *See In re Marriage of*

Frederici, 338 N.W.2d 156, 158 (1983). A parent seeking to take over physical custody from the other spouse must "prove an ability to minister more effectively to the children's well-being." *Id.*; *In re Marriage of Sprague*, 545 N.W.2d 325, 327 (Iowa App. 1996). Once fixed, custody should be disturbed for only the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). In resolving a child custody dispute between a non-parent and a natural parent, Paul must overcome the presumptive preference for parental custody, establishing the unsuitability of Cassandra as Christine's biological parent. *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995).

Cassandra's life has been much less stable than Paul's since the time of the decree. She and her boyfriend, Duane, have moved seven times in a two-year period. Some of the homes were unkempt, and one in particular did not have running water or sewer service from January 1995 to May 1995.

Cassandra also has not lived up to some promises she made in prior proceedings. She had been found in contempt on August 29, 1996 for refusing to abide by the visitation orders; she had not obtained a job nor furthered her education, and she was remiss in enrolling the girls on-time at different schools when they moved.

Moreover, Cassandra continually exposed the children to foul language, failed to properly supervise them, and on occasion the children have been improperly

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clothed. A neighbor of Duane and Cassandra's while they lived in Sutherland, Iowa, testified he saw the police at the couple's residence approximately twenty to thirty times. Another neighbor in Sutherland testified that one day "[Cassandra] was rolling around and dancing around like a fairy, you know, in the yard." Several neighbors described the outside of Cassandra's residence as a pig pen, and one neighbor related it looked so bad it had earned a "city dump" sign. Additionally, the girls' preschool teacher, whose testimony the trial court found to be extremely credible, visited the home and described the inside as cluttered and filthy.

We are concerned also with Cassandra's boyfriend, Duane, who has been living with Cassandra and the girls since 1994. Duane was unemployed for at least half of that period. He has a criminal history with several drug convictions, one of which occurred in 1996, and a domestic abuse conviction from a prior relationship. On one occasion, he was involved in a high speed chase with a sheriff's deputy with the children in the car.

Conversely, since the time of the decree, Paul, 27 years old and healthy, has been steadily employed with a good home in Lake View, Iowa. He also has much of his extended family in the Lake View area who are involved in the children's lives and who are very supportive. Paul has remarried and maintains a good relationship with both children.

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Paul has met his burden of proving a substantial change of circumstances. Having met this burden, however, does not allow us to affirm the placement of both girls with him, without considering his role as a nonbiological parent to Christine. We cannot grant primary physical care where no parental rights exist, and where, under *Gallagher* and its antecedents (*see generally In Petition of Ash*, 507 N.W.2d 400, 403 (Iowa 1993) and *In re Marriage of Halvorsen*, 521 N.W.2d 725, 728 (Iowa 1994)), the facts to not rise to the status of equitable parenthood.[1] However, the original decree filed August 12, 1994, granted Paul joint custody of Stephanie. There was no appeal taken from that decree. The modification decree confirmed joint custody with Paul. Finally and significantly, Cassandra did not raise the joint custody issue in either the modification action nor this appeal. Paul's joint custodial rights, therefore, are not before us on appeal. It follows that Cassandra cannot now argue that Paul has no right to primary physical care when she failed to appeal the joint custodial decision of the dissolution court, and has not raised, nor argued the joint custodial decisions of the modification court in this appeal.

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[1] Equitable parenthood may be established properly when a father establishes he was married to the mother when the child was conceived and born, when he reasonably believes he is the child's father, he establishes a parental relationship with the child, and shows that judicial recognition of the relationship is in the child's best interests. *See Gallagher*, 539 N.W.2d at 481.

Having carefully considered all arguments before us, we affirm the trial court's placement of Stephanie and Christine with Paul, finding that Paul has shown a substantial change of circumstances. Costs on appeal assessed to Cassandra .

AFFIRMED.