IN THE COURT OF APPEALS OF IOWA

No. 1-027 / 10-0962
Filed April 13, 2011

IN RE THE MARRIAGE OF ROBIN N. MCFARLAND AND BURNS H. MCFARLAND

Upon the Petition of

ROBIN N. MCFARLAND,
Petitioner-Appellee,

And Concerning

BURNS H. MCFARLAND,
Respondent-Appellant.

Appeal from the Iowa District Court for Sioux County, Jeffrey A. Neary, Judge.

Burns McFarland appeals the decree dissolving his marriage to Robin McFarland. **AFFIRMED.**

Burns H. McFarland, Ridgeland, Mississippi, appellant pro se.

Randy L. Waagmeester of Waagmeester Law Office, P.L.C., Rock Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

I. Background Facts and Proceedings.

Burns McFarland, a Mississippi attorney, and Robin Van Es, the owner of a dance business in Sioux Center, met in California in 2001 and married in 2004. In 2005, their son was born. Robin filed this dissolution action in 2007. To describe the litigation as contentious is an understatement. Burns was represented at times by two out-of-state attorneys and several Iowa attorneys. In May 2010, the court filed a detailed ruling awarding Robin "sole physical custody" of their son with visitation to Burns. The court awarded Robin $50,000 in attorney fees.

Burns appeals the decree dissolving his marriage arguing the court abused its discretion in allowing depositions into evidence and in failing to grant his motion to recuse the trial judge. Burns also appeals the decree's custody and visitation provisions. We affirm.

II. Standard of Review.

We review dissolution proceedings de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005).

III. Control of Trial.

Burns argues the court erred in allowing Robin to enter into evidence the depositions of seventeen lay witnesses and asserts the live testimony of these

witnesses should have been required.[1] "We review this evidentiary ruling for an abuse of discretion." *In re Estate of Rutter*, 633 N.W.2d 740, 745 (2001).

Burns acknowledges this case is an equitable proceeding and admits Iowa Code section 624.3 (2007) authorizes a court in equity to allow a witness to testify by deposition. *See Rutter*, 633 N.W.2d at 746 (comparing actions at law tried upon oral evidence in open court with equity actions where '[t]his requirement is relaxed"). Burns claims, however, "no true exceptional circumstances existed" as required under Iowa Rule of Civil Procedure 1.704(5), which provides:

> On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

We note trial judges are afforded wide discretion over the course and conduct of a trial. *In re Marriage of Thielges*, 623 N.W.2d 232, 239 (Iowa Ct. App. 2000). Additionally, trial judges control the presentation of evidence to "avoid the needless consumption of time." *Id*. (recognizing courts are not required to surrender courtrooms for "marathon productions" of witnesses). *See In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998) (stating trial court has "to responsibly manage the stream of cases through the spectrum of justice"). Further, Iowa Code section 598.8(1) provides "hearings for dissolution of marriage shall be held in open court upon the oral testimony of witnesses, or upon the depositions of such witnesses . . . ."

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[1] Burns does not appeal the court's ruling allowing Robin to enter into evidence the depositions of four expert witnesses: Stacey Hofer-Ahrenstorff, Dr. Daniel Dress, Dr. Shawn Scholten, and Dr. Thomas Price.

Our de novo review of this case shows its background is a procedural nightmare. The initial salvo in the pretrial skirmishes was fired by Robin when she filed forty-five affidavits to support her request for temporary custody of the child. No purpose would be served by a lengthy and detailed illustration of Burns's numerous changes/withdrawals of attorneys, his two attempted interlocutory appeals, and his efforts to ignore the court's orders concerning the length of trial by subpoenaing forty additional witnesses six days before a June 2009 trial date.[2] The trial court originally allocated three days for trial and, after quashing Burns's subpoenas and again continuing trial, subsequently conducted an eight-day trial of live testimony in November 2009. Additionally, after trial the court gave Burns three weeks to submit additional evidence. We find no abuse of discretion.

IV. Motion to Recuse Trial Judge.

On March 25, 2009, Burns filed an application for rule to show cause and informed the court the Department of Human Services (DHS) had contacted him on March 18, 2009, and instructed him to have no contact/visitation with his son due to allegations of abuse. Burns requested "a ruling that determines the authority of the DHS to circumvent this Court's current visitation order."

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[2] Burns's brief asserts he filed a "Federal Defamation and Conspiracy matter" where the witnesses who testified by deposition in the dissolution are "now defendants in a Federal Action." Burns devotes eighteen pages of his briefing and over 1200 pages of the appendix (4 of 6 volumes) to depositions he took in 2010 for this separate federal case. We consider none of this irrelevant material in reaching our decision. The court does not consider issues based on information outside the record. *Rasmussen v. Yentes,* 522 N.W.2d 844, 846 (Iowa Ct. App. 1994). The record on appeal is comprised of the original documents and exhibits filed in the district court, the transcript, and a certified copy of the docket and court calendar entries. Iowa R. App. P. 6.801.

On April 6, 2009, the court held a hearing on Burns's application and four other pending motions. The court informed the parties it had talked on the telephone with the county attorney to determine if there was going to be a juvenile matter involving the family that would result in the trial court losing jurisdiction over custody of the child. *See* Iowa Code §§ 232.3(1), .61. The court discussed potential scheduling issues and the various motions pending. At the hearing, Burns asked the court to "hold ruling on our application. It is our plan to contact DHS and coordinate our efforts . . . ." The court then explained it did not have a good sense of the DHS processing time frames and suggested another hearing in thirty days or less. Based on his attorney's knowledge of DHS timeframes, Burns agreed to a hearing on April 20. Eventually, the April 20 hearing was continued indefinitely.

Subsequently, the court denied Burns's repeated motions to continue the June 9, 2009 trial. On June 4, 2009, the Iowa Supreme Court denied Burns's application for interlocutory appeal and stay of the dissolution proceedings. On June 8, 2009, the day before trial was to commence, Burns filed a motion to recuse the trial judge and a motion to continue. Also on June 8, Burns's Iowa attorney, Richardson, filed a motion to withdraw stating Burns "insists upon taking action that [attorney Richardson] fundamentally disagrees with and [attorney Richardson's] representation of [Burns] has been rendered unreasonably difficult by the client."

The court was forced to continue the trial and instead held a hearing on June 10, 2009. After the hearing, the court allowed the record to be

supplemented on Burns's motion to recuse and Richardson's motion to withdraw. The county attorney filed an affidavit describing a sixty-second telephone conversation with the trial court on scheduling issues. Attorney Richardson filed an affidavit stating he sought to withdraw due to his disagreement with Burns's decision to file the motion to recuse. Noting Richardson is the fourth Iowa attorney to withdraw, the court granted his withdrawal on June 23, 2009. The court also denied the motion to recuse, ruling:

> A judge has an obligation not to recuse himself "when there is no occasion for him to do so" because of the "ever mounting sea of litigation and the need to maximize all available judicial power." [*State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994).]
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> Here there is no appearance of impropriety, no violation of any provisions of the Iowa Code of Judicial Conduct, nor any bias by the trial judge as to either party. Recusal is not only unnecessary, the request for recusal of the trial judge is without basis and clearly made at the last minute as an eleventh hour attempt to obtain a continuance of the trial. The Court finds the Motion to Recuse Trial Judge to be a frivolous motion and without merit.

Burns argues the court's communication with the county attorney prior to the April 6 hearing requires recusal and the court's prejudice against him is illustrated by the court's "punishing" him by awarding $50,000 in attorney fees to Robin.[3] He accuses the trial judge of: "bias, prejudice, unwillingness to follow the law and outright personal hostility."

Parties have a right "to have a neutral and detached judge." *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). "The burden is on a party seeking recusal to establish a basis for it, and the determination is committed to the

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[3] We again decline to consider the irrelevant portions of Burns's brief citing to matters outside the record. *Rasmussen,* 522 N.W.2d at 846.

judge's discretion." *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998). Burns is required to show "actual prejudice" before a recusal is necessary. *See McKinley v. Iowa Dst. Ct.*, 542 N.W.2d 822 (Iowa 1996). The test is objective: "whether a reasonable person would question the judge's impartiality." *Id*.

The Iowa Code of Judicial Conduct governs disqualifications of judges. *See* Canon 3(C) (2009). The pertinent language states:

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following instances:
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> a. The judge has a personal bias or prejudice concerning the party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Id. at 3(C)(1)(a). Only personal bias or prejudice as opposed to judicial predilection will disqualify a judge. *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). Our review of this issue is for an abuse of discretion. *Id.*

We discern no abuse of discretion. We do not accept Burns's contention the award of attorney fees reflects bias on the part of the trial judge. The county attorney conversation resulted from Burns's informing the court of an ongoing DHS investigation and related to scheduling and jurisdiction over visitation/custody in light of the investigation. With respect to Burns' contention that the court favored Robin, the record reflects the district court, faced with a highly-contentious case, carefully considered each of the myriad issues presented and ruled within the parameters of the law. The court's actions are not consistent with Burns's assertion of bias. *Cf. In re S.P.*, 719 N.W.2d 535, 539

(Iowa 2006) (discussing "the cold neutrality of an impartial judge"). Further, no actual prejudice has been shown.

After our de novo review, we conclude "a reasonable, objective person, knowing all the circumstances, would not have questioned [the trial judge's] impartiality." *See Mann*, 512 N.W.2d at 533.

V. Custody.

Burns appeals the court's decision awarding custody and physical care to Robin. The Iowa Rules of Appellate Procedure govern the form and content for briefs and appendixes filed on appeal. *See generally* Iowa R. App. P. 6.904(4) (references to the record), 6.905 (appendix). Failure to comply with these rules can lead to summary disposition of an appeal. *Myers v. Sellers*, 234 N.W.2d 152, 153 (Iowa 1975). We are not bound to consider a party's position when the brief fails to comply with our rules of appellate procedure. *Inghram v. Dairyland Mut. Ins. Co*., 215 N.W.2d 239, 239-40 (Iowa 1974) (stating "unprofessional failure can lead to summary disposition of an appeal"). The section of Burns's brief challenging the custody award amounts to five out of fifty-one pages. Burns cites to only one evidentiary question/answer in support of his wide-ranging claims. The brief's quoted questions and answers of witness McElroy cite to the trial transcript, not the appendix, and are not even contained in the appendix. Otherwise, Burns simply cites to the decree without reference to the appendix. Burns fails to refer us to relevant portions of the evidence supporting his custody claims. Therefore, reaching the merits on this issue "would require us to assume a partisan role and undertake the appellant's research and

advocacy. This role is one we refuse to assume." *Id*. at 240. Accordingly, we affirm the trial court's ruling.

V. Attorney Fees.

Robin requests $19,200 in appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's sound discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the relative merits of the appeal. *Id*. We award Robin appellate attorney fees in the amount of $15,000. Costs on appeal are assessed to Burns.

AFFIRMED.