APR 28 1978
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JERRY HANSEN AND TANYA HANSEN,

UPON THE PETITION OF JERRY HANSEN,

Appellant,

AND CONCERNING TANYA HANSEN,

Appellee.

Filed April 28, 1978

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2-60402

Appeal from Dallas District Court - Van Wifvat, Judge.

Husband appeals and wife cross-appeals from trial court decree entered in a modification of dissolution decree proceeding concerning alimony, visitation rights and husband's conduct as trustee of a trust established for the benefit of the parties' two minor sons. - Affirmed with modification.

Gregory A. Hulse, of Van Werden & Hulse, Adel, for Appellant.

John G. Black, of Austin, Myers, Peterson & Gaudineer, Des Moines, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Petitioner Jerry Hansen appeals and respondent Tanya Hansen cross-appeals from the trial court's decree entered in a proceeding for modification of a dissolution decree initiated by Jerry. In his petition, Jerry sought to limit Tanya's visitation rights and to eliminate her permanent alimony award of $5000 per year agreed to at the time of the dissolution. Tanya counterclaimed asking custody of the parties' two minor sons, Neil and Eric, be changed from Jerry to Tanya, that child support be ordered, that Jerry account for his trusteeship, that judgment be entered for his alleged self-dealing and that he be removed as trustee.

The authority to modify a dissolution decree is found in § 598.21, The Code: "Subsequent changes may be made . . . when circumstances render them expedient." The subsequent change of circumstances which is necessary to justify a modification of the original decree is a substantial and material change, In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973), and the circumstances which have changed must be those which were not within the contemplation of the trial court at the time it entered the original decree. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974); Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). The provisions for support payments in a divorce decree are final as to circumstances then existing. Holland v. Holland, 260 Iowa 248, 249, 149 N.W.2d 124, 125 (1967). See also Pucci v. Pucci, 259 Iowa 427, 432-3, 143 N.W.2d 353 (1966).

The burden is on the applicant Jerry to establish the required change of circumstances by a preponderance of the evidence. Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972). Our review in this equity proceeding is de novo. Rule 4, Rules of Appellate Procedure. See In re Marriage of Jensen, 251 N.W.2d 252, 254 (Iowa 1977). And, while we give weight to the trial court's findings of fact, we are not bound by them. Rule 14(f)(7), R. App. P.

Jerry's first contention on appeal is that the trial court erred when it failed to terminate or reduce Tanya's alimony award. The substantial and material change in circumstances upon which Jerry relies in support of his argument for modification is the death of Tanya's father and her subsequent inheritence. Tanya

argues that Jerry knew of her father's crippled and invalid condition at the time of the dissolution and that it was not outside of the contemplation of the parties that Norman York would die and leave a substantial portion of his estate to Tanya.

However, Jerry argues it is not what the parties knew at the time of the dissolution which is important but what the decretal court knew or could reasonably forsee as sufficient to cause a subsequent, unforseen change in circumstances. See Mears v. Mears, 213 N.W.2d at 515. The testimony produced at trial amply supports the findings of the trial court and our de novo review of the evidence pursuant to our prescribed duty, Rule 4, R. App. P., leads us to the same conclusion: that the trial court did not err in failing to reduce or terminate Tanya's alimony award.

At the time of the original dissolution, the parties' net worth was stipulated to be about $349,095. Of that amount, Tanya received 15.3%, the children 14% in the form of a trust and Jerry 70.7% as a result of a compromise settlement agreed to by the parties and subsequently approved by the court. Tanya was also to receive $5000 a year in the form of alimony until she dies or remarries. Tanya's father, Norman York, died June 11, 1976. Through his will, Tanya will inherit property having a value of $76,760, the major part being an individed one-half interest in a 108 acre farm. Tanya's share of the average yearly income from the rental of the farm was estimated to be $3871. The trial court was correct when it found Tanya's assets had not otherwise changed significantly.

However, Jerry's net worth and annual income has risen substantially during the same period, although at a smaller percentage. During the three years prior to the dissolution, the Hansen's average adjusted gross income was $14,144. For the two years following the dissolution Jerry and his new wife's average adjusted gross income was $34,536. At the time of the dissolution, Jerry's share of the marital assets was valued at approximately $243,000. By the time of the modification hearing, Jerry's net worth was found to approximate $438,121. The trial court found the stipulated property settlement which left Tanya a smaller share of the marital assets contemplated continued support for her. Jerry has failed to establish any substantial changes in circumstances sufficient to warrant a change in the stipulated alimony awarded for Tanya's benefit.

Jerry's second contention is that the trial court erred in failing to limit respondent's visitation rights to one weekend per month. It is well established that the status of children should be fixed as soon as possible and thereafter seldom disturbed and then, only for the most cogent reasons. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). When a change in visitation is sought, the change of circumstances relied upon must relate to the welfare of the child. "The applicant has the burden of showing by a preponderance of the evidence substantial and material changes in circumstances which make the modification expedient or necessary. It must appear a new custodial arrangement will better serve the child's well-being." In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976).

However, a much less extensive change of circumstances need be shown in visitation right cases than is required for a change in child custody after the original decree. Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973). See also In re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973). "The rationale for such a rule is that the best interest of a child ordinarily requires continuing association with his noncustodial parent unless the contrary is clearly shown." Donovan, supra and cases cited therein.

The original custody agreement between the parties gave custody of Neil and Eric to Jerry. However, Tanya was granted reasonable rights of visitation; the stipulation provided that her rights of visitation were to be liberally construed by the court to allow Tanya to exercise her rights by seeing her children on a very frequent basis, so long as the exercise of those rights did not interfere with the health, safety, or education of the children. In practice, Tanya had custody of the two boys every weekend.

The trial court found that due to the boys' activities and their association with the six children of Jerry's new wife, Yvonne, circumstances had sufficiently changed to warrant a change in visitation. It found it would be in the boys' best interests to provide less frequent visits, but visits of a longer duration. The record amply supports such a change.

Neil and Eric are both normal, well adjusted and doing well in school. Secondly, both children desire to spend time with their natural parents. However,

the weekly visits made it impractical for the 'new' Hansen family to plan family type activities or take weekend trips. It also gave Jerry little opportunity to spend time with his own sons. The modified visitation schedule proposed by the trial court worked well during the interum period of the modification hearing. There was no error.

The final issue raised in this appeal, Jerry's actions as trustee, is raised by Tanya in her cross-appeal. As part of the property settlement pursuant to the dissolution, the parties transferred approximately 77 acres of land which they owned to a trust for the benefit of their two children, Eric and Neil. Jerry was appointed trustee by the trust agreement and was given broad and general fiduciary powers. The trust provided that the trustee should "annually furnish the grantors herein with an informal accounting with a copy of the State and Federal Fiduciary Tax Returns, filed on behalf of the Trust, and shall at all times make the books, records, including bank records, available for inspection at reasonable times and places to either of the Grantors herein."

On appeal, Tanya contends that Jerry, as trustee, is required to rent the property, at a fair and reasonable value and to account for all income and disbursements associated with the trust. Since 1974, Jerry has rented the farmland himself. In 1974, he paid no rent, but gave each of his sons approximately $1600 in the form of a gift. He had already incurred all of the expenses of planting prior to creation of the trust; he also personally paid the real estate taxes. In 1975, he paid a rent of $40 per acre based upon an 80 acre tract of land. He also personally paid all other expenses the property incurred during the same period as well as his sons' income taxes. However, neither the 1974 nor 1975 payments were deposited in the boys' savings accounts until the fall of 1976, although they were allegedly in Jerry's safety deposit box prior to that time. The average fair and reasonable cash rental value for the land was stipulated to be $90 an acre. At the time of the modification hearing, the 1976 rent was unpaid.

The trial court found that Jerry should not be removed as trustee as Tanya argues, but that he should annually furnish her with an accounting of the trust activity. The court also provided a means whereby the annual fair and reasonable

cash rental value of the land could be determined as long as Jerry rents the trust farmland from himself. Finally, the trial court found no fault with Jerry's management of the trust corpus.

Our de novo review of the evidence leads us to the same conclusions. Both parties have accurately apprised this court on the law concerning a trustee's fiduciary duties and the prohibitions against self-dealing at less than full and adequate consideration for his own benefit. Nothing in the record suggests that the apparently low rental price for 1975 was the result of self-dealing. At the same time, Jerry was paying the identical cash rent to a family partnership for similar farmland. However, where Jerry personally paid the expenses and the real estate taxes on the trust land, the family partnership paid those items from the $40 per acre rent. The loose accounting procedures are in part a product of the spiteful relationship which developed between Jerry, Tanya and Yvonne Hansen subsequent to the divorce. The trial court was correct in finding no mismanagement, in not removing Jerry as trustee and in prescribing a method of determining the fair rental value in the future.

Tanya also seeks an accounting for the 1976 rental year. In this we think there is merit. Upon remand, if Tanya has not received an accounting for the 1976 and 1977 rental years, she shall be entitled to one. Further, any rent due the trust shall be figured according to the procedure established by the trial court in the modified decree. The findings of the trial court are otherwise affirmed in their entirety.

MODIFIED AND AFFIRMED.