FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA SUE CHESHER AND MICHAEL JOHN CHESHER

Upon the Petition of)

LINDA SUE CHESHER,)

Petitioner/Appellee/ Cross-Appellant,) Filed May 31, 1983

And Concerning)

MICHAEL JOHN CHESHER,) 3-48 / 3-88626

Respondent/Appellant/ Cross-Appellee.)

Appeal from Woodbury District Court - Charles R. Wolle, Judge.

Respondent husband appeals and petitioner wife cross-appeals from the decree dissolving the parties' marriage and awarding the parties joint custody of their child. REVERSED.

John T. O'Brien of O'Brien, Galvin, Huehl & Mullin, Sioux City, for respondent-appellant.

Kelly A. Rice of Legal Services Corp. of Iowa, Sioux City, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

DONIELSON, J.

Respondent husband appeals and petitioner wife cross-appeals from the decree dissolving the parties' marriage and awarding the parties joint custody of their child. On appeal, respondent husband asserts (1) that the trial court should have allowed the parties equal time with their child in its joint custody arrangement; and (2) that the child support he is required to pay during the time the child is with the petitioner wife is excessive. On cross-appeal, petitioner wife asserts (1) that the trial court should have given her sole custody of the parties' child; and (2) that the trial court should have required respondent husband to pay her child support even when the child is living with him. Petitioner wife also requests attorney fees and costs on appeal. We reverse the joint custody award and grant sole custody to respondent.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give them weight especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); In re Marriage of Bauder, 316 N.W.2d 697, 700 (Iowa 1981). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I.

Petitioner, Linda Sue Chesher, and respondent, Michael John Chesher, were married in November, 1979. They have a daughter, Katie, born in January, 1980. Linda's son and daughter from a previous marriage, ages 12 and 8 at the time of trial, also lived with the parties. Linda works as a salesperson, earning about $5,200 a year. She also receives child support for the two children from her previous marriage. Mike works at a cold storage company, earning $18,500 a year. Mike also earns overtime pay on occasion. In 1981, Michael's gross income was $24,000.

After hearing evidence regarding the parenting abilities of both parties, the court concluded that a joint custody arrangement was appropriate in this case. In its decree entered May 14, 1982, the court provided that Linda was to have Katie in her home from January 1 through May 31 and from September 15 through December 31 of each year. Mike was to have Katie in his home from June 1 through September 14 of each year. Each party was to have visitation rights during the time Katie was living with the other party. The trial court directed Mike to pay Linda child support of $75 per week for all weeks when Katie was living with Linda. Linda was not required to pay any child support. Mike was also awarded visitation rights with the two children from Linda's previous marriage. This appeal followed.

II.

Each party sought custody of Katie in the lower court proceeding. The court agreed with Katie's guardian ad litem in concluding that this is an appropriate case for a joint custody arrangement. Based on our de novo review of the record, we disagree with this conclusion.

The principles to be considered in determining whether a joint custody arrangement is appropriate are set forth in Iowa Code § 598.41 (1983), which codified many aspects of our prior case law. See Burham v. Burham, 283 N.W.2d 269, 271-74 (Iowa 1979). We believe the following provisions weigh against granting joint custody in the instant case:

> c. Whether the parents can communicate with each other regarding the child's needs.
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> * * *
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> e. Whether each parent can support the other parent's relationship with the child.
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> * * *
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> g. Whether one or both the parents agree or are opposed to joint custody.

The record reveals that the parties actually opposed the idea of joint custody, though they nominally agreed to joint custody in an apparent effort to keep the other from being granted sole custody. While they agreed to make an effort to implement a joint custody arrangement, both parties expressed doubt regarding their ability to work together and to reach shared decisions about Katie's welfare. On cross-appeal Linda still argues strongly that joint custody is inappropriate for this reason, among others.

The parties have also demonstrated an inability to communicate with each other. When Katie was in temporary custody of Linda, the parties experienced problems implementing the temporary visitation arrangement. Linda denied Mike the right to exercise his visitation and was cited for contempt as a result. There are other indications that Linda does not support Mike's relationship with Katie. At various times, Linda has discouraged the development of a healthy father-daughter relationship by refusing to allow Mike to see or hold Katie and by threatening to teach Katie to dislike her father because he is a bad man. Under these circumstances, we believe that a joint custody arrangement is inappropriate in this case. Accordingly, we consider the factors set forth in section 598.41, and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), to determine which parent can minister more effectively to the long-range best interest of Katie.

We believe either parent would be a fit custodian of Katie. Both parents love their daughter very much. However, we believe it is in Katie's best interest to be in the permanent custody of her father. Linda is to have liberal visitation rights.

When the parties met, Mike was an alcoholic and Linda was experiencing emotional instability including periods of depression and anxiety. Mike underwent treatment for his alcohol and drug dependency and had completely quit using these substances before the parties were married and became the parents of Katie.

Mike still attends alcohol counseling sessions which serves to enforce our belief that he has his problem under control and will not return to alcohol or drug use in the future. In fact, after Mike received treatment for his alcoholism, his father sought treatment for his own alcoholism. Mike presently lives with his parents and we can assume Mike and his father will support each other in their continued abstinence from alcohol. It is clear from the record that Mike's home would be suitable for Katie. Linda argues that the fact that Mike lives with his parents, who are in the process of retiring, should work against his being granted custody of Katie. We disagree. Mike's parents are eager to help care for and raise their grandchild. They will be able to babysit while Mike is at work. We disagree that the grandparents' advancing ages and infirmities would make them unsuitable to care for Katie.

Linda, on the other hand, has no contact with her mother and has little, if any, support from her family circle. She argues that Katie should not be separated from her older half-brother and half-sister. We recognize that siblings should not be separated without good cause. Winter, 223 N.W.2d at 168. We believe that good cause exists and that the visitation arrangement can be arranged so that Katie will be able to continue the sibling relationship she now enjoys with Shane and Stacy. Presently, Shane and Stacy visit their natural father every other weekend. We therefore direct that the visitation arrangement provide that Katie is to spend every other weekend with her mother, such weekends to coordinate with the weekends that Shane and Stacy remain at home with their mother.

We note that Linda has experienced periods of emotional instability and depression. She was admitted for psychiatric treatment following her first divorce. While it is apparent that, at times, she still suffers from such instability, she is not presently seeing a counselor or receiving any treatment. She is presently working full time as a sales clerk and receives child support for Stacy

and Shane. Mike works full time and earns approximately three times as much as Linda. He attends parenting classes and is supportive of the mother-daughter relationship between Linda and Katie.

In awarding custody to Mike, we grant Linda liberal visitation rights. On the weekends Linda has visitation rights, she may have Katie from Friday at 5:00 P.M. to Sunday at 7:30 P.M. Linda shall also have Katie one month during the summer, the precise month of which may be agreed upon by the parties with an eye toward coordinating the month of Katie's visit with a summer month in which Shane and Stacy will remain in their mother's home. During the summer month when Katie is with Linda, Mike shall have visitation rights with Katie every Saturday from 9:00 A.M. until 7:30 P.M. The parties shall alternate having Katie on holidays as follows: . January 1, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

We note that this visitation arrangement represents a minimum; the parties are encouraged to be flexible and liberal with each other and to promote the other's parent-child relationship with Katie in Katie's best interest. Under this arrangement no child support is due either party. This custody arrangement is to be implemented immediately. In the event that Katie has not stopped breast feeding, the arrangement shall be implemented immediately with Katie to remain initially with Linda under the one-month summer visitation schedule in order for Katie to stop breast feeding.

III.

Linda also seeks attorney's fees in connection with this appeal. Attorney's fees are not recoverable as a matter of right, but depend upon one party's financial needs and the other party's ability to pay. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). Likewise on appeal, our primary consideration in making an award of attorney's fees is the parties' resources. Considering the

rties' financial needs and abilities, we believe that Mike shall be responsible for nda's attorney's fees and for the costs of this appeal.

Having considered all of the parties' contentions, we reverse the award of int custody and remand for entry of the custody provisions set forth above.

REVERSED.