FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-265 / 90-1368

IN RE THE MARRIAGE OF JULIE J. CLAUSEN and BRUCE A. CLAUSEN

Upon the Petition of

JULIE J. CLAUSEN,

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Appellant,

And Concerning

BRUCE A. CLAUSEN,

Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Petitioner seeks review of the child custody provisions of a dissolution decree. She contends the primary physical care of the parties' two children should have been awarded to her, not to their father. **AFFIRMED.**

Russel A. Neuwoehner, Dubuque, for appellant.

Mark S. Beckman of Fitzsimmons & Beckman, Dubuque, until his withdrawal; respondent, pro se.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Bruce and Julie Clausen were married on November 14, 1973, and the marriage was dissolved on August 14, 1990. Two children were born of the marriage, Christopher and Genavieve. At trial the children were ages eight and ten, respectively. The parties had not accumulated substantial assets during the marriage, and the present dispute centers on the district court's custody award.

At the time of these proceedings, Bruce was self-employed repairing antique furniture. His income is minimal. He has had a history of mental health problems and has been involuntarily committed three times in the two years preceding the dissolution. The district court found Bruce had *provided for the primary care of the children* throughout the marriage because Julie was either attending school or actively employed, while Bruce was functionally unemployed.

Julie is employed as a registered nurse earning approximately $19,000 per year. After the parties separated, Julie began to cohabit with Tom Brown, a convicted felon, who had recently been convicted of several less serious offenses including public intoxication, disorderly conduct, assault with injury, OWI, and operating a motor vehicle while his license was suspended. The court noted that charges were currently pending against Tom arising out of his alleged assault of Bruce. The court also found that Tom had physically hurt the children.

In granting the primary physical care of the children to Bruce, the court observed that both Julie and Bruce, while capable of serving as adequate parents, have performed extremely poorly as parents. The court considered its task to be that of choosing between the lesser of two evils. Accordingly, the court awarded the parties joint custody of the children, placing the children in Bruce's primary physical care. The court awarded Julie liberal visitation rights and ordered her to pay child support of $400 per month.

Julie appeals. She contends the district court erred by allowing the children to testify without placing them under oath as required by Iowa Rule of Evidence 603. She further argues that the district court erred in placing the children in Bruce's primary physical care. She asks that the district court's ruling be reversed and that she be granted primary physical care of the parties' two children. We affirm the district court's judgment.

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 Marriage of 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).

I. **Testimony of the Children.** Julie first contends the district court erred in allowing the children to testify without first being sworn as required by Iowa Rule of Evidence 603. We find that this issue is not properly before us. The issue was not properly preserved for appeal.

In equitable proceedings, the district court will usually note an objection and allow the offered testimony subject to the objection. This is done to preserve a complete record for the appellate court's de novo review. See In re Marriage of Erickson, 228 N.W.2d 57, 59 (Iowa 1975). However, even in equity, to have properly preserved error, the party seeking to exclude the testimony must have made an adequate objection at trial. See Local Board of Health, Boone County v. Wood, 243 N.W.2d 862, 868 (Iowa 1976). The objection must have been sufficiently specific to bring the issue to the attention of the district court and to provide opposing counsel with an opportunity to correct the error. See State v. Buckner, 214 N.W.2d 164, 167-68 (Iowa 1974).

In the case before us, the objection made at trial was not sufficiently specific to preserve the issue for appeal. As his objection to the testimony of Genavieve Clausen, counsel for the petitioner stated: "I would, for the record, enter an objection. A home study has been ordered. I don't think it's appropriate or necessary in light of the home study and the age of the child." As his

objection to the testimony of Christopher Clausen, counsel stated: "I would lodge the same objection of age and home study that would make this unnecessary." However, on appeal petitioner asserts as error that when the children testified, neither child was required to declare that he or she would testify truthfully, by oath or affirmation, as required by Iowa Rule of Evidence 603. Had this argument been made with this added degree of specificity at trial, the issue could have easily been resolved there.

In the interests of judicial economy, such matters must be adequately raised at trial in order that the district court and opposing counsel be afforded the opportunity to resolve the issue. See generally, Allbee & Kincaid, Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner, 35 Drake L. Rev. 1 (1985-86); Iowa R. Evid. 103(a)(1).

II. Physical Placement of the Children. Julie next argues that the district court erred in granting the primary physical care of the children to Bruce. She challenges the court's findings that (1) Bruce has provided for the children's primary care the greater majority of the time, and (2) if Julie receives the children's primary care, there will be a continuing problem with Bruce's exercise of his visitation rights. She further contends that the record demonstrates Bruce's alleged efforts to alienate the children from Julie.

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) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and 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).

It is apparent the district court found that under the circumstances of this case, Bruce is better able to care for the needs of the children than is Julie and that it was in the children's best interest to be placed in Bruce's primary physical care. We agree and affirm the district court's judgment.

Julie is ordered to pay the costs of this appeal.

For all the reasons stated, the district court's judgment is affirmed.

AFFIRMED.

Oxberger, C.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result.