

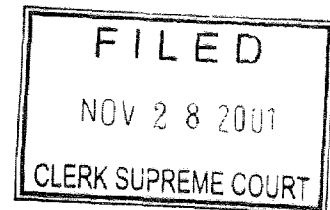
IN THE COURT OF APPEALS OF IOWA

No. 1-484 / 00-1914
Filed November 28, 2001

IN RE THE MARRIAGE OF VALORIE LYNETTE WYLDES
AND WILLARD CHARLES EMERSON

Upon the Petition of
VALERIE LYNETTE WYLDES,
Appellee,

And Concerning
WILLARD CHARLES EMERSON,
Appellant.



Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs,
Judge.

The respondent appeals the child custody and visitation provisions of the
parties' dissolution decree. **AFFIRMED.**

Jane White, Alfredo Parrish, and Tammy Westhoff of Parrish, Kruidenier,
Moss, Dunn, Montgomery, Boles & Gribble, L.L.P., Des Moines, and Linda
Hansen Robbins of Irvine & Robbins, L.L.P., Cedar Rapids, for appellant.

Patricia T. Lough, Vinton, until withdrawal, then Thomas Gillespie, Cedar
Rapids, for appellee.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

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VOGEL, J.

Willard Emerson appeals from the district court's order granting sole custody of the minor child to his former wife, Valorie Wyldes. As we find both the custody and visitations provisions of the dissolution decree to be appropriate, we affirm the district court.

Background Facts and Proceedings. Willard (Bill) and Valorie's son Collin was born in March 1993, while Bill was incarcerated in a federal prison in Arizona. The couple married in August of the same year. Bill's imprisonment was a result of a probation violation following a 1989 conviction for assaulting a federal officer. In April 1994 Valorie moved back to her hometown of Vinton, Iowa. Shortly thereafter, Bill escaped or "walked away" from his limited security facility. Bill attempted contact with Valorie and Collin, but Valorie became fearful of Bill and refused his attempts. Bill remained on walk-away status until April 1997, when he was rearrested in Ohio. In April 1999 Valorie filed a petition for dissolution. When the matter came on for trial in August 2000, Bill was under house arrest in Arizona. He was represented by counsel, however, and appeared by telephone.

The district court found Valorie should have sole legal custody of Collin, citing Valorie's fear and distrust of Bill, the parties' lack of communication, and Bill's criminal history. It also provided Bill with a gradually increasing visitation schedule. On appeal Bill argues the court applied the wrong standard in granting sole custody to Valorie, and that it failed to expressly state what clear and

convincing evidence supported a sole legal custody award. He also contends he is entitled to a greater visitation award.

Scope of Review. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the district court's determination of factual findings, we give them considerable weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Clear And Convincing Evidence Supporting Sole Custody. Bill argues he should have been granted joint legal custody of Collin. The basis of Bill's argument, both on appeal and in his motion pursuant to Iowa Rule of Civil Procedure 179(b), is that the district court failed to utilize the statutory test under Iowa Code section 598.41, using instead the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). It is clear from a review of the dissolution decree that the district court heavily considered the *Winter* factors in assessing the evidence and making the custody determination.

Winter sets forth twelve criteria to be considered in a custody determination, including the child's needs, characteristics of the child and the parents, each parent's capacity and interest in providing for the child's needs, each parent's relationship with the child, the effects of continuing or disrupting the current custodial status, and the nature of the environment to be provided by each parent. In reviewing the criteria it is apparent they are largely geared towards a physical, rather than legal custody determination. The *Winter* case also predates certain statutory amendments to Iowa Code section 598.41, which clarified that joint legal custody did not also require joint physical care, and

created specific guidelines for determining sole legal custody. *In re Marriage of Bolin*, 336 N.W.2d 441, 443 (Iowa 1983); Iowa Code § 598.41(3), (5) (1999).

Those guidelines require a district court awarding sole legal custody to cite clear and convincing evidence “that joint custody is unreasonable and not in the best interest of the child.” Iowa Code § 598.41(2)(b) (1999). In determining the best interest of the child, the court is to consider a number of relevant factors, including the parents’ custodial suitability, the impact a lack of active contact with a parent may have upon a child, the parents’ ability to communicate and to support each other’s relationship with the child, the parents’ positions on a joint custody arrangement, the parents’ geographical proximity, whether both parents actively cared for the child before and since the separation, any history of domestic violence, and whether joint custody would jeopardize the safety of the child or the other parent. Iowa Code § 598.41(3) (1999).

Although the district court did state all statutory criteria had been considered, it did not specifically refer to section 598.41 and its enumerated factors. Bill contends this omission is fatal to the district court ruling. We cannot agree. The question for this court is whether, despite its failure to specifically discuss relevant statutory criteria, the district court nevertheless made the proper ruling. *See In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa 1997). Because we conduct a de novo review of the record, we are able to proceed with this analysis. *Id.* Upon applying the statutory factors, we find little to advance Bill’s argument.

What permeates our analysis is Bill's total absence from Collin's life since shortly after his son's 1993 birth. He has not only failed to provide financial support but has contributed nothing to Collin's growth and development. Although Bill did attempt to communicate with Valorie, he did so while being sought by law enforcement, and the nature of those communications caused Valorie serious concern for her safety. While Bill disputes he ever was threatening to Valorie, we defer to the district court's assessment of witness credibility. The parties' inability to communicate, the implications of Bill's criminal history and Bill's current, distant geographical location are also relevant to our analysis, and all support the district court ruling. The record in this case, when assessed in light of section 598.41(3), demonstrates that joint custody would be unreasonable and not in the best interests of Collin. We therefore affirm the district court's grant of sole custody to Valorie.

Visitation. Bill also asserts the district court should have granted him more visitation. The court detailed a graduated schedule of visitation that began with initial contact by telephone and mail and increased over a period of approximately sixteen months to include every other weekend, alternate holidays and two weeks of summer visitation. Although Bill claims this is insufficient, we agree with the district court's approach. At the time of trial, Bill had not seen Collin since he was an infant and had absolutely no relationship with him. The best interests of Collin demanded that the reintroduction of Bill into Collin's life be approached with some caution, in hopes of developing a more normal parent-child relationship. This gradual approach also serves to allay Valorie's fears Bill

might abscond with Collin. The district court very carefully crafted a plan to achieve those goals. We find the plan appropriate for the unique circumstances of this case and affirm on this issue.

Attorneys' Fees. Valorie seeks attorneys' fees on appeal. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Bill asserted at trial that he would be released from custody in December of 2000 and was a skilled heating and ventilation technician capable of earning a substantial income. Valorie earns \$8.50 per hour and was forced to defend the district court's decree on appeal. We award Valorie \$1000 in appellate fees. Costs on appeal are assessed to Bill.

AFFIRMED.