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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-239 / 89-1137

IN RE THE MARRIAGE OF DOUGLAS W. CLIFF AND NIMFA T. CLIFF

Upon the Petition of

DOUGLAS W. CLIFF,

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Petitioner-Appellee,

And Concerning

NIMFA T. CLIFF,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Respondent appeals a default decree of dissolution awarding sole custody of the parties' child to petitioner. **AFFIRMED.**

Mark S. Braun, Des Moines, for appellant.

Eric Borseth, Pleasant Hill, for appellee.

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

SACKETT, J.

The question here is whether the trial court abused its discretion in failing to set aside a default dissolution decree, and whether the custody award in the decree is correct. We affirm.

Petitioner-appellee Douglas W. Cliff filed a petition seeking dissolution of his marriage to respondent-appellant Nimfa T. Cliff. Respondent was personally served on March 8, 1989, with an original notice stating a petition was on file and she had twenty days to appear. She did not appear. On June 9, 1989, petitioner Douglas W. Cliff appeared, offered his proof and obtained a default. The marriage was dissolved and custody of the parties' five-year-old daughter was awarded to petitioner.

On June 14, 1989, respondent filed a motion to set the decree aside. She relied on Iowa Rule of Civil Procedure 216. The motion was denied. Respondent contends petitioner had told her he would drop the action. She also contends she does not clearly understand and speak English. There was controverted evidence on both of these issues. The trial court found respondent not to be a credible witness and found that petitioner's testimony he had not told respondent he would drop the action credible. Respondent had written letters that were placed in evidence. The letters show respondent had an excellent command of the English language. There is substantial

evidence to support the trial court's factual determinations. On this issue, the scope of review is on errors of law. Therefore, we are bound by these findings. See Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). The trial court did not abuse its discretion in granting the default.

The decree placed custody of the parties' minor child with petitioner. Respondent contends this placement is not in the child's best interests. Review of the default dissolution decree is de novo. In re Marriage of Huston, 263 N.W.2d 697, 699 (Iowa 1978). But it is review de novo, not trial de novo, and this is a court of review without original jurisdiction to retry dissolution proceedings. Huston, 263 N.W.2d at 699. Therefore, our review is de novo on issues properly raised below. Id. However, in a dissolution case, the appellate de novo review permits a broader determination to assure the decree is basically fair in light of the record before us. Huston, 263 N.W.2d at 700; In re Marriage of Olive, 340 N.W.2d 792, 795 (Iowa App. 1983).

In some circumstances a child's best interests may require a hearing on the custody issue, even when there has been a default. Respondent has made no showing that petitioner is an inadequate custodian or that the child is not cared for, or that she is better able to minister to the child's needs. We therefore reject respondent's

argument there should be a hearing on the custody issue. On our review, we determine the custody award is proper and affirm the trial court on this issue.

Respondent's last contention is she has been denied a constitutionally protected right because she was denied the opportunity to be heard. We recognize respondent's constitutionally protected rights. See Gottschalk v. Sueppel, 140 N.W.2d 866, 870 (Iowa 1966). Respondent was not denied the opportunity to be heard. She received an adequate notice that clearly advised her of the action and allowed her adequate opportunity to defend and be heard. Respondent lost her right to a hearing by her failure to exercise it.

AFFIRMED.