IN THE COURT OF APPEALS OF IOWA

No. 1999-215 (9-439) / 98-2205
Filed August 27, 1999

IN RE THE MARRIAGE OF DENISE M. WILLARD and DONALD M. WILLARD

Upon the Petition of
DENISE M. WILLARD,
Petitioner-Appellant,

And Concerning
DONALD M. WILLARD,
Respondent-Appellee.

FILED
AUG 27 999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Wife appeals the provisions of her dissolution decree. **AFFIRMED.**

Cheryl J. Newport and Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for appellant.

Donald M. Willard, pro se.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

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SACKETT, C.J.

Petitioner-appellant Denise M. Willard appeals from the decree dissolving her marriage to respondent-appellee Donald M. Willard. We affirm.

Denise contends (1) the district court should have granted her a default judgment giving her the relief she requested, (2) she should have been awarded temporary custody and the district court should not have considered unsworn testimony at the temporary custody hearing, (3) her motion to compel discovery should have been granted, (4) because William did not attend a "Children in the Middle" class, he should not have been granted physical care, (5) she was the better custodian and should have been granted physical care, (6) she should not have been required to travel a distance to exercise her right of visitation, and (7) the district court did not properly calculate child support. We affirm.

Denise and Donald were married in 1995. They have one child, Joshua born in 1989. Denise filed a petition for dissolution of the marriage on February 13, 1998. In the petition she asked, among other things, she be granted both temporary and permanent custody of Joshua.

On February 25, 1998, the court held a hearing on temporary custody and visitation. Both parties appeared with legal counsel. The court found Denise had serious problems with using alcohol in excess and granted Donald temporary custody but provided Denise liberal visitation rights.

Denise contends she sent interrogatories and a request for production to Donald's attorney on August 25, 1998. The discovery requests were primarily

directed to inquiry as to Donald's financial resources and employment. Additionally, Denise sought Donald's medical records for the fifteen prior years. There was filed a proof of mailing the discovery documents. On September 25, 1998, Denise's attorney inquired as to the answers to the interrogatories and the documents requested. Donald's attorney replied he did not recall receiving the discovery request. The requests were faxed to Donald's attorney. On September 28, 1999, Denise filed a motion to compel which was denied on September 29, 1999. Answers were not filed.

On October 9, 1998, the parties filed a stipulation agreeing as to the disposition of debt and division of personal property and the payment of attorney fees. The issue of Joshua's custody was submitted to the district court. The court, after finding Denise had a serious alcohol problem, named Donald the custodian of Joshua.

Denise first contends she should have been granted a default judgment and should have received all the relief requested in her petition because Donald did not file a timely answer to her petition. Denise does not contend she asked the district court for a default judgment. For us to consider an issue on appeal, it must first be raised in the district court. Our review is then limited to those grounds the challenger has raised in the district court. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994); *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992); *Bartels v. Cair-Dem, Inc.*, 255 Iowa 834, 845, 124

N.W.2d 514, 521 (1963). Denise having failed to preserve error on this issue, we need not address it and do not do so.

Denise next contends the district court should not have heard unsworn testimony at the temporary custody hearing, and she should have been awarded temporary custody.

Temporary custody orders are subsumed in the final custody determination and are not judgments that can be separately enforced. *In re Marriage of Denly,* 590 N.W.2d 48, 50 (Iowa 1999). A district court's decision on the temporary custody issue does not materially affect the final decision. *Id.* Which party is awarded custody of the couple's child or children on a temporary basis is not a factor the district court is to consider in determining the final custody arrangement. *See* Iowa Code § 598.41.

An order on final custody has now been entered rendering the temporary custody order moot, and there is no compelling reason to address it. *See Watts v. State,* 456 N.W.2d 683, 683 (Iowa App. 1990). There is no reason to address Denise's challenges to the temporary custody order, and we do not do so.

Denise next contends her motion to compel discovery should have been granted. The focus of the discovery request was on financial matters that were resolved by stipulation before trial. Denise does not challenge the allocation of assets and debts or the allocation of attorney fees on appeal. Denise was not prejudiced by Donald's failure to complete discovery on the financial issues. She

had ample opportunity at trial to inquire as to Donald's physical and mental health. We find no basis to reverse on this issue.

Denise contends she should have been granted more time for the custody hearing. This issue was not raised at the time of trial and first surfaced in a motion for new trial. We have registered our disapproval of arbitrary limitations of time allowed the parties to present evidence in a child custody case. *See In re Marriage of Ihle,* 577 N.W.2d 64, 68 (Iowa App. 1998) (Sackett, J., specially concurring). While noting the district court should examine proffered testimony before deciding to grant or deny a request to present additional evidence, we recognize it is the responsibility of the party seeking additional time to alert the district court to the nature of the evidence he or she seeks to introduce in the additional time to establish prejudice as a result of the limitation. *See id.* at 68-69. We cannot presume the existence of prejudice when evidence is excluded from a trial. *See Henkel v. R & S Bottling Co.,* 323 N.W.2d 185, 193 (Iowa 1982); Iowa R. Evid. 103(a) (error may not be predicated on the exclusion of evidence unless a substantial right of a party is affected and an offer of proof was made or the substance of the excluded evidence was otherwise identified. Even claims of constitutional dimension are waived on appeal if not specifically raised at trial. *Martin v. Raytheon Co.,* 497 N.W.2d 818, 820 (Iowa 1993). Denise did not make her objection known at trial. The error Denies raises on appeal was not preserved and will not be addressed.

Denise contends she, not Donald, is the better custodian. She contends she was Joshua's primary caretaker. She also contends Donald did not support his other children, he spanked Joshua, and he is a violent person. She contends the district court incorrectly found he had an extended support network to help raise his son. She further points to his prior drug use. She also contends the failure of his attendance at a "Children in the Middle" class and his move to Illinois further support her position.

We review this issue de novo. Iowa R. App. P. 4; *In re Marriage of Riggert,* 537 N.W.2d 789, 791 (Iowa App. 1995); *In re Marriage of Harris,* 499 N.W.2d 329, 330 (Iowa App. 1993).

The question is always which parent will do the better job of raising the children. *In re Marriage of Rodgers,* 470 N.W.2d 43, 44 (Iowa App. 1991). We look to the factors set forth in *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974). We are dealing with the life of Joshua, not his parents. *See Halstead v. Halstead,* 259 Iowa 526, 535, 144 N.W.2d 861, 866 (1966).

We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Yet, we are not bound by these determinations. *Id.* We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner,* 338 N.W.2d 351, 356 (Iowa 1983). The interest of these children are the primary consideration. *See In re Marriage of Vrban,* 359 N.W.2d 420, 424 (Iowa 1984); *Neubauer v. Newcomb,* 423 N.W.2d 26, 27 (Iowa App. 1988). We give

consideration to each parent's role in child raising prior to a separation in fixing primary physical care. *See In re Marriage of Love,* 511 N.W.2d 648, 650 (Iowa App. 1993); *In re Marriage of Fennell,* 485 N.W.2d 863, 865 (Iowa App. 1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Engler,* 503 N.W.2d 623, 625 (Iowa App. 1993) (Oxberger, C.J. and Schlegel, J., dissenting).

Iowa courts had historically recognized society's mobility and had not fixed or changed custody based on one party's move from an area where both parents resided absent other circumstances. *See Vrban,* 359 N.W.2d at 425; *In re Marriage of Frederici,* 338 N.W.2d 156, 161 (Iowa 1983). These cases pre-date legislative changes providing if a parent is to relocate the residence of a minor child to a location one hundred fifty miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in circumstances. *See* Iowa Code § 59821(8A) (Supp. 1997); *In re Marriage of Mayfield,* 577 N.W.2d 872, 874 (Iowa App. 1998). This legislative change is compatible with other legislative changes in the past decade focusing on the opportunity for substantial parental involvement in a child's life, even when there has been a marriage dissolution. *Mayfield,* 577 N.W.2d at 874.

We consider Donald's move depriving Denise of close association with his children as a factor in assessing who should be the physical custodian.

Denise admitted she used alcohol in excess. While Denise testified she no longer does, the district court found this portion of her testimony not credible.

The requirements of Iowa Code section 598.19A[1] have not been met in that Donald has not certified attendance at a mandatory course as described in the statute. Donald's failure to attend does not, however, preclude him from receiving custody if the other factors weigh in his favor. We determine they do and affirm the custodial award. This determination, however, is not intended to minimize the fact that district courts should comply with the provisions of Iowa Code section 598.19A(1).

The district court fixed Denise's child support at $250 a month. Denise contends she should only pay child support of $217.06. She contends the district court did not correctly calculate Donald's income. Before applying the child support guidelines, there needs to be a determination of the net monthly income of

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[1] **Mandatory course--parties to certain proceedings**

1. The court shall order the parties to any action which involves the issues of child custody or visitation to participate in a court-approved course to educate and sensitize the parties to the needs of any child or party during and subsequent to the proceeding within forty-five days of the service of notice and petition for the action or within forty-five days of the service of notice and application for modification of an order. Participation in the course may be waived or delayed by the court for good cause including, but not limited to, a default by any of the parties or a showing that the parties have previously participated in a court-approved course or its equivalent. Participation in the course is not required if the proceeding involves termination of parental rights of any of the parties. A final decree shall not be granted or a final order shall not be entered until the parties have complied with this section.

2. Each party shall be responsible for arranging for participation in the course and for payment of the costs of participation in the course.

3. Each party shall submit certification of completion of the course to the court prior to the granting of a final decree or the entry of an order.

Iowa Code § 598.19A.

the custodial and noncustodial parents. *See In re Marriage of Powell,* 474 N.W.2d 531, 534 (Iowa 1991). A court must determine the parents' current income from the most reliable evidence. *Id.; see also In re Marriage of Lalone,* 469 N.W.2d 695, 696 (Iowa 1991); *In re Marriage of Miller,* 475 N.W.2d 675, 678-79 (Iowa App. 1991). The first step in using the child support guidelines is to arrive at "net monthly income" as defined by the guidelines for each parent. *See Miller,* 475 N.W.2d at 678.

Donald is a union iron worker and at the time of the dissolution hearing was earning $20.30 per hour while Denise became fully employed following the couple's separation and earned $15,600 per year. We have examined the district court's computation of child support and find it reasonable.

We have considered Denise's challenge to visitation and find it without merit.

Denise requests an award of appellate attorney fees. We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle,* 312 N.W.2d 147, 150 (Iowa App. 1981) (Johnson, J. and Oxberger, C.J., specially concurring). We award no appellate attorney fees.

AFFIRMED.