



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LEIGH ANN CROUSE AND RANDY CROUSE

318

Upon the Petition of	)	
LEIGH ANN CROUSE,	)	Filed October 22, 1986
Petitioner-Appellee,	)	
And Concerning	)	
RANDY CROUSE,	)	<u>6-276</u>
Respondent-Appellant.	)	86-05

Appeal from the Iowa District Court for Webster County (No. 3590) Newt Draheim, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage, asserting that the trial court should have awarded him, not petitioner wife, sole custody of the parties' children and that the economic obligations imposed on him are excessive. **AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.**

Robert C. Oberbillig, Des Moines, for appellant.

Thomas T. Tarbox of Bennett, Wilke & Tarbox, Fort Dodge, for appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

SNELL, J.

The parties to this appeal, Randy and Leigh Ann Crouse, were granted a dissolution of their marriage by the District Court for Webster County on December 5, 1985. As part of its dissolution decree, the district court awarded custody of the parties' sons, Randall Lee and Victor William, to Leigh Ann. At the time the dissolution decree was entered, these children were four and one-half and one and one-half years old, respectively. Randy appeals the district court's custody award, as well as the obligations imposed upon him by the dissolution decree for child support, insurance, attorney's fees, and costs. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's findings of fact, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

We begin our analysis with the recitation of what is certainly one of the most firmly-established propositions in the jurisprudence of our state: In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15); In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). The general principles applicable to the custody issue are summarized in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974) and In re Marriage of Bowen, 219 N.W.2d 638, 687-88 (1974), and need not be set out at length here. In addition to the cases, we find guidance in the statutes. Iowa Code Chapter 598 (1985).

The dissolution granted by the district court ended Randy and Leigh Ann's tumultuous and relatively short-lived marriage. The evidence adduced at trial indicates that the nature of the marital relationship may have resulted in Randall Lee's delayed development in several areas. As Victor William's birth predated the separation of the parties by only two weeks, he is, as the evidence at trial showed, not as direct a victim of the environment created by his parents. The

disintegration and final dissolution of this marriage was replete with allegations of sexual abuse of Randall Lee by several persons, alcoholism, spousal abuse, spousal rape, parental neglect, and violence. It has also been marked by periods of the parties' separation, numerous interventions by courts and child-welfare organizations, periods when each party interfered with the other's contact with the children, a contempt citation, and a series of visitation arrangements, both informal and judicially sanctioned. In light of all the above, we note tragically that once again our determination of what custodial arrangement will serve the best interests of the children has become a matter of choosing the least detrimental available alternative for safeguarding the children's growth and development. Winter, 223 N.W.2d at 167.

As we have noted, the district court awarded custody of the children to Leigh Ann. Our de novo review of the record in this case leads us to agree with that conclusion and, accordingly, we affirm that court's custody award.

Among the factors upon which our courts base their custody determinations is the character of the individual parents. Winter, 223 N.W.2d at 166. The record refers to a number of occasions when Randy exhibited excessively violent behavior. This conduct was directed frequently, but not exclusively, at Leigh Ann. Illustrative of this behavior was an assault charge filed against him by a woman who Randy contends he had angered by leaving her stranded after splitting a twelve-pack of beer with her. Accordingly, Randy asserts that charge is meritless. We are not so persuaded. Although no conviction resulted from his incident, Randy did forfeit bail bond in connection with the offense.

We also note our concern with Randy's abilities to provide for the children. See Winter, 223 N.W.2d at 166. Record evidence shows Randy's frequent changes of employment and a prolonged period when he was unemployed. There also

exists testimony regarding the inadequate clothing and housing conditions provided by Randy to his family during the marriage. Additionally, we acknowledge the recommendation of the attorney appointed for the children that custody be given to Leigh Ann. This factor weighs in our custody determination. Winter, 223 N.W.2d at 167.

We are fully aware that Leigh Ann has engaged in inappropriate conduct occasionally during the marriage. Her periods of excess drinking and temporary relinquishment of parental responsibility are of considerable concern to us. We are persuaded, however, as was the district court, that she has made significant and positive steps toward restructuring her life. We agree with the testimony adduced at trial that she is capable of appropriately disciplining and parenting her children and affirm the district court's custody award.

We also note that the present case is a close one and that there is a great deal of conflicting testimony evident in the record. Situations such as the present one which present us with irreconcilable testimony are precisely those situations where our deference to the district court's ability to see and hear the witnesses as they testify is most appropriate. The rationale behind this proposition is that the district court has the opportunity to observe the demeanor of the witnesses as they testify and to formulate an appropriate impression, based on that demeanor, as to the credibility of that testimony. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). We think that, in the present case, great weight should be given to the district court's credibility assessment.

The district court, in the dissolution decree, granted Randy certain visitation rights. We believe the present record is insufficient to permit us to determine this issue. In particular, we note our great concern with the allegations made in this case to the effect that Randy has sexually abused Randall Lee. Although there was testimony at trial that the allegations of sexual abuse were

not substantiated, much of the highly probative evidence on this issue was not received by the district court as a result of the privilege claimed by several witnesses under Iowa Code section 235A.15D (1985). That section authorizes the disclosure of child abuse information

[t]o a juvenile court or district court upon a finding that information is necessary for the resolution of an issue arising in any phase of a case involving child abuse, except that information obtained through the registry shall not be utilized in any aspect of any criminal prosecution.

Several witnesses at trial claimed this privilege and the district court refused to order their testimony.

We think this testimony is vital to a well-informed determination of Randy's visitation rights. We therefore vacate that part of the district court's decree dealing with visitation and remand this case for a hearing limited to supplementing the present record with respect to the issue of sexual abuse and determining Randy's visitation rights accordingly.

Upon taking such evidence as is necessary the trial court shall enter a finding of fact determining the validity of the allegations of child sexual abuse against Randy. Testimony from investigators of the department of human services shall be ordered to be heard by the trial court for its aid on this issue. Thereafter the court shall fix the visitation rights of Randy, whether under supervision or not, as is appropriate.

Randy next argues that the district court erred in ordering him to pay \$150 per month in child support, adequate medical and hospital insurance for the children, attorney's fees for the children, and the costs of the court-ordered home investigation study. We must consider the factors enumerated in Iowa Code section 598.21(4) (1985) to determine the propriety of an award of child support. Both parties have an obligation to support their children, but this obligation is not necessarily to be borne equally by them. It should be apportioned

according to the fair ability of each to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa Ct. App. 1984). In light of the relative circumstances of the parties, we think the district court's award of child support was reasonable and, therefore, affirm. In addition, we affirm the district court's order requiring Randy to provide medical and hospital insurance for the children.

The district court also ordered Randy to pay \$2,280.15 toward the attorney fees of the children's counsel and \$812.13 to cover costs of the court-appointed home investigation study. Both of these services were court-appointed pursuant to Iowa Code section 598.12 (1985). Randy contends that he is "indigent" within the meaning of section 598.12(3) (1985) and therefore should be relieved of this obligation. That section of the statute states that:

[t]he court shall enter an order in favor of the attorney, the department of human services, or an appropriate agency for fees and disbursements, which amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent in which event the fees shall be borne by the county.

In In re Marriage of Kopp, 320 N.W.2d 660, 662 (Iowa Ct. App. 1982), we said that, for purposes of requiring the county to pay the guardian ad litem's fees under section 598.12, an indigent "is a person who would be unable to employ counsel without prejudicing his financial ability to provide economic necessities for himself or his family." In Kopp, we found a person with no property and an annual income between \$4800 and \$6000 to be indigent within the meaning of the statute. In the present case, although Randy failed to file an affidavit of financial status, the record establishes his income is between \$450 and \$500 per month. He receives no employment-related benefits. We think that Randy is indigent and hold that he is not responsible for the children's attorney's fees or for the costs of the home investigation study.

AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.

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

SACKETT, J. (dissenting)

I agree with the majority when it determines additional testimony should be taken from the investigators for the department of human services. Where there are allegations of sexual abuse, courts charged with making custody determination should have all the facts available to assist them in making a decision. However, I am disturbed by the majority's decision to decide the custody issue at this time when they admittedly are unsure of whether sexual abuse took place.

Leigh charges Randy sexually abused the children. Randy contends the trial court erred in awarding custody of Leigh where the only reasonable inference from the evidence is that she fabricated the sexual child abuse claim against him which included involving the child in the fabrication. There is merit to Randy's claim. The evidence in this record of Randy's alleged sexual abuse came only from things Leigh said the child did and said and things the child did and said under circumstances such as we could clearly find Leigh was coaching the child.

I specifically note an Iowa Department of Human Services employee, employed as a child protective service worker, testified she had been employed by the department since 1980 and investigates about five sexual abuse cases a month. She is responsible for investigating reports of child abuse and neglect and dependent abuse and neglect. She has a four-year bachelor's degree from the University of Iowa with a social work certificate. She determined sexual abuse complaint against Randy was not substantiated. By department guidelines she found more evidence that it did not happen than it did. If Leigh has in fact fabricated the sexual abuse, I would weigh that fact very heavily against her in making a custody determination.

Randy exhibited more maturity and stability during the marriage. A family therapist employed by Iowa Children and Family Services, after spending exten-

sive time with the parties, the children and about thirteen other persons with knowledge of the custody issue, recommended Randy be the custodial parent. I therefore cannot agree with the majority decision to affirm the custody award at this time. I would remand the case to obtain additional evidence from the investigator.