FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PATTI D. STANLEY AND MARK E. STANLEY

Upon the Petition of)

PATTI D. STANLEY,)

Petitioner-Appellee,)

And Concerning)

MARK E. STANLEY,)

Respondent-Appellant.)

358

Filed March 23, 1988

7-563
87-525

Appeal from the Iowa District Court for Poweshiek County (No. TM 1270), James D. Jenkins, Judge.

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

Emil Trott, Jr. of Barrett & Trott, Des Moines, and Roger W. Sunleaf of McNeil & Sunleaf, Montezuma, for appellant.

Donald J. Charnetski of Charnetski, Olson & Lacina, Grinnell, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

359

The parties were married on July 1, 1983. One child, Chelsey Jo, was born of the marriage. She was born on November 9, 1984. Chelsey has been with the petitioner since the separation and had extensive visitation with respondent during the separation when, pursuant to the dissolution decree, respondent's visitation rights were more limited.

Petitioner is twenty-two years of age. She is a high school graduate. She is employed by Hardee's as an administrative assistant earning $4.15 per hour. She works a forty-hour week. During the time she is at work, Chelsey is with a baby-sitter.

Respondent is twenty-six years of age. He is employed by DeLong Sportwear earning $5.85 per hour. He works at least forty hours per week, getting some overtime. His job involves shipping and receiving of materials.

The parties separated in May 1986, and petitioner filed for dissolution of the marriage in June 1986. The district court appointed a conciliator, but conciliation efforts were unsuccessful. The trial court entered the decree of dissolution.

Respondent husband appeals from the decree asserting that the trial court should have set up a joint custody arrangement with him having physical care of the parties' child. Instead, the court gave petitioner wife sole custody of the child.

Custody questions are decided on the best interests of the child. In re Marriage of Carrico, 284 N.W.2d 251, 254 (Iowa 1979); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974); Iowa R. App. P. 14(f)(15). It is highly desirable that the status of a child be fixed as quickly as possible, be thereafter disturbed as little as possible, and then only for the most cogent reasons. Halstead

v. Halstead, 259 Iowa 526, 531, 144 N.W.2d 861, 864 (1966); In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983).

Joint custody is preferred because, properly tailored to the parties' circumstances, joint custodial arrangements will often go a long way toward encouraging both parents to share the rights, responsibilities, and frequently joyful and meaningful experiences of raising their children. In re Marriage of Wiedner, 338 N.W.2d 351, 358-59 (Iowa 1983). Where the husband and wife are unable to communicate effectively, however, which prevents them from participating equally in decisions affecting the upbringing of the children, joint custody will not be awarded. In re Marriage of Miller, 390 N.W.2d 596, 602 (1986).

Although the findings of the trial court are not binding upon the court of appeals in its de novo review of dissolution of marriage decree, they are viewed with considerable weight. In re Marriage of Bornstein, 359 N.W.2d 500, 502 (Iowa App. 1984); Iowa R. App. P. 4. This is because the trial court is present to listen to and observe the witnesses. In re Marriage of Behn, 385 N.W.2d 540, 541 (Iowa 1986).

The trial court found, and we agree, that the parties have been unable in the past to communicate with each other regarding Chelsey's needs. This fact is documented by the court-appointed conciliator's report regarding the breakdown of the parties' marriage in December of 1986. However, that there was an inability to communicate in the past should not be determinative of a joint custody issue. In re Marriage of Ertmann, 376 N.W.2d 918, 920 (Iowa App. 1985). The long-range picture is more important. Id. at 921.

The trial court was not convinced the parties' inability to effectively communicate would improve in the future. The court stated:

> Moreover, Chelsey is just two years of age, and the parties have been separated for almost a year. The court further senses that the respondent does not want this dissolution, and that he is subcons-

> ciously trying to hold on to Chelsey in a vain effort to resuscitate his marriage. The court is persuaded that respondent's interest in Chelsey is not just for her sake. For these reasons, the court finds that joint custody is not in Chelsey's best interest, and declines to make such an award.

The trial court's findings turned substantially on its assessment of the credibility of the witnesses. "Such assessment as a tool in reaching a sound decision is entitled to our close attention because we are denied the impression created by the demeanor of the witnesses during presentation of evidence." In re Marriage of Zabecki, 389 N.W.2d 396, 400 (Iowa 1986).

The record reveals that respondent intentionally shut off communication with the petitioner wife. He declined to talk to her when he returned Chelsey from her visits with him. At visitation time, he would turn his back to his wife and would not respond to her questions about, for instance, potty training. Factually it appears that he refused to tell petitioner where he lived. The respondent went so far as to threaten the petitioner that if she did not "do what he says" with regard to settlement of the case, "he would go back and get custody of Chelsey." It is clear to us that by trial time the respondent's attitude toward the petitioner was openly hostile.

In In re Marriage of Bolin, the court set out the key to successful communication in a joint custodial arrangement:

> Even though the parents are not required to be friends, they owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. One might well question the suitability as custodian of any parent unable to meet these minimum requirements. Problems are likely to develop under any custodial arrangement. The adults must have the maturity to put their personal antagonisms aside and attempt to resolve the problems.

In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983) (emphasis added).

The court in the joint custody dispute, In re Marriage of Miller, 390 N.W.2d 596 (Iowa 1986), stated:

> We believe that the degree of hostility between these parents and their complete inability to communicate would have a severe impact on the children if we ordered joint custody requiring the parties to agree on the basic decisions that must be made in the upbringing of children.

The respondent complains that the trial court failed to adequately cite clear and convincing evidence in its decree that makes joint custody unreasonable as required by section 598.41(2).

Section 598.41(2) does require the court to 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 a parent should be severed."

However, the decree does provide substantial insight into the court's reasoning. Although the decree did not state reasons in detail in denying joint custody, the court correctly concluded that the best interest of the child is the heart of the problem. Miller, 390 N.W.2d at 599.

As the court stated in Miller:

> The omission of the required citation of clear and convincing evidence does not necessitate a reversal of the trial court's award of custody for two reasons. First, the controlling issue on appeal concerns the correctness of the award of custody, not the lack of stated reasons. Second, [appellant] could have moved for an enlargement of the findings and conclusions of the trial court. Iowa R. Civ. P. 179(b). Without such a motion, we need not consider the absence of particular findings of fact or conclusions of law on appeal. See Nowlin v. Scurr, 331 N.W.2d 394, 396 (Iowa 1983).

Miller, 390 N.W.2d at 599.

When we weigh the factors of section 598.41(3), we agree with the trial court's assessment that joint custody is not in the best interest of Chelsey. We conclude that there is clear and convincing evidence that joint custody is unreasonable in this case and not in Chelsey's best interest. The factors involving lack of communication and mutual support of the other parent are so negative

that they outweigh the other factors which support the preferences for joint custody. Miller, 390 N.W.2d at 601.

Respondent husband's next contention is that he should be awarded physical care of Chelsey. As the trial court stated:

> During the 18-month period that the parties lived together as husband and wife after Chelsey's birth, the petitioner had Chelsey's primary care. It was she who fed her her meals, changed her diapers, bathed her, and provided her day to day needs. Respondent helped out as a father, but his main interest was his archery, bowling, working on his car, and his work. Since the parties' separation, they have continued that division.
>
> The court finds no reason to change the arrangement that the parties themselves worked out both during the time they lived together and since their separation. By all accounts, Chelsey is a happy, healthy two-year-old girl. It shows that the person providing her primary care, the petitioner, has done an admirable job.

Accordingly, we find it in Chelsey's best interest that petitioner be awarded her primary physical care.

The next issue is that of respondent's visitation rights. During the parties' separation, respondent had visitation rights every other weekend and on Tuesdays and Thursdays after the weekend visitation from 3:30 p.m. to 9:00 p.m. Chelsey was to visit respondent for two weeks in the summer and on alternating holidays.

The parties are in substantial agreement on visitation. The respondent, with slight modification, asks this court to allow visitation in accordance with the pretrial agreement of the parties. The petitioner, except for certain instances, asks this court to "honor the wishes of the parties and order the visitation schedule they have substantially agreed to." Although we are not bound to do so, for Chelsey's best interest is our first concern, we will do so except that 9:00 p.m. is a little too late during the week. Therefore, we modify the trial court's visitation schedule so that it is consistent with the pretrial arrangements the parties had except that the visits during the week are to be from 3:30 p.m. to 8:00 p.m.

We turn next to the question of whether we should affirm the trial court's award of $55 per week in child support to the petitioner. From her income together with child support payments, petitioner is to pay child care expenses including health care and health insurance. Petitioner's monthly take-home pay is $520. Her monthly expenses are $642. When we consider these facts in conjunction with the factors to be looked at under Iowa Code section 598.21(3) (1987), we find $55 per week to be a reasonable child support payment. We also conclude that the child support should continue during the period of time that the respondent has Chelsey's custody.

We also affirm the trial court's ruling that the party who qualifies under the IRS rules governing deductions in these types of situations will be the party claiming the dependency deduction for Chelsey.

The trial court found that the parties had divided most of their property and were satisfied with the division. From the record before us, we assume that at trial time except for the refrigerator and microwave oven, the parties had in their possession the property they wanted and which the other party agreed should pass to that party. We also believe that the trial court, in awarding the property to the party who had possession, was merely carrying out the division to which the parties agreed. Accordingly, the court confirmed in each party the property they had in their possession except that a refrigerator which was in the possession of respondent, was awarded to petitioner and the microwave oven was awarded to respondent. We affirm this division of property. In this respect, we note the appellant fails to point out any inconsistency with the manner of division utilized by the trial court and the division as agreed to by the parties.

Finally, we award the petitioner $500 in attorney fees she incurred defending this appeal by the respondent. Costs on appeal are to be assessed to respondent.

AFFIRMED AS MODIFIED.

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

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court.