

IN THE COURT OF APPEALS OF IOWA

No. 1-148 / 90-1570

FILED

JUN 25 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DAVID ELLIOTT SHORT AND
TANI JO SHORT

Upon the Petition of
DAVID ELLIOTT SHORT,

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Appellant,

And Concerning
TANI JO SHORT,

Appellee.

Appeal from the Iowa District Court for Marshall
County, Timothy J. Finn, Judge.

The husband appeals the district court's order denying
his application for temporary custody of the children in
this pending dissolution of marriage action. **AFFIRMED.**

Max H. Buck of Grimes, Buck, Schoell & Beach,
Marshalltown, for appellant.

Michael J. Moon of Cartwright, Druker & Ryden,
Marshalltown, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.,
but decided en banc:

HAYDEN, J.

David and Tani Jo Short were formerly married to each other. The marriage was dissolved by a North Dakota decree in 1987. The North Dakota decree placed the parties' two young children in Tani's primary custody.

Sometime after the North Dakota decree was rendered, the parties resumed living together. They moved to Marshalltown, Iowa, in August 1989.

The parties separated in September 1990, while still living in Marshalltown. Tani moved with the children to Utah on September 14, 1990. On September 25 David and his father forcibly removed the children from the school playground over the protests of their mother. Tani filed a report with the Utah police.

On September 26 David obtained ex parte a temporary writ of injunction, restraining Tani from interfering with David's possession of the children. At the same time he filed a petition for dissolution of a common-law marriage. He also filed an application for temporary custody. Tani denies the existence of a common-law marriage.

An order setting the hearing for temporary custody was entered for the next court service day. The order provided the hearing was to take no longer than thirty minutes. This thirty-minute time limit is in accordance with the local rules of the Second Judicial District. The shortage of judicial time, the circuit scheduling, and the high number of parties seeking the judges' attention require the

district to set limits to accommodate the court's work load.

The hearing was held October 22, 1990. The district court allowed David's attorney to exceed his fifteen-minute allotment by almost ten minutes in presenting his case. However, the court would not allow David's attorney to cross-examine Tani due to time constraints.

After the hearing, the district court denied David's application for temporary custody. The district court declined to address the question whether a common-law marriage existed. David has appealed from the district court order denying his application for temporary custody. We affirm.

This appeal is in equity. Our review is de novo. Iowa R. App. P. 4.

In our analysis, we deal first with the order quashing the temporary writ of injunction. We next will address the issues surrounding the denial of the temporary custody order.

I. Temporary Writ of Injunction

In his argument David does not appear to raise serious objections to the quashing of the temporary writ of injunction. We deal briefly with the quashing of the writ.

This was a temporary writ of injunction. It had been obtained ex parte.

The granting of injunctive relief is governed by well established principles. Such relief is designed primarily to avoid irreparable damage. As an extraordinary remedy, it should issue only when the party seeking it has no adequate remedy. An injunction should be "granted with caution and only when clearly required."

Presto-X-Co. v. Ewing, 442 N.W.2d 85, 89 (Iowa 1989).

David had obtained this writ ex parte after he had forcibly removed the children from their mother's custody. David crossed state lines to carry out his forceful removal. There was already a valid North Dakota dissolution decree granting custody of the children to the mother. At the time of the children's removal, there was no other legal action challenging the continuing validity of the North Dakota decree.

Our review of the record reveals nothing to justify the temporary injunction. There is no indication whatsoever the children were in any danger while in their mother's custody. It appears all the matters between the parties could be resolved without resort to extraordinary writs.

Our adversarial system disfavors orders issued with only one side represented. See, e.g., Iowa Code of Professional Responsibility, EC 7-35. Ex parte injunctions are especially suspect. Id.; see also Fed. R. Civ. P. 65(b) (temporary restraining order issued ex parte automatically expires within ten days unless hearing is held or extension granted). Additionally, we note our supreme court in this case nullified a stay of the district

court decision "[a]fter studying the papers submitted." We determine the district court acted correctly in quashing the temporary writ of injunction.

We affirm the trial court on this issue.

II. Temporary Custody Order

David contends he was denied substantive and procedural due process by the nature of the hearing on his application for temporary custody. He complains because the hearing was limited to a half hour by local court custom, the district court improperly restricted his presentation of direct evidence and improperly prevented him from cross-examining Tani.

The appellant bases his objections on constitutional issues. It is well established we will not consider a constitutional issue if the case may be decided on other grounds. Renda v. Polk County, 319 N.W.2d 250, 253 (Iowa 1982). "We are obligated to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the trial court based its holding." Citizens First Nat. Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

This case comes before us in an unusual posture. Our review of the facts and proceedings indicate both jurisdictional and collateral estoppels problems are present. Jurisdictional issues may be raised at any time, even by our own motion. Pierce v. Pierce, 287 N.W.2d 879, 881-82 (Iowa 1980).

A. Jurisdiction. A valid and binding North Dakota divorce decree between the parties had been entered in 1987. That decree had been modified by the North Dakota court in 1988. The decree granted primary physical custody of the children to Tani.

We are bound by that North Dakota decree by the full faith and credit clause of the United States Constitution. U.S. Const. art. IV, sec. 1. The binding effect of that decree continues unless and until David establishes a superseding remarriage of these parties or another superseding court decree entered by a court of competent jurisdiction.

The Uniform Child Custody Jurisdiction Act (UCCJA), Iowa Code chap. 598A, spells out the procedural requirements necessary to give an Iowa court jurisdiction over another state's valid custody decree. See Iowa Code §§ 3, 14; In re Marriage of Leyda, 398 N.W.2d 815, 819 (Iowa 1987). David's attorney apparently was aware of the interstate child custody issue, as he alluded at the beginning of the hearing the case was under chapter 598A. However, the petition was filed as a dissolution of marriage. We observe this is authorized only under Iowa Code chap. 598.

David Short has not applied for modification of the North Dakota decree pursuant to Iowa Code chap. 598A. The trial court made none of the necessary findings required to

establish jurisdiction under chapter 598A. It is clear this is a chapter 598 action as opposed to a 598A proceeding. The district court proceeded accordingly. If David simply wishes to gain physical custody of his children, he must file an application for modification of a foreign state's dissolution decree under chapter 598A.

B. Collateral Estoppel or Issue Preclusion. The custody issue was fully litigated and a final decision rendered in the North Dakota action. David is attempting to relitigate the same issue here in Iowa, albeit under a different heading.

In general, the doctrine of issue preclusion [collateral estoppel, fn. 2] prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981) (citations omitted).

David and Tani litigated child custody in the North Dakota court. The issue was determined in a valid final judgment. We hold David is collaterally estopped from raising the child custody issue in an application for temporary custody in an Iowa court, unless and until he proves a superseding intervening common-law or legal remarriage of the parties.

C. Common-Law Marriage. This action was brought as an application for temporary custody. David filed this action in conjunction with his petition for dissolution of common-law marriage. David is attempting to proceed as if this was a regular action of dissolution. However, he forgets Iowa regards common-law marriages with suspicion and does not favor them. In re Marriage of Wingard, 278 N.W.2d 505, 510 (Iowa 1979). The elements of a common-law marriage must be proven by clear and convincing evidence. In re Estate of Fisher, 176 N.W.2d 801, 805 (Iowa 1970). The burden of proof rests on the party asserting the existence of a common-law marriage. Id. at 804.

Our review of the cases convinces us a common-law marriage is presumed not to exist until established by proper proof. The proper proof of such a common-law marriage has not yet been presented in a trial thereon.

David's counsel was apparently aware of this problem. He spent most of his time at the hearing attempting to establish a common-law marriage, even though that matter was not properly before the court at that time. We note his counsel's action contravenes the clear dictates of the Iowa Code relating to hearings on temporary orders:

The hearing on the application [for a temporary order] shall be limited to matters set forth in the application, the affidavits of the parties The court shall not hear any other matter relating to the petition, respondent's answer, or any pleadings connected with the petition or answer.

Iowa Code § 598.14.

Tani vehemently contests David's allegation of a common-law marriage. This is an issue of fact to be decided by the fact-finder after a full trial on the matter. Unless and until an affirmative finding of common-law marriage in Iowa is decided, David may not properly request temporary custody. Until then the North Dakota decree remains binding upon the parties, unless modified in a proper forum and pursuant to authorized proceedings.

We affirm the trial court's denial of David's application for temporary custody. We are obligated to affirm if any reason appears for affirmance, regardless of the trial court's reasoning. Citizens First Nat. Bank, 297 N.W.2d at 332. Because we decide the case on other grounds, we need not consider the constitutional issues raised by appellant. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981).

III. Conclusion

Tani has requested attorney fees. She prevailed both in the lower court and here on appeal. However, this is an appeal from a temporary order. The issue of attorney fees is preserved until a final decision on the merits of this case.

We affirm the trial court on all issues. Costs of this appeal are taxed to David.

AFFIRMED.

Oxberger, C.J., and Donielson and Schlegel, JJ., concur; Sackett, J., dissents. Habhab, J., dissents and writes separately.

SACKETT, J. (dissenting)

A father appeals contending he has been denied due process of the law because the second district imposes a time limit on temporary child custody hearings. The majority has elected not to address the issue, finding instead that a North Dakota custody decree is controlling.

The father claims he and the mother were married by common law during the one-year period they lived together with their two children in Iowa preceding the commencement of this action. If there was a remarriage by common law, then the North Dakota decree is no longer in effect. The majority has held that because this is a dissolution of a common law marriage, David cannot seek temporary custody.

I cannot agree. What the majority holding does is place a parent seeking custody following a marriage by common law in a different class than a parent seeking custody following a marriage by ceremony. Iowa recognizes both types of marriages. There is no basis for the majority's distinction between the two in addressing an issue of custody. Furthermore, such a distinction would deprive the children of a common law marriage of a court determination of temporary custody, thereby leaving their custody undecided until a full hearing on the whole case. The refusal to address the issue in this case is particularly bothersome because the parties cohabited and had the children in the custody of both of them in Iowa for

almost twelve months prior to the filing of this action. Iowa is clearly the children's home state under Iowa Code section 598A. Furthermore, Iowa is the state where there is the most recent evidence concerning the children and their relationships with both parents. Additionally, as the trial court found, Tani left Iowa with the children under the guise of going to Minnesota to visit relatives but in fact went to Utah. It took considerable detective work on David's part to track her down. Her acts indicate her intention to deprive David of visitation and contact with his children. These factors, when coupled with the fact that North Dakota has no contact with this family, indicate a need for Iowa to carefully examine the custody issue.

I therefore would find it necessary that we address the apparently unwritten rule in the second judicial district that provides only thirty minutes for a hearing on temporary custody, and may also limit evidence to that introduced by affidavit.

David got the order setting the hearing for a motion day. The order allowed evidence to be introduced only by way of affidavit. The issue, as presented to us, represents only thirty minutes is allocated for temporary custody hearings in the district. There is no suggestion in either party's brief that additional time would have been allocated for a temporary hearing under other

circumstances. The trial court indicated a thirty-minute hearing was the only type of hearing provided for on a motion day. To receive additional time for a hearing would require a wait of four to twelve weeks before the court administrator could schedule additional time.

Tani's brief does suggest David could wait for a full hearing on the entire dissolution matter. While the record does not reflect how long it will take to get a full hearing, I think it is very reasonable to assume it will take six months and probably longer.

I have difficulty with a rule that seeks to unreasonably limit the time a trial judge has to take evidence in any case, but particularly in a child custody case. I also have problems with the judge's ability to schedule additional time being subject to the scheduling of the court administrator. A trial judge should be the person to determine the time necessary for a temporary custody hearing, based on his or her best judgment free of restraints of unwritten local rules and court administrators' schedules.

Secondly, thirty minutes is not sufficient time under most circumstances for a trial judge to hear adequate evidence to make a temporary custody decision. Decisions as important as custody decisions should not be made on only affidavits where the trial judge has no opportunity to see the witnesses and gauge their credibility and the opposite party has no opportunity to cross examine.

I recognize our court system is extremely busy at all levels, and that despite the substantial increase in litigation in the past decade the increase in the number of trial court judges has been extremely minimal. But I have continual concern about severely limiting court time devoted to temporary child custody matters. Temporary custody decisions are extremely important to children in this state whose parents are involved in the divorcing process. There are substantial studies that indicate a child experiences serious trauma during his or her parents' dissolution. A child has a better chance of handling the stress if temporary custody is quickly decided and if the temporary placement is with the better parent with substantial contact with the other parent assured.

Unfortunately, when the courts do not allocate sufficient time for temporary hearings, the child is at serious risk. Parents enter into agreements that may seriously split the child's custody. Children become pawns when the parents engage in self-help to gain custody. Furthermore, a temporary order may ripen into a permanent order because, even if the temporary custody decision where the judge heard little or no evidence was not correct, changing custody in the final decree would mean the child would have to change custodial homes. And if after a full hearing the parent who was not granted temporary custody is in fact the better parent, the child will have to change homes. Changes of custody can be very traumatic.

Thirdly, as the father persuasively argues, his rights as a parent are constitutionally protected. He has been deprived of the custodial rights to his child without due process of the law.

I understand that arranging adequate time for temporary custody hearings is difficult for trial judges and court administrators. These are generally emergency hearings. People do not generally time the filing of their dissolution actions to correspond to court schedules. The problem is not unique to the second district. I know that parent, family law lawyers and trial judges across the state see the setting of temporary child custody hearings as a problem. It is a problem that will only be solved if we as judges are ready to face it head on. The children of our state are being seriously short changed in this area.

I would vacate the order establishing custody with the mother and remand to the trial court to continue the hearing.

HABIB, J. (dissenting and writing separately)

I dissent but write separately. I do so mainly for the purpose of addressing the dissenter's comments on what is referred to as the second judicial district's local rule that limits the time to thirty minutes for hearings on temporary custody matters. Regrettably, the dissent is founded on a wrong premise and proceeds in a direction that improperly casts the judges of that district in an unfavorable light.

First and foremost, it must be understood that David made the request that his temporary custody hearing be fixed on a court service day. Second, to understand the problem we must distinguish between court service days and regular trial assignment times. Third, the matter referred to is not a written rule nor is it obligatory in the sense that the judge, on his or her own, takes the initiative to fix a temporary custody matter for hearing on a court service day. On the contrary, judges do not fix custody hearings on court service days unless requested by litigants.

Here, David took the initiative. He asked the court to make an exception and to grant him a hearing on court service day with his personal representation that it would not take any longer than thirty minutes. It isn't that the thirty-minute rings paramount, it is that usually court day matters, as explained later, are fixed at fifteen or thirty-minute intervals. Thus, if this case was fixed for hearing at 10 a.m., another matter was scheduled at either 10:15 or 10:30 a.m.

Rather than criticize the system or the judges, we should focus our attention on the purpose of court service days. Those days for county seat towns are fixed well in advance of the calendar year. A judge is assigned to preside over the matters that are scheduled for hearing. Usually that judge has a stack of files containing motions, pleadings, child support requests and sundry other items that will command the court's attention. In addition, the judge can expect a number of pleas in criminal cases and the resulting obligation to sentence.

Normally, hearings that will require time in excess of thirty minutes are not fixed for trial on court service day for there is not sufficient time in the trial judge's schedule. However, the court may, if its calendar is clear, sandwich in a hearing with the assurance from counsel that it will be completed within the time allotted.

To answer one of the inquiries set forth in the dissenting opinion, the thirty-minute time restraint does not apply solely to custody disputes, but applies to all requests for hearings on court service day. Any suggestion in the dissenting opinion which infers that custody hearings are singled out would be incorrect. It just is not so.

Marshall County is fortunate for it has a full day allotted for court service. In some counties, because of a shortage of judges, a judge may be there only in the morning and will be called upon to be in another county

some distance away in the afternoon. It is the rule in our state that each county is to have court service at least once a week.

David obviously was in a hurry to obtain a ruling from the court on his application seeking an award of temporary custody of his children. No one can be critical of his haste to resolve this matter. I certainly am not, even though he forcibly removed his children from his wife's custody in Utah and returned them to Marshalltown. But instead of waiting for a hearing in a regular or special trial assignment where he would have been granted ample time to present his case, he pushed for a hearing on the next court service day where he had to know of the time restraints placed on the presiding judge.

David was in the best position to know how much time his trial would take. In most instances, the court day judge does not know, for he may not be the judge who fixed the matter for hearing. I decline to be critical of the court or the system under these circumstances, for it was the litigant that caused the problem. In fairness, however, I believe that when it was evident this hearing could not be completed within the thirty minutes, better practice and constitutional requirements demand the hearing be continued and resumed at a later date, thus affording the parties the full opportunity to be heard.

I, of course, agree time restraints should not be imposed in cases as important as child custody; or as a

matter of fact, in any case where rights of litigants are involved. This admission should not be startling, for almost every trial judge I have ever been in contact with would agree with that statement. This is so, for most child custody cases, whether temporary or permanent, since the days of Solomon and before, rank extremely high on the scale of difficult decisions to decide. The trial judge must have the full measure of evidence to help in the decision-making process.

I am also convinced that almost all trial judges, which includes the judge that presided over this hearing, would agree custody disputes should be placed in a regular trial assignment. When that procedure is employed, the litigants are afforded their full opportunity to present their case.

There is no rule or practice in any of our judicial districts limiting hearings in child custody cases to thirty minutes when placed in a regular or special trial assignment. The only time hearings are limited is when the litigants specially request the court to fix their dispute for hearing in an available time slot on a court service day calendar. This is what took place here. I do not believe the trial judge abused his discretion by concluding the hearing when there was no longer available time. I do believe, however, that the judge should have either continued the case and taken further evidence at a later date or declared a mistrial which would have restored the parties to the positions they were in prior to the

hearing. In the latter event, the litigants should then ask that their dispute be placed in a regular trial assignment.

I parenthetically note that I subscribe to a general rule that all custody disputes, whether temporary or permanent, should be placed in a regular or special trial assignment. It should be the exception that such cases are assigned on court service day, and the exception should apply only if there is absolute assurance from counsel that the hearing can be completed within the time allotted.

Thus, by dissenting I would remand for additional testimony on the temporary custody issue or, at the discretion of the trial judge, declare a mistrial without prejudice. I believe the Iowa court, under the circumstances of this case, does have jurisdiction to hear this matter.