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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MICHELLE L. BRANDT AND MARK A. BRANDT

36

UPON THE PETITION OF **MICHELLE L. BRANDT,**	)	Filed November 20, 1984
Petitioner-Appellant,	)	
AND CONCERNING **MARK A. BRANDT**	)	4-307 84-105
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Bremer County - Gilbert K. Bovard, Judge.

Petitioner-wife appeals from the decree dissolving the parties' marriage. She asserts: (1) that the trial court should have given her custody of the parties' child and awarded her child support; (2) that the trial court should have awarded her the parties' washer and dryer; and (3) that the trial court abused its discretion in denying her motion for a continuance of the hearing on her posttrial motions, in refusing to allow her to present testimony in support of her posttrial motions, and in denying her motion for new trial and to amend and enlarge the findings. AFFIRMED.

Dale E. Goeke, Waverly, for petitioner-appellant.

G A. Cady III, Hampton, for respondent-appellee.

Paul W. Riffel, Waverly, for the parties' child.

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

SNELL, J.

The petitioner in this appeal, Michelle Brandt, asserts several errors in the trial court decision to award custody of the parties' child to the respondent, Mark Brandt. She also says she should have received the washer and dryer given to Mark. We affirm.

The petition for divorce was filed by petitioner in April 1983, along with a request for an injunction to prevent Mark from approaching Michelle, alleging that he had physically abused her in the past. Prior to the trial and decree a number of legal squabbles ensued. Temporary custody of the couple's son, Chad, born in April, 1982, was awarded to Michelle. An attorney was appointed to represent the child's interests. At the close of trial, the court awarded custody to Mark, but stayed that order pending this appeal. It overruled Michelle's motions to enlarge and amend the findings of fact pursuant to Iowa Rule of Civil Procedure 179(b), and for a new trial. The court refused a request to continue the hearing so that the attorney for the child could testify. The court also refused to accept numerous affidavits presented on petitioner's behalf.

We initially dispose of petitioner's claim that the hearing should have been continued and she should have been allowed to present twenty-four affidavits regarding her parenting abilities. A trial court decision regarding a continuance is overturned only if clear abuse of discretion is shown and when an injustice has been done. Dept. of General Services, State of Iowa v. R. M. Boggs Co., Inc., 336 N.W.2d 408, 410 (Iowa 1983). It is also within the discretion of the court whether witnesses and other evidence may be presented at the hearing. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). The trial court pointed out the attorney for the child would only repeat his findings at the trial, and that the testimony of the witnesses and affidavits could have been presented at trial. The affidavits were cumulative and merely indicated that the affiants felt Michelle was a good parent. We believe the trial court was within its discretion in allowing

the continuance and refusing to review the affidavits, and affirm its rulings. Accordingly, we do not consider the affidavits in our decision.

In deciding which parent shall have custody of the child, we look to the best interests of the child. Iowa R. App. P. 14(f)(15). The factors to be considered in a custody decision include those set out at section 598.41 of the Code and at In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

We agree with the trial court that this case is not appropriate for an award of joint custody. The communication between the parties has disintegrated to the point that they do not speak to each other except for the most perfunctory exchanges, and will ignore each other when present in the same room. At one point Mark refused to give Michelle his unlisted phone number so that visitation could be arranged. The parties also live a considerable distance from each other; Michelle is in Waverly and Mark lives in Sheffield.

Our review is de novo. Iowa R. App. P. 4 (1983). We are not bound by the findings of the trial court, but we give weight to them. Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972).

After reviewing the record, we conclude that the award of custody to Mark was proper. The trial court found that both parties demonstrated a genuine affection for Chad and that both parents could provide a neat clean home. The court concluded, however, after viewing both parties, that Mark is more mature and could provide a more stable environment. The court stressed his work record, his stability in his job, his residence, his responsibility, and his educational achievements. The court found that Mark performed the mundane duties of the care and feeding of Chad on a regular basis and is no stranger to cooking, cleaning, and household duties.

The trial court also found that Mark is more apt in financial matters, both in the area of spending philosophy and in budgeting and recordkeeping. The evidence shows that Michelle had difficulty with balancing her receipts when selling wicker

products, was unconcerned how much money was in the checking account when she wanted something, is a compulsive spender, had to have the best, and demands a lot of material things. She wasn't happy with her wedding ring and diamond. They weren't big enough or good enough so she exchanged it for another ring without Mark's knowledge.

Besides having some problems administering discipline, which the trial court discounted, there is evidence that Michelle is more interested in herself than in Chad. She would get herself ready, not caring whether Chad had been fed. On one occasion it was 1:00 in the afternoon and he had not been fed. Some evidence was presented that she didn't want to be told anything and was hard to reason with.

Mark's mother described Michelle as being a very good housekeeper. She always kept the house neat and clean. However, she was impatient in feeding Chad, didn't like to do it, or to change his diapers.

By contrast, Mark appears to be responsible and attentive to Chad's needs. He knows how and does cook for himself and Chad. He testified that the first two years of the marriage he did 70% of the cooking. When he came home from work until bedtime, he performed 80% of Chad's care. This included feeding, changing, and bathing him.

The trial court found that "Mark's appearance at trial substantiated his school transcript as far as his intellectual abilities are concerned." We find the trial court's remark appropriate and a matter of proper consideration in a custody matter.

Further, the trial court' expressed concern about Michelle's dating. This concern is consistent with the evidence that Michelle cares more for herself than for Chad's care.

Finally, the record indicates that Mark is close to his mother and takes Chad to her house when he has visitation. She has a genuine concern for her grandson's

welfare. The support she will give Mark in raising his child is a plus factor, not a minus. See In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982) (help received from grandparents is a consideration in custody matters).

We find the decision of the trial judge is well reasoned and adequately supported by the record. The trial court's custody award of Chad to his father is affirmed. Michelle shall have liberal visitation rights, which include, at a minimum, alternate weekends from 9:00 a.m. Saturday to 6:00 p.m. Sunday, and alternate holidays as described by the trial court in its original decree regarding visitation.

Michelle further claims error in that she should have received the washer and dryer given to the couple by her parents as a wedding present. We affirm the trial court's award of the parties' washer and dryer to Mark.

Michelle has requested attorneys fees on appeal. We consider the needs of the requesting party, the ability of the other party to pay, and the results on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). Without indicating the amount the attorneys fees should be, we hold Mark shall contribute $500 towards Michelle's fees.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I respectfully dissent.

The majority decides these circumstances do not warrant a joint legal custody decision. I believe this is contrary to the newly enacted statute regarding joint custody. The strongly worded statute clearly indicates joint custody is preferred, and the lack of communication between the parties cited by the majority does not rise to the level that joint custody should be denied. Iowa Code § 598.41(2); 1984 Legis. Serv. No. 3 at 43 (West).

I also dissent from the majority's determination that physical custody should be placed with Mark.

Initially, it must be noted that several statements on the part of the trial court made in support of an award to Mark reflect erroneous conclusions of law. The court gives strong weight to the fact that Mark earns more money than Michelle. The financial situation of each party "while entitled to some consideration, is of little import when we remember the first consideration of courts in cases of this kind is to keep an eye to the best interests of the children involved." Hagen v. Hagen, 226 N.W.2d 13, 16 (Iowa 1975). The hours Michelle works, although irregular, allow her to be with Chad during most of his waking hours.

The court also gives considerable weight to the fact that Mark earned better grades in high school than Michelle did. I reject the idea that the grades a person earns on such various subjects as literature and math, while between the ages of thirteen and eighteen, have a significant relation to that person's ability to parent.

The court also reported as a factor in its decision that Michelle was now dating a man, saying "Michelle's testimony that she has resumed dating leads the Court to believe that her future interests may soon be divided between her suitors and her son." Michelle's social life should not be a significant factor unless it in some way adversely affects the child. See In re Marriage of Kramer 297 N.W.2d

359, 362 (Iowa 1980); In re Marriage of Kehrli, 241 N.W.2d 923, 924 (Iowa 1976). The record is devoid of any evidence that her social activities show she will devote less attention to her child.

An award of custody to Mark is unsupported by the factual situation involved. The court refers to Michelle's dissatisfaction with her wedding ring as evidence of her immaturity, while ignoring the fact that Mark has admitted to hitting Michelle; and she testified to the fact he has threatened her in front of the child and cut her with a knife. Mark has lived with his mother for the majority of his life and she plays an important role in his care of Chad. During trial testimony, Mark's mother made no attempt to hide her scorn of Michelle. She evidences extreme hostility towards her daughter-in-law, an attitude that will be exposed to Chad. Our courts have indicated that where one party shows hostility toward the other parent and toward that parent's relationship with the child, that alone may indicate an award of custody to the other parent is warranted. See In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983).

Mark claims he has cared for Chad, but the evidence shows Michelle is the primary caretaker and Mark must be coaxed into being involved in the day-to-day care of his son.

The evidence and legal precedent overwhelmingly indicates the trial court should be overruled, joint custody awarded, and physical care of Chad placed with Michelle.