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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF HAROLD R. GLANN AND GAIL J. GLANN

Upon the Petition of)

HAROLD R. GLANN,) Filed March 9, 1988

Petitioner-Appellee-Cross-Appellant,) 152

And Concerning) 7-504 87-311

GAIL J GLANN,)

Respondent-Appellant Cross-Appellee.)

Appeal from the Iowa District Court for Polk County (CD 051-30250), *Rodney J Ryan and Jack D. Levin, Judges.*

Petitioner filed a motion for new trial based on newly discovered evidence following a dissolution and stipulated order in December 1986. **REVERSED.**

Larry D. Knox, Des Moines, for respondent-appellant.

Robert A. Bartolomei, Des Moines, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J. 153

The petitioner filed a motion for new trial based on newly discovered evidence following a dissolution and stipulated order in December 1986. The motion was granted, but the trial court limited the new trial to custody and related financial issues, noting that the petitioner must prevail in a significant way on the custody issue before consideration would be given to the financial matters. The respondent appealed, claiming that the evidence of alleged sexual dalliance on her part did not warrant a new trial. She also argues that the requirements for a new trial have not been met. The petitioner cross-appeals, claiming that the new trial should not be restricted as to content. He further challenges a protective order preventing a deposition of the respondent until after the time for filing an appeal had passed. Each party also seeks attorney fees connected with this appeal. As this case was tried in equity, our scope of review is de novo. Iowa R. Civ. P. 4. We reverse.

After fifteen years of marriage, the petitioner, Harold Glann, filed a petition for dissolution of his marriage to the respondent, Gail Glann. On December 10, 1986, a decree of dissolution was granted and the parties' settlement agreement was incorporated in the decree. Gail was given custody of the parties' three children, with Harold responsible for child support. The property was divided, but no alimony was awarded. On December 13, 1986, Gail married Thomas Gish. After the dissolution was final, Harold learned that Mr. Gish and Gail were cohabiting in the same house as the parties' children prior to the divorce decree. Based on this evidence, Harold moved for a new trial.

Iowa Rule of Civil Procedure 244(g) provides for a new trial as follows:

> The aggrieved party may, on motion, have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted,

> for any of the following causes, but only if they materially affected his substantial rights:
>
> (g) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial.

We believe there has not been the requisite "due diligence" by the petitioner to discover and produce at trial the evidence regarding Gail's cohabitation with Mr. Gish. The petitioner could have called Gail to the witness stand and questioned her about her life-style and living arrangements. Also, even though it appears that Harold was denied visitation with his thirteen-year-old daughter during the period of cohabitation, he nevertheless could have been in contact with the daughter and obtained the information at issue here. It is our opinion that the questions regarding a party's life-style and living arrangements are sufficiently pertinent and central to the issue of custody that due diligence would suggest that such matters be investigated almost as a matter of course. We therefore hold that because the petitioner did not use due diligence to obtain the information that he now claims is newly discovered, the grant of a new trial was improper. Accordingly, we order that the grant of a new trial be reversed and the trial court's original decree be reinstated. Having determined that the trial court erred in granting a new trial, we need not discuss the petitioner's issues on cross-appeal.

Finally, we determine that the parties should pay their own appellate attorney fees. Costs are assessed one-half to each party.

REVERSED.