IN THE COURT OF APPEALS OF IOWA

No. 7-314 / 96-1967

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IN RE THE MARRIAGE OF MARILYN K. WENDEL AND TODD L. WENDEL

Upon the Petition of
MARILYN K. WENDEL,
Appellant,

And Concerning
TODD L. WENDEL,
Appellee.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

The petitioner appeals the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED.**

Evelyn Ocheltree of Legal Services Corp., Mason City, for appellant.

Lance W. Von Ah of Eggert, Erb, O'Donohoe, Frye & Von Ah, P.L.C., Charles City, for appellee.

Heard by Sackett, P.J., Vogel, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

VOGEL, J.

The petitioner appeals the child custody and economic provisions of the parties' dissolution decree. Petitioner contends the district court erred in: (1) granting the parties joint custody despite respondent's history of domestic violence; (2) awarding respondent unsupervised visitation; (3) failing to impose a permanent protective order; (4) failing to correctly calculate respondent's income for purposes of child support; and (5) failing to fashion an equitable property division.

Background facts. Todd and Marilyn Wendel were married on March 11, 1985. They have three children, Nathaniel, born October 23, 1985, Mandalin Kay, born September 23, 1991, and Margaret May, born April 6, 1995. Todd was thirty-one years of age at the time of trial and Marilyn was thirty-one.

Marilyn is a high school graduate and attended Hamilton Business College for two months. Marilyn was primarily a homemaker during the parties' marriage. She suffers from arthritis and is currently attending vocational rehabilitation. Todd completed the tenth grade and worked at a Ford dealership as assistant service manager, earning $9 per hour. Todd later obtained employment with C&W Used Cars and Suburban Refuse. He was paid on a commission basis for selling cars and received an hourly wage. Todd and the owner of C&W, Charles Wulf, formed a partnership shortly after Todd began employment. Pursuant to the agreement, Todd would pay one-half the bills and receive up to 100 percent of the profit per sale. In 1992, C&W sold $346,000 worth of cars. By 1995, sales had increased to $525,000.

The partnership was allegedly dissolved in 1995. Todd continues to help out around the business. He is currently active in racing cars. At trial, Todd reported his net monthly income was $1098.93 per month. Marilyn maintained he earned $2313 per month.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1992); *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Joint custody. Marilyn contends the district court erred in granting joint custody. Initially, in her proposed resolution of disputes submitted at trial, Marilyn proposed she and Todd should be awarded joint legal custody of the children and that she be awarded their primary care. It was not until she testified that she requested sole custody. Our statutes express a preference for joint custody over other custodial arrangements. *See* Iowa Code § 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356, 359 (Iowa 1983) ("Joint custody is preferred because . . . 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."). Sole custody is appropriate under certain circumstances. *Weidner*, 338 N.W.2d at 356-59 ("[Sole custody may be appropriate where the parties] are

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unable to communicate with each other regarding their children's needs, [and] neither parent would be adequately supportive of the other parent's relationship . . . ."). The custody issue is a close call and we defer to the trial court in having made the proper assessment of the credibility of the witnesses in determining joint custody was appropriate. We accordingly affirm.

Visitation. Marilyn also maintains that supervised visitation is necessary because Marilyn worries about the children's safety if left in Todd's unsupervised care. The parties separated in March 1995. Marilyn referred Todd to the Department of Human Services (DHS) after Todd allegedly shoved Nathan against a wall and called him a bastard in April 1995. This incident was unfounded. Marilyn further claimed Todd had engaged in sexual intercourse with another woman in Nathan's presence at the used car lot. This incident was unfounded. She also reported an incident which occurred in August 1994, during which Todd allegedly slapped Nathan after he used foul language and attempted to kick Todd in the groin. This incident was founded.

Iowa Code section 598.41(1) (1995) provides in relevant part:

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, unless direct physical harm to the child, other children, or parent is likely to result from such contact with one parent, and which will encourage parents to share the rights and responsibilities of raising the child.

Id. We find the court was mindful of providing maximum parental contact with the children pursuant to Iowa Code section 598.41(1). The court addressed any concerns regarding possible physical or emotional harm to the children and ultimately granted Todd visitation every other weekend from 7:00 p.m. Friday until 7:00 p.m. Sunday, and one evening per week from 4:00 p.m. to 7:00 p.m. He was also granted reasonable summer visitation.

Marilyn argues three professional mental health care experts (Ms. Blunt, an in-home family counselor, Dr. Gordon, a psychologist, and Ms. Hanson, a clinical social worker) testified that Mandalin and Nathan are afraid of their father and that Todd should only have supervised visitation. Dr. Gordon testified at trial a supervised visitation for a limited time period until Todd re-established a relationship with Nathaniel and the other children was advisable. Both parties at trial agreed to a supervised visitation schedule for two months, to be followed by unsupervised visitation, provided the supervised visits went well. The court made clear that if at any time either the supervisors of the visitation, or the children's counselors had any reservations about starting unsupervised visits, application should be made to the court. After the two-month period expired, the court was not notified by either the supervisors, Alice Bramley or Virgil Goodale, or the children's counselors that there were any problems during those visits. Marilyn argues it was not clear the parties understood the need to apprise the court of problems with the visitations; however, this is against the clear evidence in this case. We find a mechanism was in place for

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the parties to report any problems and no problems were reported. The court therefore granted unsupervised visitation to Todd.

We affirm the district court's granting of unsupervised visitation.

No-contact order. Marilyn petitioned the court for a no-contact order on May 10, 1995, as Marilyn alleged Todd was very "hostile and very threatening . . . and my children were afraid" following their March 1995 separation. The district court in Cerro Gordo County, Cause No. 55713-0595, granted the order, and Todd had no further contact with Marilyn except for court hearings. She contends there is a history of physical abuse in their relationship, and she argues the district court should have imposed a permanent protective order. Both parties testified to an isolated incident in December of 1992. There was conflicting testimony as to whether Marilyn or Todd was the aggressor in that incident. Because of the remoteness in time since that incident, the conflicting testimony, and resolution of the visitation issue, we affirm the district court in denying a permanent protective order.

II. Calculation of income for child support. Todd was ordered to pay $581 per month in child support based on the trial court's finding that Todd's net monthly income was $1335. The court ordered each party to be responsible for one-half all unpaid medical and dental bills. Todd was awarded the tax deductions. No alimony was ordered. Marilyn contends the district court erred in finding Todd earned a net monthly income of $1335. She contends Todd has hidden assets, such as a racing car and trailer, and a salary paid by Charles Wulf for commission sales at the used car lot.

While Marilyn speculated as to the extent of Todd's income and assets, none of her allegations are supported by the record. We affirm the trial court in setting an appropriate child support amount based on the evidence presented.

III. Debt distribution. Marilyn lastly argues the decree's debt distribution is inequitable. A profile of Marilyn and Todd's assets and debts is helpful.

Exclusive of the homestead, the contract balance, and two attendant debts, the court awarded assets and assigned debt as follows:

Marilyn's Assets:		***Todd's Assets:***	
1981 Escort	$ 350	Cougar	$500
Personal property	2000	Merkur	500
		Davey collection	800
		Personal property (no specified value)	
TOTAL	$2350	TOTAL	over $1800
Marilyn's debts:		***Todd's debts:***	
Student loan	$5487	Credit union	
James Cunningham	2195	(Merkur)	$1900
		Ford	3594
		Wulf	600
		Dr. Scribbens	387
		Harmon Insurance	265
		Dr. Ruen	125
		TCI	69
		TransAm	2184
TOTAL	$7682	TOTAL	$9124

Marilyn's net is roughly a negative $5,332, whereas Todd's net is less than a negative $7324.

The parties' largest asset was the marital home which the court valued at $29,644, with a balloon payment due September 1, 1996, of $15,984. Debt that

would either be assigned to Marilyn if she retained the home or was to be paid prior to dividing up the proceeds upon sale were $2000 and $1452 for recent repairs. That would leave a net equity in the home of $10,208. The court ruled if Marilyn wished to purchase their home, she would be required to pay Todd $4,000 within ninety days of the date of decree, otherwise the home would be sold and proceeds would be divided equally. After a close review of the trial court's division of assets and debts, we fail to see any inequity and affirm the trial court.

Having carefully considered all issues on appeal, we affirm the rulings of the district court.

AFFIRMED.