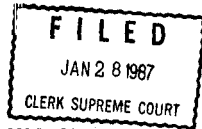


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF JANE ANN BENGÉ AND GORDON ROSS BENGÉ

Upon the Petition of	)		21
JANE ANN BENGÉ,	)	Filed January 28, 1987	
Petitioner-Appellee,	)		
And Concerning	)		
GORDON ROSS BENGÉ,	)	<u>6-457</u>	
	)	86-784	
Respondent-Appellant.	)		

Appeal from the Iowa District Court for Cedar County (D 988) - David
J Sohr, Judge

Respondent husband appeals from the decree dissolving the parties'
marriage **AFFIRMED.**

Jon A Kinnamon, Cedar Rapids, Iowa, for appellant.

Stuart P Werling, Tipton, Iowa, for appellee.

Heard by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.**22**

Petitioner Jane Ann Bengé and respondent Gordon Ross Bengé were married on August 25, 1969. They have one child, Amanda, who is currently seven years of age. Petitioner is presently a bookkeeper, earning approximately \$13,000 to \$14,000 per year. She is a college graduate, which she achieved during the marriage through financial support provided by her parents. Respondent is a high school teacher and has completed 60 hours towards his master's degree. His current income is over \$22,000 per year.

The petition for dissolution of marriage was filed on October 26, 1984. Petitioner requested sole custody of Amanda. The case was tried to the court on April 2 and 3, 1986. The majority of testimony concerned the issue of custody. On May 23, 1986, the trial court entered a finding of fact and conclusions of law and a decree of dissolution of marriage. The trial court dissolved the marriage, awarded sole custody of Amanda to petitioner, and provided visitation to respondent. From this decision respondent has appealed.

On appeal respondent contends: (1) the trial court should have granted joint custody with him having physical care, rather than awarding sole custody to petitioner; (2) the trial court erred in admitting a tape recording of a conversation between the parties, over his objections of improper foundation, irrelevance and lack of materiality; and (3) the psychologist called by petitioner was not yet licensed by the State of Iowa and therefore not qualified as an expert. Petitioner requests attorney fees on appeal.

Since dissolution actions are equitable proceedings, our review is de novo. Iowa Code § 598.3 (1985); Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). As with all dissolution cases, precedent is of little value and therefore our decision must ultimately

depend on the particular facts relevant to each issue. In re Marriage of Vrbanc, 359 N.W.2d 420, 423 (Iowa 1984); In re Marriage of Kehrl, 241 N.W.2d 923, 926 (Iowa 1976), 378 N.W.2d 735 (Ia. Ct. App. 1985).

I.

Respondent asserts the trial court erred in not awarding joint custody and failing to award physical care of Amanda to respondent. We disagree and affirm.

Pursuant to section 598.41 (1985), the court is directed to provide ample visitation with both parents and, upon request of one parent, to consider joint custody subject to the best interests of the child and reasonableness of the proposal. In re Marriage of Miller, 390 N.W.2d 596, 598 (Iowa 1986). In enacting section 598.41, the legislature did not use the word presumption when referring to joint custody; however, the statutes do express a preference for joint custody over other custodial arrangements. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In support of reversal, respondent cites section 598.41(2) for the following:

If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and parent should be severed.

Respondent contends the trial court failed to cite clear and convincing evidence that joint custody was unreasonable.

Although the court did not expressly cite to the applicable factors found in section 598.41(3), we conclude this is not reversible error. See In re Marriage of Miller, 390 N.W.2d at 599-600. Here the court indirectly revealed its reasons for denying joint custody. The court referred to severe visitation problems which relate directly to the parents' ability to communicate with each other

regarding Amanda (section 598.41(3)(c)(e)). It referred to petitioner as the primary caretaker of Amanda (section 598.41(3)(d)). The court also found that respondent was manipulative of Amanda; this relates directly to respondent's suitability as a custodian (section 598.41(3)(a)). After considering these factors and the ample visitation provided, we find the trial court's decision to grant sole custody of Amanda reasonable and in the child's best interests.

II.

Respondent also contends that trial court erred in admitting an auditory tape recording over objections of improper foundation, irrelevance, and lack of materiality.

Prior to the adoption of the Rules of Evidence, the Iowa Supreme Court held the foundation required for admission of a sound recording is a clear showing that the recording is accurate and trustworthy. State v. Russell, 261 N.W.2d 490, 495 (Iowa 1978). Along these same lines petitioner was required to authenticate and identify the conversation on the tape. Iowa Rule of Evidence 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Here petitioner, prior to playing the tape to the court, testified that she had reviewed the tape, identified it as one she had made, and verified its accurate representation of the conversation. Prior to playing the tape, petitioner's counsel fully explained the contents of the tape to the court. After the tape had been played for the court petitioner identified the participants in the taped conversation and narrated the conversation. In the present case, although we consider the petitioner's procedure awkward, we conclude that sufficient evidence was produced to create a proper foundation to admit this evidence.

Regarding relevancy and materiality, they are both matters of trial court discretion. Carter v. MacMillan Oil Company, Inc., 355 N.W.2d 52, 55 (Iowa 1984). Evidence is relevant if it renders the existence of a material fact more or less probable with it than without it. Briner v. Hyslop, 337 N.W.2d 858, 869 (Iowa 1983). Here we find no abuse in the court's discretion, and therefore affirm.

III.

Finally, respondent asserts the psychologist, called as an expert witness by petitioner, was not qualified as an expert. Specifically he contends that since this witness was not licensed in Iowa, she was not competent to testify.

"The trial court has considerable discretion in determining whether a witness has sufficient personal experience to render an expert opinion." State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983). The decision as to whether a medical witness's learning and training qualify him to give an opinion rests largely within the discretion of the trial court. Prokop v. Houser, 245 Iowa 480, 483, 62 N.W.2d 781, 783 (1954). In the present case the witness's unlicensed status was but one element for the court to consider. The trial court determined the psychologist was qualified to testify to her expert opinion. We will not reverse the trial court on admitting expert testimony unless the court's discretion has been manifestly abused. State v. Taylor, 336 N.W.2d at 726. The trial court did not abuse its discretion.

Petitioner requests an award of attorney fees on appeal. We consider this request reasonable and conclude \$1,000 is an equitable amount. Respondent shall pay said fees.

AFFIRMED.

Snell, J., concurs; Oxberger, C.J., dissents.

In our de novo review I would remand the matter of joint custody to the trial court for an order requiring the parties to participate in custody mediation pursuant to section 598 41(2) Upon completion of the mediation the trial court should enter such order that is appropriate