



IN THE COURT OF APPEALS OF IOWA

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IN RE THE MARRIAGE OF ELIZABETH A. STINTON AND LYLE R. STINTON

Upon the Petition of)

ELIZABETH A. STINTON,)

Petitioner-Appellant,)

Filed November 30, 1983

And Concerning)

LYLE R. STINTON,)

3-235
83-312

Respondent-Appellee.)

Appeal from Chickasaw District Court - Joseph C. Keefe, Judge.

Petitioner wife appeals from various provisions of the parties' dissolution decree. **AFFIRMED.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns & Beatty, P.C., Decorah,
for petitioner-appellant.

Isadore Meyer and Andrew Nelson, Decorah, for respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Petitioner wife appeals from various provisions of the parties' dissolution decree. She claims that: 1) in addition to their daughter, she should have been awarded custody of their son and her daughter (the latter was born before the parties' marriage and is not the husband's natural child); 2) the child support and property division provisions of the decree are inequitable; and 3) the trial court abused its discretion in allowing the husband to amend his answer on the day of trial to request custody of his stepdaughter and in allowing him to call witnesses not identified by him in answers to interrogatories. Our review is de novo. Iowa R. App. P. 4. We affirm.

Elizabeth and Lyle Stinton were married in 1971. They are the parents of two children: Douglas, born in 1975, and Karen, born in 1977. In addition, Elizabeth has a third child, a daughter born in 1969. This daughter, Toni, has lived with the parties throughout the marriage. Lyle is not Toni's natural father and has not adopted her. Both parties are trained as teachers. Lyle teaches full time and earns over \$19,000 per year. Elizabeth is a part-time guidance counselor and earns about \$12,000 per year. The parties' only substantial asset is a house, valued by the court at \$54,000 but subject to a debt of more than \$30,000. The parties have other unsecured debts of around \$8,000.

The trial court placed Karen, the youngest child, in Elizabeth's custody; however, the court placed Douglas and Toni in Lyle's custody. With regard to Toni, the court noted that Lyle is not a natural parent and that Elizabeth is therefore entitled to a presumption of preference as custodial parent. However, the court stated that Toni is a "troubled child", and that Toni has a tense and stormy relationship with her mother but a more stable and calm relationship with her stepfather. The trial court concluded that the presumption in Elizabeth's favor had been rebutted and that Lyle would be the preferable custodian for Toni.

The court directed Lyle to pay Elizabeth child support of \$30 per week for the one child in Elizabeth's custody but declined to require Elizabeth to pay child support to Lyle for the two children in his custody. The court also awarded the parties' house to Lyle, subject to its indebtedness. The court also directed Lyle to assume all of the parties' other debts. Elizabeth received a car and personal effects; she was also awarded cash and stocks totalling about \$7,700 in order to give her approximately half the parties' net worth. Lyle was directed to contribute \$500 toward Elizabeth's attorney's fees. Neither party was awarded alimony. Elizabeth brought this appeal.

I.

We first consider Elizabeth's procedural arguments. She first claims that the trial court erred in allowing Lyle to amend his answer on the day of the hearing to include a request that he be given custody of Toni, his stepdaughter. The amendment of pleadings is governed by Iowa Rule of Civil Procedure 88. "Amendments are the rule and denials the exception. The trial court has considerable discretion in allowing amendments." Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). After a responsive pleading has been filed, amendments should not be allowed if they substantially change the issues. Id. We do not believe the court abused its discretion in allowing Lyle's amendment. Elizabeth cannot be heard to claim undue prejudice or surprise from his request for custody of Toni. Lyle's pretrial statement of affairs indicated his desire "to continue to have Toni in his home as her stepfather" and his willingness "to support her as if she were his own." Elizabeth's own trial brief, filed before trial, contained a discussion of the issue of Toni's custody. Elizabeth thus appeared prepared to litigate that issue.

Elizabeth also claims that the court erred in allowing Lyle to present witnesses who were not identified in responses to her interrogatories as persons

having knowledge of this case. It is not disputed that many of Lyle's witnesses were not specifically identified in those responses and that, therefore, the court could have entered an order prohibiting the testimony of those witnesses. See Iowa R. Civ. P. 134(b)(2)(B). It is also clear, however, that Rule 134 does not mandate sanctions but merely allows the court, in its discretion, to impose them. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 289 (Iowa 1979). Again we find no abuse of discretion. We first dismiss as patently ludicrous Elizabeth's contention that Lyle and Toni should not have been allowed to testify because they were not listed in Lyle's response to the interrogatory. As for the other challenged witnesses, their testimony was at most merely cumulative. In fact, the trial court's decree indicates that the testimony of those other witnesses was given little if any weight. We find no merit in either of these procedural issues.

II.

We must now deal with the always-difficult issue of child custody. Three children are involved here—Doug and Karen, the parties' children, and Toni, Elizabeth's natural daughter and Lyle's stepdaughter. The record does not indicate who or where Toni's natural father is. The trial court awarded custody of Toni and Doug to Lyle while Elizabeth was given custody of Karen. Elizabeth contends that she should be given custody of all three children. Lyle wants the present arrangement affirmed; he does not challenge the decree with respect to Karen.

It would be well to reiterate some of the principles particularly relevant to this case which govern our review of a child custody decree. Our primary consideration and goal, of course, is the best interests of these children. Iowa R. App. P. 14(f)(15). Ordinarily, siblings should not be separated although circumstances may arise which indicate that separation would better promote their long-range interests. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). While not controlling, the expressed preference of the children is entitled to some

consideration. Id. Absent a strong case to the contrary, custody should be awarded to a natural parent of the children at issue. In re Marriage of Corbin, 320 N.W.2d 539, 545 (Iowa 1982). In making the actual custody determination, we consider the relevant factors listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Finally, we note that the statutory preference for joint custody (In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983)) is not applicable in this case since neither party requested joint custody. See Iowa Code § 598.41(2) (1983) ("On the application of either parent, the court shall consider granting joint custody..." (emphasis added)). The trial court here, in a commendable abundance of caution, nevertheless considered and then rejected the possibility. We agree with the court's conclusion that "the lack of communication between the parties and their fundamental disagreement on how children should be raised would make joint custody an impossible situation."

Upon our de novo review of the record in this case and the application of the relevant legal principles, we see no reason to disturb the custodial arrangement established by the trial court. We fully realize that, in affirming the custody decree, we are running up against the two traditional presumptions referred to above; i.e. that a natural parent is to be preferred as a custodian and that siblings should not be separated. Like the trial court, however, we are convinced that the unique circumstances of this case are such that both presumptions are rebutted.

We first consider that portion of the decree awarding custody of Toni to Lyle, her stepfather, instead of Elizabeth, her natural mother. It cannot be disputed that Toni and Elizabeth have had a very tumultuous relationship for many years. It is difficult to determine the cause, but the fact remains that they have had and continue to have a love-hate relationship where they are caring and affectionate to each other for one minute and then engage in tirades of yelling,

screaming, and swearing at each other the next. These problems do not exist between Toni and Lyle. Lyle seems to be able to handle Toni's problems and temperament much more calmly and easily than does Elizabeth; in turn, Toni has become more mature and responsible under Lyle's care. At trial, Toni expressed her desire to stay with Lyle where she could be in familiar surroundings with her friends. Given her age (thirteen at the time of trial), we should give special consideration to her expressed preference to stay with Lyle. See In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979).

We adopt as our own the following language from the trial court's decree:

The record is clear in this case that Toni is a troubled child. Whether her problems arise from hyperactivity or just lack of parental control as she was being raised, or a combination of both, is difficult to state. Regardless of why, there has developed an animosity between the petitioner and Toni. A close relationship has developed in recent years between respondent and Toni, and at this point in her life she needs more stability than the petitioner can give her. At this point in the family relationship the record supports an allegation that the respondent is more willing to spend time with Toni than is the petitioner. Further evidence of this is the fact that he has resigned as assistant wrestling coach, a position held for some eight years, to be more available to all three children.

The Court is convinced and the evidence is clear that the presumption in favor of the petitioner as natural parent has been rebutted and the best interests of Toni require that she remain in the custody of the respondent.

Finally, we reject Elizabeth's argument that Lyle should not have custody of Toni because he is "a stranger to the parent-child relationship" between Elizabeth and Toni. The record shows that Lyle took Toni as his own when the parties were married; Toni was eighteen months old at the time. Lyle wanted to adopt Toni as his legal daughter but was unable to do so when Elizabeth refused to make the necessary efforts to contact Toni's natural father. Lyle has been caring for Toni's material and emotional needs as much as, if not more than, Elizabeth has since their marriage. Under these circumstances, Lyle cannot be considered a stranger

to the parent-child relationship; he has been and continues to be deeply involved in Toni's upbringing. This in turn mitigates against the applicability of the natural parent presumption. In any event, as we have already stated, we believe that presumption has been rebutted in this case. We therefore affirm the trial court's award of Toni's custody to Lyle.

We next consider that part of the decree awarding custody of Doug to Lyle. As stated before, Lyle is not challenging Elizabeth's custody of Karen. Therefore, we need only determine whether the trial court was correct in holding that Lyle should have custody of Doug and whether it was appropriate to separate Karen and Doug in this fashion.

On September 24, 1982, an order was issued giving temporary custody of Toni and Doug to Lyle; Elizabeth was given temporary custody of Karen. Although the parties appear to be equally effective parents, we agree with the trial court that maintenance of the current custody arrangement would be in the children's best interests. Doug appears to be well-situated with Lyle, is doing well at school, and has expressed a preference to stay with him. The record also indicates that Karen and Doug have trouble getting along with each other. We see no reason to disturb this custody arrangement where Doug and Karen are being cared for satisfactorily and are close enough (Lyle and Elizabeth live only about twenty miles apart) so that they can try to improve on their presently-strained sibling relationship.

III.

Finally, Elizabeth complains about the property division and child support provisions of the decree. In determining the propriety of these provisions, we consider the factors listed in Iowa Code § 598.21(1) (property division) and § 598.21(4) (child support). We believe the result reached by the trial court is equitable. Since Lyle is to have custody of two of the three children involved, he was properly awarded the house. We also refuse to increase Lyle's child support

obligation. Although his income is larger than Elizabeth's, he is also responsible for all of the parties' debts including a home mortgage of \$32,500. Considering his debt load and Elizabeth's own income, we affirm the child support award.

Finding no reason to disturb any of the provisions of this decree, we affirm it in its entirety.

AFFIRMED.

All judges concur, except Schlegel, J., who dissents in part, and Sackett, J., who specially concurs.

SCHLEGEL, J. (dissenting in part)

I cannot agree that the two presumptions that militate against the award of custody to Lyle have been overcome. I believe that Toni will benefit more from residing with her natural mother than with her stepfather. It appears from the record that to place her, along with Doug, in Lyle's home, will be against the best interests of all three of these children. I would give custody of all three children to Elizabeth, award her the family home subject to Lyle's interest, and require the payment by Lyle of \$90 per week child support.

Since the majority has granted Lyle custody of a stepdaughter and has split custody of siblings, both in violation of established principles, I respectfully dissent.

SACKETT, J. (concurring specially)

I agree with J. Donielson in all respects except I do not consider the mortgage assumed on the home by Lyle to be a factor to be considered in arriving at a fair child support for Lyle to pay Elizabeth. The home Lyle received had substantial equity. The home was awarded to him subject to the debt. If the expense of maintaining the home is too great, he has the option of liquidating the home and obtaining less expensive living quarters. Furthermore his monthly house payments increase his equity in the home.