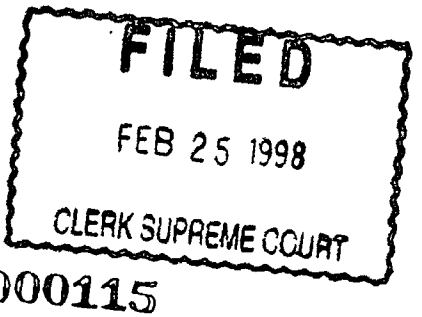
IN THE COURT OF APPEALS OF IOWA



No. 8-025 / 97-0435

000115

SAMUEL FLEEGE,
Appellant,

vs.

TIMOTHY J. BURBACH, PAUL R. KURT, and WILLIAM BEATTIE, JR.
Appellees.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

The Appellant, Samuel Fleege, appeals the district court's ruling granting the defendants summary judgment on his breach of contract action involving buy-sell agreements for his stock in two closely-held corporations. **AFFIRMED.**

Robert L. Sudmeier, Douglas M. Henry and Norman J. Wangberg, of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Brian J. Kane of Kane, Norby & Reddick, P.C., Dubuque, for appellees.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

The appellant, Samuel Fleege, appeals the district court's ruling granting the defendants, Timothy Burbach, Paul Kurt and William Beatty, Jr. ("defendants") summary judgment on his breach of contract action involving buy-sell agreements for his stock in two closely held corporations. Fleege claims that the district court erred in determining the defendants were not required under the agreements to attempt to reach a mutual redetermination of the value of the Fleege's stock and in not granting him partial summary judgment on the basis the defendants had breached the agreement by not attempting good faith negotiations for reaching a mutual redetermination of the value of the stock.

Background facts. Fleege was a shareholder in two closely held corporations. In one corporation, defendants Burbach and Kurt were the other shareholders. Those defendants and defendant William Beattie, Jr., were the other owners of the second corporation.

In August 1993, Fleege and the defendants entered into buy-sell agreements for the sale of shares based upon designated events, including termination of employment of a shareholder from the corporation. The agreement set the purchase price based on an annual mutually agreed redetermination of stock value as of the end of the year to be determined within 75 days after year's end. The agreement further provided that if the shareholders failed to make a redetermination of value at the end

of any fiscal year, the last previous stipulated value should be used unless no such value was agreed upon for three consecutive fiscal years for an event requiring a stock sale. The issue of contention on appeal is whether the defendants had a duty under the contract to attempt to negotiate a redetermination of share value. We find defendants had no such duty and accordingly affirm.

Scope of review. We review law actions for errors at law. Iowa R. App. P. 4. We determine whether the trial court correctly applied the law. *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996).

Summary judgment. We are mindful that our task in reviewing the correctness of the trial court in granting summary judgment is to see if the moving party shows no genuine issues of material fact existed and they are entitled to judgment as a matter of law. *See C-Thru Container v. Midland Mfg.*, 533 N.W.2d 542, 544 (Iowa 1995).

It is fundamental that a contract must be interpreted based on the intent of the parties at the time the contract was entered. *See Home Fed. Sav. & Loan Ass'n v. Campney*, 357 N.W.2d 613, 617 (Iowa 1984). Moreover, a contract interpretation giving a "reasonable, lawful and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Iowa Fuel & Minerals Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991).

The relevant language in paragraphs 3 and 4 of the buy-sell agreement follows:

3. EVENTS REQUIRING SALE AND PURCHASE. Upon . . . termination of employment (whether by reason of resignation, discharge or retirement) of any Shareholder, such shareholder . . . (the "Seller") shall sell, and the remaining Shareholders or Shareholder (the "Buyers") shall purchase in proportion to their share ownership all of the stock owned by the Seller at the date of such event. The purchase price of such shares to be sold shall be determined in accordance with this Agreement.

4. PURCHASE PRICE. The purchase price of each share of stock sold pursuant to this Agreement shall be determined as follows. Unless and until changed as herein provided, the value of all of the outstanding stock of the Corporation shall be [Initial value] per share. Within 75 days after the end of each fiscal year of the Corporation, the Shareholders shall by mutual agreement redetermine such value as of the end of the fiscal year and the redetermined value shall be entered on the applicable endorsement to this Agreement attached hereto and by this reference made a part hereof. If the Shareholders fail to redetermine the value as of the end of any fiscal year, the last previous stipulated value shall apply except that if no value is agreed upon for 3 consecutive fiscal years prior to the event requiring sale and purchase, the value of all of the outstanding stock shall be agreed upon by the remaining Shareholder or Shareholders and the selling Shareholder.

The last prior redetermination of stock value as of December 31, 1993, occurred in July 1994. In January 1996, Fleege's employment with the two corporations was terminated. Fleege and the defendants each obtained counsel regarding the sale of the Fleege's stock. Fleege and the defendants corresponded regarding the valuation of the stock. The parties scheduled a February 27, 1996 meeting regarding the valuation of the stock. Prior to the meeting, the defendants determined that Fleege's stock value under the buy-sell agreements should be the previously stipulated value as of December 31, 1993.

At a February 27 meeting, Fleege was asked for his proposal on the value of the stock. The defendants indicated through corporate counsel that they would only purchase the stock at the previously stipulated value as of December 31, 1993.

We find the language of the Buy-Sell Agreement to be clear. Although the agreement states that the shareholders shall redetermine the value of the stock, there was a fall back mechanism if a redetermination of value did not occur. Fleege argues this fall back provision did not relieve the defendants of a good faith attempt to negotiate a new stock price after he was terminated. The defendants argue that a "triggering event" (Fleege's termination) essentially negated the clause calling for annual redetermination of value.

Fleege was terminated on January 3, 1996, within the three years of the date of the last agreed upon value in July 1994. Paragraph 4 of the agreement further provides the value of the stock shall be the stipulated value "[u]nless and until changed as herein provided . . . ." As no change was effected, "the last previous stipulated value shall apply."

The language of the contract is clear. Paragraph 4 contains a method for pricing the stock. It was entered into when all parties were similarly situated, as shareholders in a closely held corporation. Upon the occurrence of an event which calls for one shareholder's interest to be bought out by the remaining shareholders, the bargaining positions of the parties to the agreement change. One of the purposes

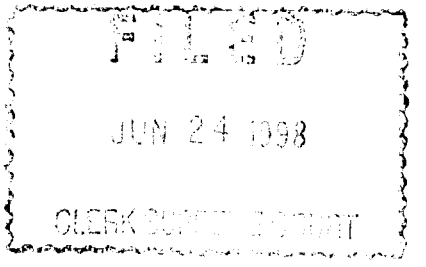
of buy-sell agreements is to fix a value or method of valuation of stock when the parties are on equal footing so as to dispense with the task of determining values when an event triggering a buy or a sell occurs. For the parties to voluntarily agree to and execute this agreement and its attendant provisions and then attempt to renegotiate the price when the posture of the parties has changed defeats the purpose. It undermines the purpose of buy-sell agreements which are designed to avert disputes regarding value once an event requiring sale occurs and the buyer and the seller become known. *See* 1 O'Neal's *Close Corporations* §7.01 (3d ed. 1994) (stating one of purposes of buy-sell agreements is to provide a clear methodology for determination of stock value); *see also Renberg v. Zarrow*, 667 P.2d 465, 470 (Okla. 1983) (same).

As we find the contract was unambiguous, we are unable to conclude the trial court erred in granting summary judgment to the defendants, nor did the court err in denying Fleege's motion for partial summary judgment. We accordingly affirm.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 8-020 / 97-0435
Filed June 24, 1998



IN RE THE MARRIAGE OF SUSAN ELLINGSON AND BRIAN ELLINGSON

Upon the Petition of
SUSAN ELLINGSON,
Appellant,

And Concerning
BRIAN ELLINGSON,
Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Susan Ellingson appeals from the decree dissolving her marriage to Brian Ellingson. **AFFIRMED.**

Kevin H. Collins and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellant.

Susan L. Ekstrom, Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ., but decided en banc.

HUITINK, P.J.

Susan Ellingson appeals from the custodial provisions of the decree dissolving her marriage to Brian Ellingson. We affirm.

I. Background Facts and Proceedings.

Brian and Susan Ellingson were married on June 13, 1987. They have two children: Shelby, age seven; and Ashley, age five.

Susan filed this action following the parties' separation in March 1996. Brian moved from the family home in West Des Moines where Susan remained with the children. Brian and Susan made arrangements to share custodial and financial obligations pending dissolution of their marriage. After a dispute resulted in default on the Ellingson's home loan, Susan moved with the children to an apartment in Ankeny. Brian subsequently cured the default and returned to the family home.

In June 1996, the district court entered a temporary order to clarify the Ellingson's financial and custodial obligations. Although the order lacks sufficient detail to determine the court's intended custody arrangement, the record indicates Brian and Susan successfully shared these duties pending entry of the final decree.

Physical care of the children was among the issues disputed at trial. Susan testified she was the primary care provider during the marriage. She offered considerable evidence of parental duties she was obliged to perform because Brian was unable or unwilling to attend to them. Susan also testified Brian was "controlling" and physically abused her during the marriage. Brian disputed Susan's

claims of greater primary care experience. He offered anecdotal evidence of his primary care contributions during the marriage. Brian also questioned Susan's parental judgment and stability citing her extramarital affair and unilateral decision to relocate the children before custodial issues were resolved.

The record also includes the "Ellingson Custody Report" completed by Lutheran Social Services (LSS) pursuant to the district court's order. This report was the result of an LSS assessment of the children's primary care needs and a comparison of each parent's ability to address the needs identified. The report recommended joint custody with physical care granted to Brian.

The district court granted joint custody and physical care of the children in conformity with the recommendations made by the custody evaluation. Brian's greater stability and parental commitment were cited as factors distinguishing him as the preferred physical care provider. Although the district court noted Susan's considerable parental qualities, the court found her parental attention was distracted by her employment and social interests. The court expressly found Susan was untruthful about her extramarital affair and that she sought to influence the outcome of the parties' custody dispute by making false and exaggerated allegations of physical abuse.

On appeal, Susan contends the district court should have awarded her physical care of the children because it was in their best interests to do so. She argues her primary care experience distinguishes her as the preferred physical care provider.

Susan also claims Brian's hostile temperament is not suited for physical care of the children.

II. Standard of Review.

We review de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the district court's findings of fact, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Physical Care.

The critical issue in determining custody is not which parent possesses the greater right to the children, rather the controlling consideration must be the children's best interests. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. The objective should always be to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the children, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the children, the relationship of each child with each parent, the nature

of each proposed environment, and the affect of continuing or discharging an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the children, the court should make an award of custody which will assure the children the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the children. *See* Iowa Code § 598.41(1) (1995). To effectuate that policy the court must consider the willingness of each party to allow the children access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979). Moral misconduct of a parent does not preclude the erring parent from physical care, but it must be considered with other factors. *In re Marriage of Hart*, 547 N.W.2d 612, 614 (Iowa App. 1996).

We believe the custodial implications of Susan's move to Ankeny, extramarital affair, and demands of her employment have been overstated. The perception of significant negative consequences for the children resulting from Susan's judgment in these matters varies depending upon differing and irrelevant notions of social maturity and gender equity. In the absence of any objectively determined harmful

effects on the children, the foregoing circumstances should not disqualify Susan as the children's physical care provider.

We also reject Susan's claims that Brian's temperament is incompatible with physical care. Her claims of physical abuse are at best exaggerated, and according to the district court, patently and intentionally false. We note as did the district court that Susan made no allegations of physical abuse until after she learned of the content of the LSS evaluation report. Similarly, her allegations concerning Brian's "controlling" and "oppressive" behavior toward her implicate spousal issues with no more than conjectural and speculative relationship to the physical care issues raised in this case. LSS properly characterized the parties' negative complaints as "accusatory, blaming, and vindictive in nature and pertain [ing] to marital issues."

The district court resolved the parties' conflicting claims regarding the children's primary care history by finding:

> Throughout the marriage, both parties demonstrated an ability to care for the children. Both parents are capable of being the primary custodial parent. Both parties love the children and that love is reciprocated. Although Susan was the children's primary caretaker in their infancy, that is no longer true and has not been the case for some time. Both parents now equally care for the little girls.

These findings are amply supported in the record. They are also consistent with the observations made by LSS in their custody report. We adopt them as our own.

The record made by the parties in this case was largely devoted to character evidence. Both Brian and Susan sought to turn the outcome of their physical care

dispute to their advantage by inflammatory evidence of the other's character flaws. Neither party presented much evidence relating to the needs of the children, the relationship of each child with each parent, or the affect of continuing or discharging an existing custodial status. Fortunately, the custody evaluator's report contains an extensive discussion of these factors.

The evaluator's assessment of these factors was summarized as follows:

> The importance of the continuity of Ashley's closeness to Mr. Brian Ellingson which is a representation of Ashley's reconnection with her previous day care facility and the home in which she spent the majority of her young life and the importance of maintaining the intactness of the physical togetherness of the siblings would seem worthy of consideration while addressing the custody issue. Furthermore, considering the "hyperactivity" of Shelby and the attention and need for parental supervision for the two preschool children, it would be desirable if the custodial parent has a regular built in support system close by.

The evaluator concluded these objectives could be best accomplished by granting Brian physical care citing four specific reasons:

> (1) The representation of the familiarity and stability of the family homestead at 3500 Boulder Drive, West Des Moines, Iowa;
> (2) The conduciveness of the family homestead in space and structure for the children's growth;
> (3) The accessible support system of Mr. Brian Ellingson's parents in the same neighborhood, and the availability of the paternal grandparents; and
> (4) The close relationship between the two siblings.
>
> . . . .

Although we are not bound by the custody evaluator's investigatory findings and recommendations, they are highly persuasive. *See In re Marriage of Wilson,* 532

N.W.2d 493, 495 (Iowa App. 1995). The recommendations of the evaluator in this case are fortified by essential considerations of the children's needs, relationships with each parent, and the affect of removing the children from their familiar environment to a new home.

Lastly, we reject Susan's claim the custody evaluator was biased and presumptively favored Brian as physical caretaker. The only fact from which such an inference could be made is the greater time the evaluator spent with Brian during the evaluation. However, this inference is unjustified, in view of the reports equally frank assessment of Brian's parental liabilities and negative assessment of the parties' mutual hostility.

We therefore affirm the district court's custody and physical care decision.

IV. Appellate Attorney Fees.

Both parties seek appellate attorney fees. An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996).

Based on Brian's substantially greater earning capacity, we limit his award of appellate attorney fees to $500.

AFFIRMED.