

IN THE COURT OF APPEALS OF IOWA

No. 2-459 / 92-665

FILED

NOV 30 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF STEVEN NICHOLAS BUCHHEIT AND
NAOMI LOUISE BUCHHEIT

77

Upon the Petition of
STEVEN NICHOLAS BUCHHEIT,

Appellant/Cross-Appellee,

And Concerning
NAOMI LOUISE BUCHHEIT, n/k/a NAOMI LOUISE HEMESATH,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Winneshiek
County, Margaret L. Lingreen, Judge.

The husband appeals a district court decision awarding sole legal and physical custody of the parties' children to the wife. The wife cross-appeals, contending the district court erred in determining the amount of child support and in failing to award her trial attorney fees. **AFFIRMED AS MODIFIED.**

Marion L. Beatty and Donald H. Gloe of Miller, Pearson, Gloe, Barns, Beatty & Cowie, P.C., Decorah, for appellant.

Dale L. Putnam of Putnam & Strand, Decorah, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

The husband appeals a district court decision awarding sole legal and physical custody of the parties' children to the wife. He also contends the district court abused its discretion in taking unsworn testimony of the parties' seven-year-old son, Ryan, outside the presence of the parties and their attorneys. The wife cross-appeals, contending the court erred in determining the amount of child support and in failing to award her trial attorney fees. She also requests attorney fees on appeal and an order instructing the husband to pay all appellate costs, including the cost of the appendix.

Steven Buchheit, born on April 6, 1964, and Naomi Hemesath, born on November 18, 1968, started dating when Steven was nineteen, having graduated from high school. Naomi was fourteen years old and in eighth grade at the time.¹ The parties have two children: Ryan, born on June 20, 1984, and Darin, born on January 3, 1987. The parties married on July 18, 1987.

The parties separated in 1989 but attempted to reconcile. As part of the reconciliation, the parties moved to Illinois. In April of 1990 Naomi left Steven and returned to Iowa with the children. She commenced dissolution proceedings in Illinois at that time. On

¹ The trial court found Steven was nineteen years old and Naomi was thirteen years of age when the two began dating. Given the parties' birth dates, this is impossible.

July 15, 1990, an Illinois court dissolved the parties' marriage but left the question of child custody and visitation for the Iowa courts to decide since Steven had also returned to Iowa.

On February 13, 1991, Steven filed a petition seeking custody of the boys. On February 5, 1992, a seven-day hearing was held. Each side presented evidence alleging the other party abused alcohol and was involved in relationships with members of the opposite sex. In addition, there were allegations made by both parties of child abuse and assault. Naomi testified that Steven had been physically abusive toward her.

On February 12, 1992, Naomi filed a notice of additional witness identifying their child, Ryan, as an additional witness. Steven resisted the notice. On February 14, 1992, the district court granted Naomi's request to call Ryan. The presiding judge interviewed Ryan in chambers alone. Each party received a copy of Ryan's interview.

On March 6, 1992, the district court entered its findings of fact, conclusions of law, judgment and decree. The district court found that neither party was entirely truthful while testifying. The court found insufficient evidence of drug and alcohol abuse by either party and found the medical evidence corroborated Naomi's allegations of spousal abuse. In addition, the court found that Ryan's statements to the court generally confirmed Naomi's

testimony that Steven had physically abused the children, and the court directed the parties to secure counseling services for the children.

Based upon these findings, the district court awarded sole legal and physical custody of the children to Naomi subject to liberal visitation rights for Steven. The district court based its custody award upon the fact that the parties do not reside in close geographic proximity and upon the court's belief that the parties are incapable of supporting each other's relationship with the children. Furthermore, the court ordered Steven to pay child support in the amount of \$325 per month based upon his gross income of approximately \$15,000 per year. At the time of the hearing, Naomi was unemployed and was receiving workers' compensation benefits. The parties were ordered to pay their own attorney fees.

On March 12, 1992, Steven filed a rule 179(b) motion asking the court to modify the decree and award custody of the children to him. Naomi filed a resistance, and the district court entered an order denying Steven's motion to amend. Steven appeals, and Naomi cross-appeals.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision

primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1991), in Weidner, 338 N.W.2d at 356, and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Having carefully reviewed the record in light of these guiding principles, we conclude the district court correctly awarded sole legal and physical custody of the children to Naomi. The reasons for the district court's custody decision, included above, are firmly grounded in the record and in Iowa Code sections 598.41(2) (1991), 598.41(3)(e) (1991), and 598.41(3)(h) (1991). Iowa Code section 598.41(2) provides in relevant part:

If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interests of the child to the extent that the legal custodial relationship between the child and a parent should be severed.

In turn, Iowa Code section 598.41(3) provides in pertinent part:

In considering what custody arrangement under subsection 2 is in the best interest of the minor child, the court shall consider the following factors:

* * *

e. Whether each parent can support the other parent's relationship with the child.

* * *

h. The geographic proximity of the parents.

Next, we turn to Naomi's contention on cross-appeal that the district court's child support award was inadequate. It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). In the present case, we are suspicious of Steven's reported gross income of \$15,000. In 1988, prior to the time Steven and Naomi moved to Illinois in an attempt to reconcile the marriage, Steven received approximately \$20,500 in income while employed by his father on the family farm. After Naomi filed for divorce in 1990, Steven returned to the family farm, but his father reduced Steven's rate of pay to \$15,000.

Throughout the time Steven has worked on the farm he has lived rent-free and utility-free. This fact alone reveals that Steven's "arrangement" with his father greatly exceeds the reported value of \$15,000. Furthermore, despite claiming he had little income in 1991, Steven's bank account indicates deposits in excess of \$100,000. However, even after careful consideration of the record, we find it extremely difficult to discern which of the deposits constitute money derived from Steven's bank loans and which constitute earned income. As a result, any effort on our part to accurately determine Steven's income would be mere speculation.

Furthermore, we do not believe that remanding this case for further evidence on this issue would prove to be a fruitful disposition. Accordingly, we accept the district court's finding that Steven earned a net weekly income of \$222.78 which would be a net monthly income of \$965.38 ($\$222.78 \times 52 \text{ weeks} = \$11,584.56$; $\$11,584.56 / 12 \text{ months} = \$965.38/\text{month}$). We also adopt the court's finding that Naomi is unemployed due to a back injury. Applying the child support guidelines to these figures reveals Steven's child support obligation is \$358.16 per month ($\$965.38 \times .371$), rather than \$325 per month as previously determined by the district court.

We focus next on Steven's claim that the district court erred in interviewing Ryan in chambers in the presence of the court reporter but outside the presence of the parties

and their attorneys. We conclude the court did not violate Iowa Rule of Evidence 603 by failing to place Ryan under oath. The record indicates the court thoroughly questioned Ryan to ascertain his ability to distinguish between telling the truth and lying and impressed upon him his duty to tell the truth. See In re J.D.S., 436 N.W.2d 342, 347 (Iowa 1989). We believe the court accomplished its goal, and we believe Ryan was a competent witness. As the supreme court has noted, it would have been superfluous for such a young child to participate in a rote recitation of the oath. Id. at 347.

In addition, we find no abuse of discretion in the court's decision to interview the child outside the presence of the parties and attorneys. In an attempt to serve the best interests of the children in determining the custody award, the court felt compelled to attempt to confirm or disaffirm the numerous allegations of physical abuse of the children by the parties. In light of this subject matter, the court believed the child needed to be free of any pressure or influence which might potentially be exerted by the presence of the interested parties.

In an exercise of its broad discretion, the court determined the best interest of Ryan would be served if the child was not required to confront the parties and their attorneys. Considering the situation posed to the district court, we respect the court's attempt to ascertain the truth with minimal disruption to the child. The court's

solution to informally interview the child in lieu of direct examination and cross-examination achieved this goal.

Finally, Naomi seeks trial and appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We deny Naomi's request for trial attorney fees, but Steven shall pay \$2,500 toward Naomi's appellate attorney fees. In addition, Steven shall pay the costs of this appeal, including the entire cost of the appendix.

Steven's appellate attorneys' decision to include the entire transcript in the appendix is improper and is a clear violation of Iowa Rule of Appellate Procedure 15(b). This rule states: "In designating parts of the record for inclusion in the appendix, the parties shall consider the fact that the entire record is available to the appellate courts for examination and shall not engage in unnecessary designation." (Emphasis added.) Here, the appendix consisted of seven separate volumes consisting of 2,435 pages. The cost of producing such a multitudinous collection exceeded \$10,000.

Counsel blames the time constraints of the appellate rules for the failure to designate only the relevant testimony. In addition, counsel asserts that it would be an even greater expense to the client if counsel sat down and read the entire transcript and included only the relevant portions. These excuses are unacceptable for such a violation of the letter and spirit of the appellate rules.

AFFIRMED AS MODIFIED.

Habhab, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I would grant the parties joint custody.