FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF SARAH JANE SCHROEDER and RICKEY DEAN SCHROEDER

Upon the Petition of	)	
SARAH JANE SCHROEDER,	)	
Petitioner-Appellant,	)	Filed September 27, 1983
And Concerning	)	
RICKEY DEAN SCHROEDER,	)	3-207 83-0098
Respondent-Appellee.	)	

Appeal from Grundy District Court - Peter Van Metre, Judge.

Petitioner-appellant appeals from the dissolution decree challenging the award of child custody and contending the trial court erred by denying her motion to extend the time for filing a motion for new trial. AFFIRMED.

Timothy M. Sweet of DeWolf, Beard, Monk & Sweet, Reinbeck, Iowa, for petitioner-appellant.

Richard Pilcher of Kliebenstein, Heronimus and Schmidt, Grundy Center, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

HAYDEN, J.

Petitioner-appellant, Sarah, appeals from the dissolution decree, challenging the award of child custody to respondent-appellee, Rickey. She also contends the trial court erred by denying her motion to extend the time for filing a motion for new trial. We affirm.

The parties were married in 1981 after living together for three or four years. They are the parents of one child, a son, Deric, born in November 1981. In addition, Sarah has custody of a son, Ryan Christensen, from a previous marriage.

The trial court placed the parties' child in Rick's custody. The trial court concluded that Rick had displayed more "stability" and "consistency." The trial court also noted that Rick had presented testimony from his extended family members in support of his request for custody, but that Sarah had not presented any such evidence.

After the decree was filed Sarah discharged her attorneys and retained new counsel. Twenty-eight days after the decree, Sarah's new counsel filed a motion for new trial, accompanied by a motion to enlarge the time for filing a motion for new trial. The motion for new trial alleged that Sarah's mother had planned to testify in Sarah's behalf but had been prevented from doing so by illness. The motion to enlarge time alleged that Sarah's change of counsel excused the untimeliness of the new trial motion.

The trial court orally denied Sarah's motion to enlarge time on the day it was filed, January 27. On January 28 Sarah filed a notice of appeal. On February 18 the trial court entered a written order confirming its oral denial of the motion to enlarge time. On February 23, Sarah filed a "supplemental notice of appeal" challenging the February 18 order.

Rickey, hereinafter referred to as Rick, provided for Sarah and Ryan Christensen by maintaining employment and usually held more than one job. Sarah did not work and had never held any job for any length of time. Rick stood as the

father of Ryan Christensen, as the child's natural father had very little contact with Ryan, or Sarah. The relationship between Rick and Ryan had difficulties, both prior to and after the marriage of the parties. Basically, the conflict centered around methods, or lack thereof, of disciplining Ryan.

During the marriage Rick has purchased a new residence for the parties and was making substantial improvements to the residence. The renovation work coupled with Rick's work at John Deere Tractor Works in Waterloo, Iowa, left Rick with little free time for family activities. Rick was working as much overtime as possible to cover expenses and eventually began working a night shift as a result of extensive layoffs at his place of employment. The unusual working hours made it difficult for Rick to assist Sarah after Deric was born in November, 1981. Rick would attempt to assist Sarah in caring for the child, but because of Sarah's protective attitude toward Deric, Rick was unable to actively assist in parenting the child.

Within a few months of Deric's birth, Sarah began to cutoff contact between Rick and his son. Sarah left the residence in the morning while Rick was sleeping and returned home in the afternoon after Rick left for work in Waterloo. Sarah has locked Rick out of his home and has cutoff contact between he and Deric. Rick is concerned about his lack of contact with his son. He anticipates that he will stay in the Grundy Center area the rest of his life and is willing to make whatever arrangements are necessary for the proper care of his child. Rick is a healthy, hard-working, family-oriented person. He is the fifth child in a large family and is close to his brothers and sisters. His parents own and manage a tavern and he has previously tended bar. He has experienced problems with alcohol in the past.

Sarah Schroeder is a healthy adult and has a close relationship with her children. She is willing to spend her time raising her children and feels comfortable with that fact. She has encountered problems with emotional stability and has demonstrated a low tolerance for stressful situations.

Both parties perceive the other as a fit parent and they both express a strong affection for their son, Deric.

Because of the dispute regarding custody of Deric, this case proceeded to trial on December 16, 1982. There were three witnesses at the trial: Sarah, Rick, and Rick's mother, Claire Schroeder. No record was made at the time of trial indicating that Sarah planned to call her mother as a witness. Sarah knew at the time of this trial that her mother was unavailable to testify. There was no attempt made by Sarah to continue the trial due to the unavailability of this witness.

I. Scope of Review. Our review of this equity case is **de novo.** Iowa R. App. P. 4. When considering the credibility of witnesses, the court gives weight to the factfindings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). In child custody cases, the first and governing consideration of the court is the best interest of the child. Iowa R. App. P. 14(f)(15).

II. Appellant Sarah's primary thrust in this appeal is her claim the trial court erred in awarding sole custody of the minor child to respondent-appellee, Rick. We do not agree.

In deciding the custody issue the criteria delineated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), are to be weighed together in reaching any custody decision. In re Marriage of Mikelson, 299 N.W.2d 670, 674 (Iowa 1980). The custody determination should neither punish one party, nor specifically reward the other, In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973), and there should be no inference favoring one parent as opposed to the other in deciding which is a more fit custodian, except the facts arising from the case. In re Marriage of Bowden, 219 N.W.2d 683, 688 (Iowa 1974).

Sarah alleges the trial court failed to correctly apply the consideration factors set forth in section 598.41(3)(a) through (h), The Code (1983). These factors are set forth as follows:

a. Whether each parent would be a suitable custodian for the child.

b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.

c. Whether the parents can communicate with each other regarding the child's needs.

d. Whether both parents have actively cared for the child before and since the separation.

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

f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

g. Whether one or both the parents agree or are opposed to joint custody.

h. The geographic proximity of the parents.

Upon review of the entire record in this case, we find the trial court did not err in awarding custody to the respondent, Rick, subject to reasonable rights of visitation by petitioner, Sarah. Accordingly, we affirm the trial court on this issue.

III. Appellant Sarah also contends in this appeal that the trial court erred in overruling her motion to enlarge time for filing a motion for new trial.

Petitioner's basic argument is that she should be entitled to a new trial because her mother was not able to testify at the time of trial. The petitioner claims that her mother was not able to testify due to an unavoidable accident, or surprise which ordinary prudence could not have guarded against, and therefore, the request for a new trial falls under Rule 244(c) Iowa R. Civ. P.

The petitioner's argument fails for two reasons. First, there is no unavoidable accident, or surprise which ordinary prudence could not have guarded against; second, even if it were assumed there was a surprise regarding the unavailability of a witness, the trial court was never informed of this fact even

though the unavailability of a witness was known by the petitioner prior to, during, and immediately after the date of the trial.

The petitioner must prove that she is entitled to a new trial, In re Marriage of Hitchcock, 265 N.W.2d 599 (Iowa 1978), and she attempts to satisfy this requirement by an Affidavit which she signed. The Affidavit itself, in paragraph two thereof, discloses that there was no surprise regarding the unavailability of the petitioner's mother at the time of trial.

> I, further state that prior to trial I had planned on having my mother, Evelyn Beenken of Morrison, Iowa, testify on my behalf at the hearing, and my mother had agreed to testify. Shortly before the trial, she became ill with internal bleeding and she was required to go into the hospital for surgery. She entered the hospital on the day of the trial. Because of this, she was unable to testify at the time of trial.

To support the motions filed herein, the petitioner is required to show that the evidence was discovered following trial, Yoder v. Iowa Power & Light Company, 215 N.W.2d 328, 335 (Iowa 1974), which the petitioner by her own affidavit refutes.

Furthermore, the petitioner did not advise the trial court at any time of her desire to call another witness. Accordingly, the trial court was never given the opportunity to rule on this matter of the unavailability of a witness until January 27, 1983, 28 days after the entry of the Decree and 43 days after the date of the trial. A party cannot sit by and fail to avail itself of legal procedures to secure a fair trial and later raise the lack of the same procedures as grounds for a new trial. State v. Johnson, 243 N.W.2d 598 (Iowa 1976).

In ruling on a motion for a new trial, the trial court has broad discretion to determine whether the verdict effectuates substantial justice. Iowa R. App. P. 14(f)(3). Only when the evidence clearly shows that the trial court abused its discretion should there be an interference with the trial court's decree. Vojak v. Jensen, 161 N.W.2d 100, 105-106 (Iowa 1968). We find no showing in this record of an abuse of discretion by the trial court.

As stated in Wilkes v. Iowa State Highway Commission, 186 N.W.2d 604, 607 (Iowa 1971):

> It still remains, however, courts do not favor the granting of a new trial because of newly discovered evidence. (citations omitted).
>
> Furthermore, abuse of discretion means no discretion to do what was done. Verdicts should not be set aside lightly and the court, in granting a new trial, must be sure there exists sufficient cause to support the exercise of such discretion. Every litigant is entitled to a fair trial, but only one. (citations omitted).

We hold the trial court did not err in overruling Sarah's motion to enlarge time for filing a motion for new trial, and accordingly, affirm on this issue.

AFFIRMED.