

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LYNN KOENEN AND RIFFIE KOENEN

UPON THE PETITION OF

LYNN KOENEN,

Petitioner-Appellee,

AND CONCERNING

RIFFIE KOENEN,

Respondent-Appellant.

FILED

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CLERK SUPREME COURT

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Appeal from Washington District Court, Richard J. Vogel, Judge.

Respondent-wife appeals the Washington County District Court decree of dissolution, claiming the trial court lacked jurisdiction over the case due to an action for separate maintenance that was pending in Woodbury County District Court, and challenging on the merits, the Washington County District Court's order placing custody of the parties' minor child with petitioner-husband. AFFIRMED IN PART AND MODIFIED IN PART.

Timothy W. Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, Iowa, for respondent-appellant.

G. Gifford Morrison, Washington, for petitioner-appellee.

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

PER CURIAM

Respondent-wife appeals the Washington County District Court decree of dissolution, claiming the trial court lacked jurisdiction over the case due to an action for separate maintenance that was pending in Woodbury County District Court, and challenging on the merits, the Washington County District Court's order placing custody of the parties' minor child with petitioner-husband. We affirm the trial court as to the decree of dissolution, and place custody of Jeramy with respondent-wife.

Petitioner-husband, Lynn Koenen, and respondent-wife, Riffie Koenen, were married November 18, 1978. At the time of their marriage, both parties lived in Sioux City, Woodbury County, Iowa. On May 5, 1979, Jeramy E. Koenen was born to the couple. On November 13, 1979, Riffie moved to the State of Florida, taking Jeramy with her. Riffie took a job as a hotel desk clerk at a hotel in North Miami Beach. Riffie now works forty hours per week, down from the fifty to fifty-five hours per week prior to October of 1980. Her wages are currently \$4.50 per hour, reflecting a recent fifty-cent per hour raise. Riffie generally works Wednesday through Sunday, from 4:00 p.m. to midnight. While Riffie is at work, Jeramy is cared for at a day care center. Riffie generally picks Jeramy up after work between 12:30 a.m. and 2:00 a.m. Riffie graduated from high school and has started college twice, but has never completed the requirements for a degree.

Lynn is a graduate of the American School of Business located in Des Moines, Iowa. Lynn also graduated from Westmar College, receiving a degree in business administration with a teaching certificate and coaching endorsement. On January 3, 1980, Lynn began his employment with Crane Company, located in Washington, Iowa. Since January 3, 1980, Lynn has resided in Washington, Iowa. Lynn's monthly salary is \$1350 and works from 7:30 a.m. to 4:30 p.m. five days per week.

Recognizing the existence of marital problems, Riffie filed an action for separate maintenance in the Woodbury District Court on November 19, 1979. Riffie's petition sought custody of Jeramy and support from Lynn for Jeramy and her. Lynn's answer to Riffie's petition requested conciliation and, in the alternative, dismissal of the action or custody of Jeramy in the event a decree of separate maintenance was issued by the court. On December 11, 1979, a conciliator was appointed by the court, at the request of the parties.

On January 8, 1980, the parties entered into a stipulation concerning the Woodbury county action for separate maintenance, under which Lynn agreed Riffie should have temporary custody of Jeramy and agreed to pay temporary support pending trial of the action. The Woodbury district court judge accepted the stipulation on February 4, 1980 and entered a decree incorporating its provisions.

On May 6, 1980, Lynn filed an action for dissolution in Washington County District Court. Riffie filed a motion to dismiss the Washington county dissolution action, contending the district court could not divest the Woodbury County District Court of jurisdiction over the action for separate maintenance. The Washington county trial court overruled Riffie's motion to dismiss, holding the proceeding for separate maintenance in Woodbury county was final and therefore, the separate maintenance action in Woodbury county did not divest the Washington County District Court of jurisdiction. The court also concluded Lynn could not have counterclaimed for dissolution in the Woodbury county separate maintenance proceeding. The court reasoned sections 598.3, and .28, The Code 1979, when read in conjunction with each other, preclude joinder of any action, except one for alimony, with an action for separate maintenance or dissolution.

On appeal from the Washington County District Court decision, Riffie claims the trial court erred in overruling her motion to dismiss for lack of subject

matter jurisdiction, and alternatively, custody of Jeramy should have been granted to Riffie.

Our review of a ruling on subject matter jurisdiction is on errors assigned. Kalo Brick and Tile Co. v. Chicago and Northwestern Transportation Co., 295 N.W.2d 467, 468 (Iowa App. 1979); Moraveck v. Davenport Community School District, 262 N.W.2d 797, 800 (Iowa 1978); cf. Berkley International Co., Ltd. v. Devine, 289 N.W.2d 600, 602 (Iowa 1980)(a case concerning appellate review of the denial of a special appearance contesting the trial court's jurisdiction). Consequently, the findings of the trial court have the force and effect of a jury verdict. Id. We are not, however, bound by the trial court's application of legal principles or its conclusions of law. Id.

The issue of Washington county's jurisdiction to act upon a petition for dissolution filed after an order for separate maintenance was entered in Woodbury county can be broken down into two questions. First, can a separate action for dissolution be commenced after an order for separate maintenance is entered? Second, must the action for dissolution be presented to the court that originally ordered separate maintenance in the form of a petition to modify the original order.

In In re Marriage of Kurtz, 199 N.W.2d 312 (Iowa 1972), the court was faced with the question "whether an adverse judgment and decree granting separate maintenance and denying a counterclaim for divorce, in an action determined before our present dissolution of marriage proceedings became effective, bars the unsuccessful party from later seeking dissolution of the marriage under what is now chapter 598, The Code 1971." Id. at 313. In Kurtz, the court held the prior decree of separate maintenance was not a bar to subsequent action for dissolution and concluded the doctrine of res judicata did not preclude maintaining the second action. Id. at 315. Since the two actions required proof of different facts, see

Young v. O'Keefe, 248 Iowa 751, 756, 82 N.W.2d 111, 114 (Iowa 1957), the prior action for separate maintenance was not res judicata on the subsequent dissolution action. In re Marriage of Kurtz, 199 N.W.2d at 315.

An action for dissolution under the new "marital-breakdown" approach does not require proof of cruel and inhuman treatment as was required under the pre-July 1, 1970, law of Iowa dissolutions. Id. at 314. Under the current law, the proof required for a decree of separate maintenance is identical to the proof required for a dissolution. In re Marriage of Morgan, 218 N.W.2d 552, 559-60 (Iowa 1974). As such, Kurtz would preclude initiation of an independent action for dissolution once the merits of a prior action for separate maintenance had been fully litigated and adjudicated. Kurtz, however, does not present res judicata problems in this case because the separate maintenance action in Woodbury county had not been fully litigated and the decree entered was only temporary in nature. The decree styled "Temporary Decree" approved the parties stipulations as to temporary matters during the pendency of the action. The stipulation itself stated that "temporary" matters have been agreed to which included temporary custody of the minor child Jeramy. Our conclusion that the Woodbury county action has no preclusive effect upon the Washington county action leads to the second question concerning which court should hear the present action.

Section 598.5, The Code 1979, provides that the contents of a petition for dissolution state whether a separate action for dissolution was pending elsewhere. Lynn's petition stated there was none and also stated that the separate maintenance action was commenced in 1979 in Woodbury county. We find nothing in chapter 598 nor in case law that prevents the filing, in Washington county, of the dissolution action or forecloses jurisdiction in that court. In Main v. Main, 180 Iowa 616, 623, 103 N.W. 364 (Iowa 1917), the court allowed a divorce action to continue in Webster county although an annulment action (which for this purpose

was treated as an action for divorce) was pending in Jasper county. The court reasoned that the relief sought in the independent action was not identical so that the prior case would not abate the other. See also Schroeder v. Todd, 249 Iowa 139, 142, 82 N.W.2d 101 (Iowa 1957), which stated "the fundamental basis for abatement of an action is the pendency of another action with identical parties, causes of action, issues, relief prayed, and with prior filing in accordance with statutes or decisions of jurisdictions involved." Here the separate maintenance action had not become final and did not countenance the same relief as the dissolution action. There was, therefore, no grounds upon which abatement of the Woodbury county action could be ordered. Consequently, we review this matter de novo as an original action. Iowa R. App. P. 4; In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). We give weight to the trial court's findings of fact, but we will not abdicate our duty to review de novo and determine issues presented upon the record. Id.

After careful review of the record, we find permanent custody of Jeramy should be in Riffie. The parties have not changed residences since the decree. Each party is still employed by the same employer. Neither party's marital situation has changed. In Lynn's own words, the parties are in exactly the same situation as when the trial court in Woodbury county entered the decree of separate maintenance. The Washington county trial court concluded either parent can satisfy the physical and emotional needs of Jeramy, and we agree. Lynn agreed that Jeramy looked happy when he saw him in Florida, that his physical health was all right and his mental health was fine. His interaction with other little children was very good, and he interacted with adults really well. Further, we are reluctant to alter the custody arrangements given the length of time Riffie has had custody of Jeramy (cf. In re Marriage of Melton, 256 N.W.2d 200, 206

(Iowa 1977)(where the court refused to alter the custody provisions partially for the reason the custodial parent had custody of the child for over two and one-half years)), and the satisfactory adjustment of Jeramy to his new surroundings. Consequently, we reverse the Washington county trial court's decree regarding custody of Jeramy. We note the Washington County District Court's review of the guardian ad litem's report was error, see In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979), and on our de novo review, we do not consider its contents. See Tamm, Inc. v. Pildis, 249 N.W.2d 823, 834-35 (Iowa 1976); Shepard v. Gerholdt, 244 Iowa 1343, 60 N.W.2d 547, 550-51 (Iowa 1953); Flint v. Varney, 220 Iowa 1241, 1243-46, 264 N.W. 277 (Iowa 1935).

Costs are taxed to Lynn.

AFFIRMED IN PART AND MODIFIED IN PART.