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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SCOTT D. BURK,	)	
Petitioner-Appellant,	)	Filed January 29, 1986 52
vs	)	5-537 85-226
DENISE A. SHOWMAN,	)	
Respondent-Appellee	)	

Appeal from the Iowa District Court for Jefferson County, James P. Rielly, Judge

The parties, who were never married to each other, are the parents of a boy born in 1982 The court placed the child in Denise's custody, subject to Scott's specified visitation rights Scott has appealed, seeking custody of the child **AFFIRMED.**

David P Miller and William A Downing, Libertyville, for the petitioner-appellant.

Myron Gookin of Foss, Kuiken and Gookin, Fairfield, for the respondent-appellee.

Heard by Oxberger, C J , Snell, and Schlegel, JJ

The petitioner-father has appealed from the trial court's award of custody of the couples child to the respondent-mother, and its support award. We affirm.

We initially note that during oral arguments, one of the counsel for the parties mentioned the question of subject matter jurisdiction. The parties have never been married to each other, and there is no dispute that the petitioner is the father of the child.

The father brought the petition to determine custody of the child. The trial court determined it was operating under Chapter 675 of the Code dealing with paternity of children and their support. In oral argument, the respondent's attorney noted that the pertinent Chapter provides for an award of custody where paternity is judicially established. Iowa Code § 675.40 (1985). Since there is no judicial paternity order, he argues, there is no subject matter jurisdiction. This issue was not raised by either party in their briefs presented to this court. The trial court found jurisdiction to be proper under this section which indicates the mother of the child has sole custody unless the court orders otherwise.

This court generally has the jurisdiction to determine custody of a child, even though it does not involve a divorce or question of paternity. See Lamar v. Zimmerman, 169 N.W.2d 819, 821 (Iowa 1969); Parks v. Parks, 257 Iowa 1029, 1033, 135 N.W.2d 625, 627 (1965); Stevenson v. McMillan, 250 Iowa 737, 739, 95 N.W.2d 719, 721 (1959); Helton v. Crawley, 241 Iowa 296, 309, 41 N.W.2d 60, 69 (1950). The usual procedure for bringing such a question is through habeas corpus. See, id. We find this court has jurisdiction over the subject matter of this action. An argument could be made that habeas corpus was the proper method of presenting the issue to the court. It could also be argued that if

the parties stipulate to paternity, Chapter 675, is still available since the court is recognizing this admittance of paternity. An attack upon the method used was not made by the respondent. In any event, this court properly has subject matter jurisdiction.

Scott Burk and Denise Showman met in November of 1980 and began living together. Denise has a child from a prior relationship, Beth, who was four years old in 1980. On July 20, 1982, a child was born to Scott and Denise, Nathan Edward Burk. Denise says the relationship was continuously troubled by disagreements and arguments and in February 1984 the couple separated. At that time Denise had developed a relationship with another man, Dale Clark. A reconciliation was attempted, and the couple resumed living together and moved from an area near Batavia to Pella. Problems again arose and Denise asked that the couple separate. They parted on July 25, 1984. At this time she was continuing her relationship with Clark. Scott and Nathan lived at his parents' farm from this time until October 8, 1984.

Scott is twenty-six years old, has finished eleventh grade, and is employed as a truck driver. He earns $800 to $1000 per month. Denise has completed tenth grade education and is currently working to achieve her GED. She has worked part time for Pizza Hut for seven years, and has cared for the children in the home. At trial she was unemployed and receiving welfare and food stamps. She is living with Clark.

Scott points to his assets as a parent and Denise's problems as an indication the court erred in awarding custody to Denise. He points out that he cared for the child from July 1984 to October 1984. On October 8, an incident occurred which Scott says is indicative that Denise should not be given custody. There are varying versions as to what happened. Denise went with Clark and her

daughter Beth to see Nathan. When they were leaving with Nathan, Denise says she slipped and Scott's mother then grabbed her by the hair. Denise says Beth ran up and pushed Scott's mother. Scott's mother says she did not pull Denise's hair, and that she did not see who struck her, but says it must have been Clark. Denise says that Clark remained in the car.

Scott also notes that Denise has married or lived with four men since 1977. He says it was her involvement with Clark that ended the relationship, and he points out Clark is eighteen years old and dropped out of school. He says during their relationship, Denise was unpredictable and would leave to go shopping and not return until late. She would drink or come home drunk, and on one occasion left to go grocery shopping and returned without groceries or the money. He says she had a hard time waking up in order to get the eldest child to school on time. Finally, Scott says he is employed and can provide for Nathan, while Denise is on public assistance.

A friend of Scott's testified that although he left his own children with Denise to be babysat by her, he would not recommend her to have custody of Nathan. This is because Denise had a hard time waking up in the morning and once when left his children with her, he walked into the home to find Nathan sitting on the couch without his diaper on. Another woman testified for Scott that Denise had shoplifted on one occasion, although Denise accuses the woman of the shoplifting.

Denise first notes that if in Scott's care the child would spend the majority of time with a third person, some time with Scott's mother, and very little time with Scott. Scott is a truck driver and according to his mother tries to make it home every ten days. Scott says the child will be left in his mother's care during this time, but the mother works five days a week and the child will be left with a babysitter.

Denise also disputes Scott's contention that Nathan was in his continuous care for the two months in 1984. She says it was Scott's mother, and not Scott, who cared for the child while Scott was working.

During the time that Nathan was with Scott, Denise says Scott would not let her see the child. After ignoring letters she says he sent to him, Denise called to arrange a visit. This is when the October 8 incident occurred. Denise also notes Scott has stated several times that Nathan is "his child only," and not hers. She says this indicates his hostility towards encouraging a good relationship between her and the child.

Denise also disputes Scott's indication that it was the relationship with Clark which caused their alliance to end. Denise argues that the relationship had been difficult during the time they lived together, and that it deteriorated prior to her involvement with Clark. Further, Scott's reaction to the situation, she says, shows his lack of maturity. Scott at one time threatened Clark and Clark's parents. Prior to trial he "flashed" a gun at Clark while Clark was at his place of employment. When he discovered Denise's relationship with Clark, he had a friend hold Denise at gunpoint. When Denise left, Scott followed her and beat her. It was at Scott's suggestion, Denise says, that she attempted a reconciliation. When it became evident it would not work out, she asked the relationship be ended. Following this statement by her, Scott threatened to beat up the child Beth, grabbed Denise by the neck, and again stated that Nathan was his alone, and not hers.

Counsel for Denise argues this is evidence of her maturity since she broke off the relationship when, after reconciliation, it became obvious it would not work. Scott's immaturity, Denise continues, is shown by his threats to her, to Clark, to the young child, and two assaults upon Denise.

Denise candidly admits she drank and would sleep in late during the latter half of the relationship. She says stress from the relationship contributed to her problems, which have now disappeared. She is now up at 7 a.m. to take care of the children, and except for one drink on her birthday, has not had any alcohol since March 1984.

Rather than having an unstable work background, Denise says her continued employment at Pizza Hut for seven years shows her stability. During that time she was promoted to shift manager. She is now working to get her GED and intends to seek employment, while primarily caring for the children.

Denise points to the well-being of her older daughter as evidence of her parenting abilities. Beth was described as a healthy, well-adjusted seven-year-old. Finally, evidence was presented of the close relationship between Beth and Nathan.

We agree with the conclusions reached by the trial court after reviewing the evidence presented. We find that Denise has been primarily responsible for the child's welfare, and that a strong brother-sister bond had formed between Beth and Nathan. While Scott disapproves of Denise's relationships, there is no evidence that the relationship she has with Clark is not positive, and nothing to show any adverse affect upon the children. Her relationship should not be a significant factor unless it affects the child. See In re Marriage of Kramer, 297 N.W.2d 359, 362 (Iowa 1980). Scott will be away from home for extended periods of time. While both parents have shown irresponsibility in the past, we find Scott's violent conduct toward the adults involved, and the young child, to be evidence of lack of maturity. His actions in preventing Denise from having contact with Nathan during the short period he cared for the child is another indication that custody should be awarded to the other parent. In re Marriage

of Bolin, 336 N.W.2d 269, 276 (Iowa 1979). We uphold the award of custody to Denise.

We also uphold the court's visitation schedule, from 5:00 on Wednesday evening until 5:00 on Friday evening every other week. At trial Scott testified that this was when his "weekend" would fall. He now says in his brief that because of his work, he would rather have visitation on Friday to Sunday. This involves information outside the record and is a matter more properly addressed by an agreement between the parties or modification action.

Scott also objects to the court's award of support of $230 per month. This award is supported by the evidence of Scott's income, but he says it is unfair since there are a number of debts incurred by the parties which were not divided by the court. It was stipulated by the father at trial that division of the debts was not at issue, and this is also a matter properly addressed in a separate action from this appeal.

Finally, Denise requests an award of attorneys fees incurred on appeal. Ordinarily each party is responsible for their own attorneys fees. Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982). The court operated under Chapter 675 of the Code and no provision is made in this section for any award of attorneys fees, and appellant has not cited this court to any authority for such an award. Accordingly, we have no authority to make an award of appellate attorneys fees.

AFFIRMED.