



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, DEPARTMENT OF )  
HUMAN SERVICES, ex rel. COLLEEN )  
KATHERINE LESTER, )

330

Plaintiff-Appellee, )

Filed May 28, 1987

vs. )

JOHN NELSON MOSES, )

6-472  
85-1857

Defendant-Appellant. )

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Appeal from the Iowa District Court for Dubuque County (No. 45116),  
T. H. Nelson, Judge.

Defendant appeals from an adverse judgment in this Iowa Code chapter 675  
paternity and support action. **REVERSED AND REMANDED.**

Jerald W. Kinnamon and Jon M. Kinnamon of Kinnamon, Kinnamon, Russo  
& Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General; Gorden E. Allen, Special Assistant  
Attorney General; J. Livingston Dunkle, Assistant Attorney General; and  
Christian R. Smith, Assistant County Attorney, for appellee.

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

**DONIELSON, J.**

The defendant, John Nelson Moses, appeals from an adverse judgment in an Iowa Code chapter 675 paternity and support action. Moses asserts: (1) that the trial court improperly denied him a jury trial; (2) that there was not sufficient evidence to support the trial court's paternity finding; and (3) that the child support obligation the trial court imposed upon him is excessive. We reverse and remand for a new trial.

On March 25, 1985, the plaintiff Iowa Department of Human Services filed a petition on behalf of Colleen Katherine Lester, requesting that Moses be adjudicated the father of Colleen's child, Shane, born January 30, 1985. The petition also requested that Moses be required to support the child and pay the expenses of his birth. Moses, appearing pro se, filed an answer to the petition on April 10, 1985. On August 9, 1985, the district court entered an order scheduling a non-jury trial in the case for August 20, 1985. On August 15, 1985, Moses filed a pro se "motion for a jury trial," and "motion for continuance" to allow him to prepare for trial. On August 16, 1985, the district court denied Moses' request for jury trial and rescheduled a non-jury trial for October 3, 1985; the trial was in fact, however, held on October 30, 1985. Following trial, the trial court ruled that Moses was the father of Lester's child and that Moses must pay \$200.00 per month child support. The trial court granted Moses an extension of time to file post-trial motions. The trial court subsequently denied Moses' motion for new trial and motion for judgment notwithstanding the verdict. Moses subsequently appealed.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. When considering the question of whether or not a trial court was correct in granting or denying a belated motion for a jury trial, we note that the decision to grant or deny a request for a jury trial under such circumstances rests within

the trial court's discretion. Sher v. Burche, 353 N.W.2d 859, 864 (Iowa App. 1984).

Iowa Rule of Civil Procedure 177(b) provides:

A party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue. If filed with the petition, the jury demand shall be served with the original notice and petition. If filed after the petition, the jury demand shall be served and filed in accordance with R.C.P. 82.

Rule 177(d), however, provides that:

Notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

In the present case there is no question that Moses did not meet the requirements of rule 177(b). The last pleading directed to the issue was filed by Moses on April 10, 1985. Moses did not file his motion for jury trial under August 15, 1985. The question is therefore whether pursuant to rule 177(d) the trial court abused its discretion in denying Moses' motion for jury trial.

Moses concedes that the right to a jury trial in a paternity action is not fundamental. State ex rel. Rake v. Ohden, 346 N.W.2d 826, 829 (Iowa 1984); State ex rel. Bishop v. Travis, 306 N.W.2d 733, 736 (Iowa 1981). Moses, however, argues that because he demanded a jury trial pursuant to Iowa Code section 675.18 (1985), he was entitled by statute to a jury trial. Iowa Code section 675.18 states that in paternity actions "[t]he trial shall be by jury, if either party demands a jury, otherwise by the court, and shall be conducted as in other civil cases." The Iowa Supreme Court, in State ex rel. Buchanan v. Buchanan, 259 N.W.2d 820, 821 (Iowa 1977), stated that ordinarily, a party would be entitled to a jury trial on the issue of paternity if a timely demand has been filed. There-

fore, a party to a paternity action must not only demand a jury trial, but must timely demand a jury trial pursuant to rule 177(b).

The Iowa Supreme Court, however, has also recognized that under particular circumstances, in the court's discretion and for good cause shown, may grant a motion for jury trial, despite the requesting party's noncompliance with 177(b). In Schloemer v. Uhlenhopp, 237 Iowa 279, 285, 21 N.W.2d 457, 459 (1946), the Iowa Supreme Court, in interpreting the then recently-enacted rule 177, held that whether or not a belated demand for jury trial should be granted depends upon the facts of each individual case. In Katcher v. Heidenwirth, 254 Iowa 454, 462, 118 N.W.2d 52, 56 (1962), the Iowa Supreme Court, called upon to interpret subsection (d) of rule 177, held that the words "for good cause shown" are flexible, and their meaning not fixed or definite.

In State ex rel. Buchanan v. Buchanan, 259 N.W.2d 820 (Iowa 1977), the Iowa Supreme Court considered a factual situation similar to that of the present case. In Buchanan, the complainant had filed a chapter 675 paternity action against the respondent on June 18, 1974. 259 N.W.2d at 821. On June 21, 1974, the respondent's attorney appeared, but did not answer. Id. On July 1, 1974, the respondent submitted interrogatories, the answers to which complainant filed on August 13, 1974. Id. On August 28, 1975, the trial court set a non-jury trial for December 9, 1975. Id. Respondent, however, did not file his answer until December 5, 1974, at which time he also filed a demand for jury trial. Id. The trial court subsequently denied respondent's motion for jury trial. Id.

In affirming the trial court's denial of respondent's demand for jury trial, the Iowa Supreme Court initially noted the procedures outlined in rule 177(b), and stated that respondent had waived his right to a jury trial under rule 177(b), since the respondent had submitted without objection for several months to the assignment of the case as a non-jury case. 259 N.W.2d at 821. The Buchanan

court additionally noted that the respondent had also long been in default in answering pursuant to Iowa Rule of Civil Procedure 85(b).

Unlike the Buchanan case, Moses in the present case did not submit to the assignment of the case as a non-jury case, but rather filed a motion for jury trial six days after assignment by the trial court. We therefore find that Moses did not intend to waive his right to a jury trial. Additionally, we note that the trial court in the present case granted Moses' motion for continuance, rescheduling the trial for October 3, 1985. The present case was not actually tried until October 30, 1985. Therefore, the granting of a jury trial would not have resulted in any unnecessary delay in trying the case. See Katcher, 254 Iowa at 463, 118 N.W.2d at 57 (where the court noted that since the defendant filed a demand for jury trial on March 10, 1961, and trial was not to commence until March 20, 1961, there was no delay caused by the trial court's granting a jury trial).

We also note that Moses appeared pro se at the time the motion for jury trial was made. Though we recognize that ordinarily a party appearing pro se in a proceeding will not be excused from compliance with rules governing the course and conduct of a proceeding at law, see State v. Hutchison, 341 N.W.2d 33, 41-42 (Iowa 1983), we note that the record reveals that Moses substantially complied with the Rules of Civil Procedure in all other aspects of the present action's progression. The trial court apparently recognized that Moses needed more time to prepare his case and granted a significant extension. We find no evidence that the granting of a jury trial would have resulted in any delay. Because Iowa Code section 675.18 does provide for a jury trial upon demand by either party to a paternity proceeding, we believe it is desirable and proper that the trial court exercise considerable discretion in favor of granting a demand for jury trial where it does not appear that the granting of a jury trial would

otherwise delay trial and where it appears from the circumstances of the particular case that the party demanding a jury trial, though belatedly filing such a demand, does not appear to have intended to waive such right. We caution that today's holding is particular to the facts of the present case, and we do not attempt to retreat from the general rule that a party must ordinarily file a demand for jury trial no more than ten days after the last pleading directed to that issue.

Additionally, because of our holding today, we need not consider Moses' arguments of insufficient evidence of paternity and excessive child support awarded.

**REVERSED AND REMANDED.**