FILED
MAR 31 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RONALD L. HUBER AND HORTENCIA LOZANO HUBER

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Upon the Petition of )

**RONALD L. HUBER,** )

Petitioner-Appellant, ) Filed March 31, 1987

And Concerning )

**HORTENCIA LOZANO HUBER,** ) 6-493 / 86-405

Respondent-Appellee. )

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Appeal from the Iowa District Court for Polk County (No. CD46-27378) - Rodney Ryan, Judge.

Petitioner husband appeals from the decree dissolving the parties' marriage.

**AFFIRMED**

James R. Cook of Cook & Waters, Des Moines, for appellant.

Victoria L. Herring, West Des Moines, for appellee.

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

The petitioner, Ronald Huber, appeals from a decree dissolving the parties' marriage. Ronald asserts (1) that the trial court should not have awarded sole custody of the parties' child to the respondent, and (2) that the trial court's child support award is excessive. The respondent, Hortencia Huber, requests attorney fees on appeal.

Ronald and Hortencia Huber were married on March 13, 1982. The parties have one child, Travis, born on September 22, 1982. Ronald is a teacher in the Ankeny school system and earns approximately $22,000.00 per year. Hortencia, who came to this country from Mexico in 1954, runs a day-care service in the parties' home. Hortencia, however, has had limited educational opportunities and possesses few marketable employment skills. In its dissolution decree, the trial court awarded Hortencia sole custody of Travis and directed Ronald to pay child support of $125.00 per week for 26 weeks, then $100.00 per week for 26 weeks, and then $75.00 per week thereafter. Ronald has appealed from the child custody and child support provisions of the dissolution decree.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we accord weight to the trial court's findings of fact, we are not bound by them. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984).

Ronald first contends that the trial court erred in granting sole custody of Travis to Hortencia. Ronald contends that because Hortencia has few marketable skills and has a bleak employment outlook, it would be in Travis's best interest that Ronald be granted physical custody of Travis with joint custody in both parents. Ronald argues that because of his high standing within the Ankeny community and because of his comfortable and financially-stable home environment, he could provide Travis with greater emotional support and educational opportunities.

We have long recognized that there are no hard and fast rules governing custody issues in a dissolution decree. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). It is, however, without question that the first and foremost consideration in determining the issue of custody is the best interests of the child involved. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). Because our basic objective is to make an award that will assure a child the maximum opportunity for contact with both parents, we favor joint custody whenever reasonable and in the child's best interests. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). Iowa Code section 598.41(3) sets forth eight factors the trial court must consider when making a determination regarding joint custody. No single factor listed in section 598.41(3) is a condition precedent to allowing joint custody, nor is there a certain number of factors which, when satisfied either mandate or prohibit joint custody. In re Marriage of Short, 373 N.W.2d 158, 160 (Iowa Ct. App. 1985).

Whether parents can communicate with each other regarding the child's needs is one factor to be considered by the trial court in determining whether joint custody is in the child's best interests. In re Marriage of Ertmann, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985); Iowa Code § 598.41(c)(3). Without question, cooperation and communication between parents is essential in joint custody arrangements. However, "our legislature was aware that in a divorce parties are generally not getting along well and a custody contest magnifies the adversarial nature of the dissolution proceeding." Id. In order to justify a demand of joint custody, a lack of ability to communicate must be something more than the usual acrimony which accompanies a divorce. Id.

In the present case, the trial court ruled that it would be in Travis's best interests that sole physical custody be granted to Hortencia. Voluminous testimony was offered by both parties concerning the issue of which parent would

be better capable of meeting Travis's needs. The substance of this testimony may be simply reduced to the finding that both Ronald and Hortencia are excellent parents and either would be more than capable of providing Travis a comfortable and loving home. Both parties have shown that they deeply love Travis and are willing to encourage Travis to have a good relationship with each parent. The trial court, however, found that Ronald and Hortencia have completely divergent philosophies regarding the methods in raising Travis, which has led to numerous heated arguments between the parties. Ronald believes that Travis should be raised to be as independent as possible and places a great deal of emphasis on education at an early age. Hortencia, on the other hand, believes in close supervision of Travis and employs a more traditional method of child rearing. Ronald believes that Hortencia's method of raising Travis will result in Travis becoming a "skirt clinger."

We find it unfortunate that neither party has exhibited a willingness to communicate concerning Travis's welfare, since Travis most certainly would benefit by both parents' input. However, as the trial court found and as we find today, neither Ronald nor Hortencia has exhibited an ability to communicate with each other regarding Travis's welfare, and we see little likelihood of improvement in the future. We therefore do not believe that it would be in Travis's best interests that joint custody be granted.

Ronald places much emphasis on the fact that he would be a superior parent because of his extensive education, income, and his ownership of the comfortable family home. Ronald argues that because Hortencia has received only limited education and possessed few marketable skills, Hortencia would never be able to provide a financially-secure and stable home for Travis. We have continually recognized, however, that while one parent's economic or educational advantages over the other parent should be considered when awarding

custody to one parent or the other, such matters are ultimately of relatively little import and do not provide a sound basis for declining to give either parent custody. Hagen v. Hagen, 226 N.W.2d 13, 16 (1975); In re Marriage of JennerJohn, 203 N.W.2d 237, 243 (Iowa 1972). The record reveals that Hortencia has been the primary caretaker of Travis. Under Hortencia's guidance, Travis has developed into an extremely bright, verbal, and active child. Nearly all the witnesses who testified at trial opined that Travis has matured far beyond his three and one-half years of age. The record reveals that Travis responds well to his mother's discipline and has developed a close relationship with his mother. Because it is our belief that the status of children should be fixed as soon as possible after a dissolution of marriage and thereafter should not be disturbed except for the most compelling reasons, we decline to disturb the trial court's ruling that Hortencia be granted sole custody of Travis with extremely liberal visitation being granted to Ronald. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975).

We additionally note Ronald's concern that Hortencia has expressed a strong desire to move to Texas to reside with her family. Due to increasing mobility of our society, our courts have generally held that removal of children from the geographic proximity of the noncustodial parent provides no justification in itself for a custodial change. Weidner, 338 N.W.2d at 360-61. Trial courts should make a final disposition of a dissolution case on the circumstances then existing. In re Marriage of Schlenker, 300 N.W.2d 164, 165 (Iowa 1981). The trial court in the present case ordered Hortencia to remain in Iowa for the present time and that she not move outside of the state without court permission. Should such a situation arise, Ronald may bring such matters to the trial court's attention at the appropriate time.

Ronald additionally contends that the trial court's child support award is excessive. The trial court ordered Ronald to pay child support of $125.00 per week for 26 weeks, $100.00 per week for the next 26 weeks, and $75.00 per week thereafter. Ronald contends that the child support award is tantamount to granting a provision for alimony in the guise of child support. We disagree.

To reach a just and equitable determination as to the level of child support, the trial court may consider the parties' ages, present earning capacity, future prospects, amount of resources owned by each or both parties, the contribution of each to the parties' joint accumulations, the duration of the marriage, the indebtedness of each or both, and any other relevant factors. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa Ct. App. 1984). In the present case, the record reveals that Hortencia was unemployed at the time of trial. Hortencia possesses few marketable employment skills and most of those relate to her secretarial employment in prior years. Pursuant to a pretrial property stipulation signed by both parties, Hortencia received a 1979 Fiat Strada valued at $900.00, miscellaneous furniture valued at $500.00, and other personal items. Ronald received the parties' home valued at $58,000.00, a 1977 Cadillac, a $50,000 life insurance policy, furniture valued at over $1,000.00, a $2,000.00 trust account, and an IPERS account valued at $5,759.87. Hortencia has virtually no financial assets of her own. In contrast, Ronald earns approximately $22,000.00 per year as a teacher in the Ankeny school system.

The record thus reveals that Ronald has a superior ability to pay child support, and we believe that he should substantially contribute to Travis's support. The trial court's child support award recognizes that in order to provide for Travis's welfare, Hortencia must seek suitable accommodations in which to reside. Given the fact that no alimony was awarded and the fact that Hortencia has few assets of her own, the child support will provide a period of time in

which Hortencia will be able to procure gainful employment and set up a comfortable home for Travis. Additionally, Travis's material needs will undoubtedly increase in the coming years and, due to his high intelligence, his educational needs will increase as well. The child support award, however, does recognize that Hortencia must ultimately increase her share of Travis's support. Given these facts, we do not believe the trial court's child support award was excessive.

Hortencia has requested attorney fees on appeal. Attorney fees are not recoverable in a dissolution action as a matter of right, but rest in the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to pay. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa Ct. App. 1983). Because Ronald has superior financial resources, we order that Ronald pay Hortencia's attorney fees on appeal.

**AFFIRMED.**

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

**OXBERGER, C.J.** (dissenting)

Although I concur with the trial court and the majority in naming the appellee, Hortencia Huber, primary physical custodian of the parties' child, Travis, I cannot agree with their conclusion that joint custody is not feasible in this case. Accordingly, I respectfully dissent from this aspect of the opinion.

As noted by the majority, our statutes express a preference for joint custody over other custodial arrangements. See In re Marriage of Miller, 390 N.W.2d 596, 598 (Iowa 1986); Iowa Code § 598.41(2) (1985). Accordingly, although section 598.41(1) of the Code recognizes that in certain circumstances the best interest of the child may militate against joint custody, the legislature has made it incumbent upon a trial court to set forth explicit reasons justifying its decision to deny a request for joint custody. Moreover, such a decision must be supported by "clear and convincing evidence . . . [indicating] that joint custody is unreasonable and not in the best interest of the child." Iowa Code § 598.41(2) (1985). After reviewing the record de novo, I am convinced that no such showing has been made in the present case.

It is quite clear that the trial court predicated its refusal to grant joint custody upon its concern that the parties are unable to agree on the proper method for raising Travis. I am not persuaded that the record substantiates this conclusion. First, the record reflects that despite their divergent philosophies, Ronald and Hortencia have successfully raised Travis for the past three and one-half years. Moreover, the record discloses that both parties have developed close relationships with Travis and that both are effective and loving parents. Although their differences have become exaggerated since their separation, I am not persuaded that this friction is greater than "the usual acrimony accompanying a divorce." In re Marriage of Ertmann, 376 N.W.2d 918, 920 (Iowa App. 1985). As such, I do not think this is a sufficient basis for denying joint custody.

In addition, I am troubled by the majority's citation to Schoonover v. Schoonover, 228 N W 2d 31 (Iowa 1975) I do not think that Schoonover stands for the proposition that we should refrain on appeal from disturbing a trial court's decision concerning the physical custody of a child, rather, I interpret Schoonover as providing that, in a modification action, the trial court should decline from disturbing the children's status unless "for the most cogent reasons." Schoonover, 228 N W 2d at 34

In summary, I would modify the trial court's decree and allow for the joint custody of Travis