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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-010 / 90-219

IN RE THE MARRIAGE OF JOHN E. KROPF AND ANGELIKA M. KROPF 83

Upon the Petition of

JOHN E. KROPF,

Appellant,

And Concerning

ANGELIKA M. KROPF,

Appellee.

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

Petitioner appeals order finding him the father of and ordering him to pay child support for a second child with respondent. **REVERSED AND REMANDED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

John N. Wehr, Sigourney, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Petitioner, John E. Kropf, appeals a district court order finding him to be the father of and ordering him to pay child support for a second child with respondent, Angelika M. Kropf. We reverse and remand.

I.

The parties married in Germany in October 1974. They had a son, John Steven, in August 1974. The petitioner is a chief warrant officer with the United States Army who was residing at a base in Georgia at the time of hearing. (There was some dispute over whether Keokuk county was the proper venue, but there was no dispute over petitioner's Iowa residency.) The respondent resided in Michigan when the dissolution proceedings were instituted. She is a German citizen and apparently resides at Schwabisch Gmund in the Federal Republic of Germany. Although a March 22 letter from respondent's Michigan counsel, which was filed with the clerk of court, indicated that she was pregnant, she never amended her answer to reflect this. Both parties submitted to the jurisdiction of the court which entered a decree of dissolution on September 26, 1983. The court reserved the issues of child custody, visitation, and support so that the parties could submit further evidence.

In her October 13, 1983, application for child support, respondent stated that she had two children. On January 30, 1984, she filed with the clerk of court a copy of a

birth certificate for Markus Noah Kropf, born October 15, 1983. The petitioner's name appears on the birth certificate as father of Markus. At a hearing on the issue of support, respondent offered only two exhibits. The evidence includes an apparent newspaper clipping, respondent's exhibit 1, which reads:

> Schwabisch Gmund
>
> GEBURTEN:
>
> * * *
>
> 15.10 Markus Noah, S. d. Eheleute John Eldon Kropf, wohnhaft in Fort Jackson, South Carolina/USA, und Angelika Marianne geb. Blind, Schwabisch Gmund, Rinderbachergasse 42
>
> * * *

On the exhibit, the words "Birthannouncements [sic] Oct. 1983" are handwritten under the title. Respondent's exhibit 2 offered at the hearing in question is her October 22, 1987, financial affidavit on the standard Bar Association form, sworn before a German notary.[1] The affidavit reports expenses for two children. Respondent never testified during these proceedings, nor did she offer a deposition.

Petitioner admits having intercourse with respondent just before they separated for the last time in mid January 1983, nine months before Markus apparently was born in mid October. Petitioner denies having a second child with

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1. There is some confusion among appellate counsel as to what trial counsel offered as evidence. Petitioner clearly is mistaken in asserting that "Respondent's Exhibit 2 is a letter signed by Angelika, addressed to [appellate counsel] indicating that she received some type of welfare."

respondent. He contends that they had intercourse "only on one occasion" and that respondent was seeing another man when he left her. There is no evidence that she had intercourse with anyone other than petitioner.

The district court determined that a second child existed and placed the burden of showing non-paternity on petitioner. The court concluded that petitioner had failed to show by clear evidence that he is not the father of Markus Noah. Pursuant to the Iowa Temporary Child Support Guidelines, the court ordered petitioner to pay $696 per month to support both children.

II.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value as we must base our decision primarily on the particular circumstances of the parties presently before us. In re Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

It is well established that parents have a legal obligation to support their children born in wedlock. In re Fleener, 247 N.W.2d 219, 221 (Iowa 1976). A child born

during wedlock is presumed legitimate. In re Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982). The presumption extends to children conceived before dissolution but born after dissolution. Kuhns v. Olson, 258 Iowa 1274, 1277, 141 N.W.2d 925, 927 (1966). The presumption may be rebutted by evidence which is clear, strong, and satisfactory. Id. at 1276, 141 N.W.2d at 926.

III.

The dispositive question in this appeal seems to be whether there is sufficient evidence showing the existence of a child such that the presumption of legitimacy may arise. Notwithstanding the apparent confusion over the nature of respondent's exhibits, petitioner did properly raise objections to both exhibits. The district court admitted both subject to objections and, in relying upon them in its decision, apparently overruled the objections. The question then becomes whether the district court was correct in overruling the objections.

We agree with petitioner that the newspaper clipping is hearsay, see Iowa R. Evid. 802, and generally not admissible as proof of its contents. Jacobson v. Benson Motors, Inc., 216 N.W.2d 396, 399-400 (Iowa 1974) (citing Rotman v. Hirsch, 199 N.W.2d 53, 55 (Iowa 1974)). Even assuming that the newspaper clipping is a birth announcement as respondent contends, it is not admissible, in German or English, as proof of the birth of a child.

Respondent makes no argument and cites no exception to the contrary. Respondent did suggest in oral argument that this is the sort of report which is trustworthy and probative, yet it certainly is not "more probative . . . than any other evidence which the proponent can procure through reasonable efforts." Iowa R. Evid. 803(24)(B).

There is a considerable dearth of Iowa case law authority on the admissibility and weight of affidavits. One source states:

> Affidavits may be received in evidence in certain limited situations in which the weakness of this type of evidence is deemed substantially outweighed by the necessity for expeditious procedure; but affidavits of witnesses who are available for trial are not admissible.

2A C.J.S., Affidavits § 56 (1972) (footnotes omitted). Another source states:

> At a trial, the adverse party has a right to be confronted by the witnesses against him, if possible, and is entitled to the general protection of the rule excluding hearsay evidence; consequently, affidavits are not, as a rule admissible in the trial as independent evidence to establish facts material to the issues being tried. Nor are they admissible as prima facie evidence of the facts they contain, for to admit them for this purpose would be equally objectionable, since the burden of going forward with the proof would thereby be cast upon the adverse party . . . . However, an affidavit may be admissible as evidence on a material fact at issue if evidence is admissible generally on that fact as an exception to the hearsay rule.

3 Am. Jur. 2d, Affidavits § 30 (1986) (footnotes omitted). Uncontroverted affidavits may be taken as true in some circumstances. See, e.g., Berghammer v. Smith, 185 N.W.2d

226, 230 (Iowa 1971) (counsel with equal knowledge stating events occurring in trial court).

Based upon these principles, we must hold that the affidavit was inadmissible hearsay. Respondent has offered her own out-of-court statements as proof of the matter asserted. We think petitioner is entitled to cross-examine the primary witness against him and should be afforded the protection of the hearsay rule. We find this particularly appropriate when, as here, the declarant has expressed a statement seeking to establish the ultimate fact in issue. See 3 Am. Jur. 2d, Affidavits § 30 (1986); 2A C.J.S., Affidavits § 56 (1972); see also 2A C.J.S., Affidavits § 47 (1972); 32A C.J.S., Evidence § 1032 (1964). Given our supreme court's cautious approach in, for example, Berghammer, we think these principles hold true in Iowa.

It is fundamental that our courts may not decide an ultimate fact issue based only upon allegation and argument. Given that no evidence was properly presented to or ruled on by the district court, we conclude that there was no relevant, credible evidence to show the existence of a child.[2] We must, therefore, hold that the district court

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2. This analysis includes a birth certificate attached to a letter sent by respondent and filed among the court papers. Assuming it is an "original paper[]" in our "record" on appeal, Iowa R. App. 10(a), it is certain that it was never presented as evidence to and ruled on by the district court. Even if this matter were triable de novo, which it is not, and if we were allowed to admit new evidence not before the district court, which we are not, we are not at liberty to ignore the rules of evidence by admitting incompetent evidence. Even Rule of Evidence 803(9) does not mandate admissibility, see Pollard v.

erred in finding the existence of a child and ordering support. We reverse the judgment of the district court.

It is important to recognize that this is purely a decision based upon the evidence presented and the distrust the Anglo-American judicial system has for such evidence. We emphasize that we reach no conclusion on the actual existence of a child. We also reach no conclusion on the paternity of such a child or petitioner's obligation to support such a child if its existence is proven properly in a proceeding to modify the support order.

IV.

Respondent raised the issue of child support for the first time in her October 13, 1983, application following the decree of dissolution. No temporary support had been ordered. A series of continuances followed. When the matter was finally considered in December 1985, the hearing was defective and the resulting ruling was vacated. Thus, child custody, support, and visitation issues have gone unsettled until the district court's January 11, 1990, decree now at issue. In the January 11 decree the district court ordered petitioner to pay child support for the period December 31, 1985, through the date of the decree.

Metropolitan Life Ins. Co., 598 F.2d 1284, 1287 (3d Cir. 1979), or dispose of the need for authenticity or foundation, and petitioner has not had an opportunity to object or make a record in this proceeding.

Petitioner argues that the district court is without authority to enter a decree effectively ordering child support payments retroactive to some date before the original decree. Respondent argues that petitioner has an obligation to support his child from birth, In re McMorrow, 342 N.W.2d 73, 75 (Iowa 1983), and that we should treat these proceedings like those for a modification. While we might agree with respondent's argument that petitioner has an obligation to support his child for the period in question, this is significantly different than having a legal obligation imposed by a final decree.

We have said elsewhere that the district court has the discretion to allow an increase of child support payments from either the date of the petition for modification or the date of the decree of modification. In re Stanley, 411 N.W.2d 698, 702 (Iowa App. 1987). Respondent cites nothing and we have uncovered nothing that would permit the district court to order payments retroactive from the date of an original decree on the issue of support. Consequently, we must reverse the district court judgment ordering child support payments for the period December 31, 1985, through January 11, 1990.

V.

We hold that the district court erred in admitting and considering the exhibits in question and, based upon those

exhibits, in finding the existence of a second child born of the parties' marriage. We further hold that the district court erred in ordering retroactive child support payments for a period before the entry of the final decree. Therefore, we reverse the judgment of the district court.

Because the order setting child support is based upon two children, we must remand to the district court for a determination of the support for the parties' child, John Steven. In addition, we direct the district court to apply the rules as set forth in the October 16, 1990, order of the supreme court concerning child support guidelines. Under that order, "the court shall not vary from the amount of child support which would result from application of the guidelines without a written finding that the guidelines would be unjust or inappropriate . . . ." Pending hearing on remand, we order child support to be paid in the amount of $75 per week for the support of John Steven as fixed by the January 11 support decree. Further, we order petitioner to pay child support in the amount of $75 per week for the period of January 11 through the date of this decision. We do not retain jurisdiction. See In re Bergfeld, 1991 W.L. 19302 (Iowa, No. 89-1316, filed Feb. 20, 1991); In re Oakes, 462 N.W.2d 730, 733-34 (Iowa App. 1990); In re Craig, 462 N.W.2d 692, 693 (Iowa App. 1990).

REVERSED AND REMANDED.

Habhab, J., concurs; Donielson, P.J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. We have a duty to examine the entire record to determine whether the trial court properly ordered John to pay child support for two children. Iowa Rule of Appellate Procedure 10(a) informs us that the "record" on appeal consists of "[t]he original papers and exhibits filed in the trial court, the transcript of the proceedings, if any, and a certified copy of the docket and court calendar entries prepared by the clerk of the trial court . . . ." The record before us discloses the following: Angelika applied for child support stating she had two minor children. She filed with the clerk of court a copy of a birth certificate for Markus Noah Kropf, which listed John as the father of Markus. John does not deny he is the father of John Steven. At the hearing, John admitted he had sexual intercourse with Angelika in January 1983, nine months before Markus was born. He also testified that Angelika called him in April 1983 informing him she was pregnant and that he was the father of the child. Even assuming the newspaper clipping and the affidavit are inadmissible, I find there is sufficient evidence to prove the existence of Markus Noah Kropf.

At the very least, if this court finds the evidence insufficient, I would remand this case to the trial court for the submission of additional evidence on the question of "the existence of a child," Markus Noah Kropf. Throughout the proceedings in this matter, one or both of the

parties have not been present before the court. For some inexplicable reason, no interrogatories were propounded of Angelika nor was a deposition of her testimony taken. With the importance of the issues before the court, i.e., the existence of and support of a child, I believe equity demands Angelika be given an opportunity to establish the existence of the child.