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DANELLE KAY COLLINS, APPELLANT, V. COLBY REE COLLINS, APPELLEE.

837 N.W.2d 573

Filed August 20, 2013. No. A-12-505.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012) provides that in determining custody and parenting arrangements, the court shall consider the best interests of the minor child.
5. ____. The Nebraska Supreme Court has held that in determining a child's best interests, courts may consider a variety of factors.
6. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Child Custody: Armed Forces.** Neb. Rev. Stat. § 43-2929.01(1) (Cum. Supp. 2012) provides that for children of military parents, it is in the best interests of the child to maintain the parent-child bond during the military parent's mobilization or deployment.
8. **Child Custody: Visitation: Armed Forces.** Neb. Rev. Stat. § 43-2929.01(3) (Cum. Supp. 2012) provides that a military parent's military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders because of military duty shall not, by itself, be sufficient to justify an order or modification of an order involving custody, parenting time, visitation, or other access.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Nancy S. Johnson, of Conway, Pauley & Johnson, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Danelle Kay Collins appeals an order of the district court for Hall County, Nebraska, dissolving her marriage to Colby Ree Collins and awarding custody of the parties' two minor children to Colby. On appeal, Danelle challenges the court's custody award. She also asserts that the district court's custody award was in violation of Neb. Rev. Stat. § 43-2929.01(3) (Cum. Supp. 2012), concerning custody awards involving military parents. We find no abuse of discretion in the court's award of custody to Colby, and we find that the court's order was not in violation of the statute.

II. BACKGROUND

Danelle and Colby were married in August 2003 and resided in Grand Island, Nebraska, throughout the duration of their marriage. Two children were born during the marriage: Callie, born in 2005, and Tyler, born in 2008.

The primary issue litigated by the parties was custody of the two children. The parties reached an agreement related to other issues, and nearly all of the testimony adduced at trial concerned the issue of custody.

Prior to trial, the parties submitted a joint proposal for a temporary parenting plan. That proposal provided for joint legal and physical custody, including parenting time of more than 145 days per year for Colby. The court approved the temporary parenting plan.

1. PARTIES' EMPLOYMENT HISTORIES

Both parties were employed outside of the home throughout the marriage. Danelle has a degree in construction management, and she was employed in various jobs throughout the marriage. At the time of separation, she was working for a restoration company that provided services restoring homes damaged by fire or water. She testified that the job required travel across the state and was not "strictly an eight-to-five position." Danelle left that employer between the time of separation and the time of trial, and at the time of trial, she was working for

an insulation company in Kearney, Nebraska, and was starting a pesticide business.

Danelle testified that her new employment was flexible to accommodate her children. She testified that she is "able to take Tyler to work with [her] virtually all day," that she is able to go to Callie's school and volunteer to help in her classroom, and that she is able to take the children to appointments. She testified that the job also pays better than her previous employment.

Colby was employed throughout the marriage as a branch manager and loan officer at a bank. He testified that he had been with the same employer for 17½ years. Colby's typical work schedule was 8 a.m. to 5 p.m., Monday through Friday.

2. Danelle's Military Service

In addition to her various employments, Danelle was a member of the Air National Guard throughout the marriage, serving as a jet engine mechanic. She testified that she had been in the Air National Guard for approximately 12 years at the time of trial and that she was planning to serve for 20 years. She testified that her service in the Air National Guard required her to travel to Lincoln, Nebraska, for weekend drills once per month and that she is subject to deployment at any time.

Danelle testified that when she was required to travel to Lincoln for weekend drills, she typically took the children with her. She testified that the parties' teenage babysitter, Sadie C. (Sadie), accompanied her and the children to Lincoln and took care of the children while she was at the drills. Danelle testified that she did not prevent Colby from keeping the children in Grand Island, but that she did not feel he was supportive of her military career and that there would have been "a huge fight if [she] would ask him to watch the children on the weekend [she] had drill." She testified that Colby accompanied them to Lincoln on one or two occasions.

Colby, on the other hand, testified that Danelle usually did not tell him about her weekend drills until the Friday she was leaving to travel to Lincoln and that although she "[o]ccasionally" gave him the opportunity to keep the children in Grand

Island, she gave him an ultimatum of either joining them all in Lincoln or not. He testified that he did not accompany them to Lincoln because it would have meant spending the weekend at a hotel with the female teenage babysitter, Sadie, and he did not feel that would have been appropriate.

Danelle testified that, in addition to the weekend drills once per month, the other primary time commitment related to being in the Air National Guard involved 2-week training sessions held once per year. She testified that she had been serving in the Air National Guard long enough her attendance at these training sessions was no longer mandatory and that she had opted not to attend on some occasions. On cross-examination, she acknowledged that in 2010, she had told Colby she was going to be in Virginia for the 2-week drill, but she was actually in Texas. Colby testified that he was confused about why Danelle would lie about the location of her drill, and the record reveals no other explanation.

In addition to her regular service and training commitments, Danelle had been deployed on three occasions during the marriage. Danelle testified that her first deployment was in 2006, before Tyler was born. She was deployed for approximately 2 weeks to Turkey. Danelle testified that she took Callie to North Dakota to be cared for by her parents during this deployment. Colby, however, disputed Danelle's testimony that Callie was cared for in North Dakota by Danelle's parents during that deployment.

Danelle testified that her second deployment was in 2007, again before Tyler was born. She was deployed for approximately 2 weeks to Guam. Danelle testified that she again took Callie to North Dakota to be cared for by her parents during this deployment. Colby again disputed Danelle's testimony and testified that although Callie spent part of the deployment time visiting Danelle's parents in North Dakota, she spent part of the deployment time with him.

At the conclusion of the trial, the parties agreed to a stipulation concerning the first two deployments and Callie's care. The parties stipulated that Colby had provided care for Callie during "part of" the 2006 and 2007 deployments.

Danelle testified that her third deployment was in 2009, after Tyler was born. She was deployed for more than 40 days, although the record does not reflect the location of this deployment. Danelle testified that Callie and Tyler were primarily cared for by the teenage babysitter, Sadie, during this deployment. Sadie testified that she attended school during the day and cared for Callie and Tyler in the evening and on weekends, that when Colby arrived home from work he would make dinner for everyone, and that she then took care of getting the children ready for bed.

The evidence adduced at trial indicated that Danelle's military service was one of the primary sources of contention between the parties. Danelle testified that Colby "hated the military and would not support [her] in it at all." She testified that she could not ask Colby to care for the children during her weekend drills because "it was a huge fight" if she would do so. She testified that she "could not ask him to take care of [the] children while [she] was on military because it would end up in a fight" and that "to save peace and have a nonargumentative house in front of the children, [she] would just make other arrangements . . . with [her] family." She also testified that when she was notified about being deployed, she told her family before telling Colby because she "knew the kind of fight [she] would have on [her] hands when . . . talking to Colby about it."

Colby disputed Danelle's testimony. He testified that his father was in the Air Force and that he had "a lot of respect for the military." He testified that his concern with Danelle's military service centered around dishonesty on Danelle's part concerning her military service. Danelle lied to Colby and to her family in 2006, when she told them that she had been "retained" and she had, in fact, chosen to reenlist. Colby testified that the parties had had a prior discussion about her not continuing with her military service once they had children, that Danelle had "assured [him] she would get out when her enlistment time was up," and that he did not discover for more than 2 years that she had lied about voluntarily reenlisting. In addition, Danelle lied to Colby about the location of a

2-week training session in 2010, when she told him she was going to Virginia but was, in fact, going to Texas.

Colby also testified that he had concerns about her military service, because she could be deployed at any time and could be taken "overseas for months to years." He testified that he was concerned about her safety if she was deployed and about the "uncertainty all over the world."

3. Primary Caregiving

Danelle testified that when the children were in daycare, Colby took the children to daycare and Danelle picked them up. She testified that in a typical evening during the marriage, she would take the children home from daycare and would play with them while she was making supper, cleaning, and doing laundry. She testified that after eating, she would clean up the kitchen, bathe the children, "[g]et jammies on" the children, and rock the children to sleep.

Danelle testified that she made sure the children had all the clothing they needed, she did the grocery shopping, she did the cleaning of the house, she did the laundry, she took care of the children's health and medical needs, she made the appointments and took them to doctors and dentists, and she arranged for birthday parties for the children. She testified that if the children got sick, the babysitter would call her. She testified that if the children needed a hug or fell down and hurt themselves, they went to her.

Danelle testified that Colby was "[t]ypically . . . either at a community service event . . . or out playing golf or otherwise he was just at home and usually on the couch in front of the T.V." Danelle adduced testimony from her mother and from the teenage babysitter, Sadie, to support her assertion that Colby was not involved with caring for the children.

Colby disputed Danelle's testimony and evidence about his participation in caring for the children. He testified that the parties shared the responsibilities of getting the children ready in the mornings, that he took the children to daycare, and that he picked the children up from daycare approximately half of the time. He adduced testimony from the daycare provider, and she testified that he dropped the children off and that

either Danelle, Colby, or Sadie picked the children up. Colby testified that the parties shared responsibilities of feeding and bathing the children. He testified that Sadie was typically present in their home in the evenings and that she also participated in caring for the children. The witnesses who testified on Colby's behalf also testified that when the children have needed him, Colby has stopped doing business or work and left to care for them.

Colby testified that since the separation, when the children were in his care, he was responsible and able to get the children up in the morning, dressed, fed, and to school. He testified that he was responsible and able to get the children picked up after school, and that he got them home, cooked them supper, played with them, read and told stories to them, bathed them, and got them to bed. He testified that he did this on his own, without the assistance of Sadie.

Colby adduced testimony from family friends and former neighbors in support of his assertion that he had been actively involved with parenting the children. Those witnesses testified, based on their observations of the parties during the marriage, that the children were a high priority for Colby, that he shared in the responsibilities of caring for the children, and that both parties were generally working together with the children and household duties. The witnesses testified that they had witnessed Colby taking care of the children on his own, but that Danelle typically had assistance caring for the children, either from Colby or from Sadie.

4. Other Legal Matters

In 2011, Danelle was convicted of driving under the influence. She lost her operator's license for 90 days, was fined, and was required to attend classes. She testified that by the time of trial, her operator's license had been reinstated.

During the course of the proceedings, a restraining order was entered against Colby. There was very little testimony or evidence adduced concerning the circumstances of the order, but it appears to have arisen out of an altercation that occurred between Colby and another man whom Danelle had begun dating. It appears that the incident resulted in a domestic assault

charge being brought against Colby, but he was found not guilty by a jury. The parties apparently agreed prior to the dissolution trial that the details of the incident would not be discussed, and there was very little testimony about it.

5. Miscellaneous Testimony

Danelle testified that she believed it was in the best interests of the children for her to be awarded custody. She testified that the children had "only always been with [her]" and that she "primarily [took] care of them."

Danelle testified that she was planning to move to Kearney. She testified that since the separation, she had begun dating her new boss, and she acknowledged that the residence she had planned to move to in Kearney was owned by him. There was evidence adduced that Danelle had begun to date within 30 days after leaving Colby. Danelle testified that she and her boss were not living together and that he had not spent the night at her residence. She acknowledged, however, that she and the children had spent the night at his home prior to the dissolution trial.

Danelle testified that when she and the children have stayed at her boss' home, the children each have their own room "upstairs" and that she also stays upstairs. She testified that this usually happens on weekends, although there had also been occasions during the week when she had an early appointment or they had been involved in activities that ended late at night. The evidence adduced at trial indicated that the teenage babysitter, Sadie, had also stayed at Danelle's boss' home with Danelle and the children. Sadie testified that she had done so on probably more than 10 occasions.

There was also evidence adduced that Danelle had taken Sadie with her to various social events, including a bachelorette party, a "tanking" trip, and parties for the Fourth of July and New Year's Eve. Sadie testified that on these occasions, when she was 18 years of age or younger, there was alcohol made available to her, and that on some of the occasions, she had consumed alcohol with Danelle and in the presence of the children.

Colby testified that he believed he could provide the most stable and loving environment for the children. He testified that he was going to continue living in the marital home, which was the home the children had known since birth, and that he could provide consistency for Callie in attending the same school. He adduced evidence from a counselor who had treated Callie, and the counselor testified that Callie had expressed being sad about the possibility of having to move. The counselor testified that she would expect that there would be some regression in Callie's behavior if she were required to move.

Colby testified that he felt it was important for the children to know that both he and Danelle loved them and were supportive of them. He testified that he believed that he and Danelle needed to "get past all of this garbage" and find a way to "co-parent these children together." He testified that their relationship was broken, that Danelle had already moved on to a new relationship, and that he would do so once the parties were divorced, but that they needed "to be there for the benefit of [the children] and be a supportive structure for them."

6. Decree and Rulings

In the decree dissolving the parties' marriage, the court recognized that the primary issue at trial had concerned custody of the children. The court specifically indicated that, in making its decision on custody, it had

> considered the factors statutorily listed in Neb. Rev. Stat. §42-364 which is the relationship of the children to each parent prior to the commencement of the action; the desires and wishes of the minor children if of such an age of comprehension to base such desires and wishes on sound reasoning; the general health, welfare, and social behavior of the children; and any credible evidence of abuse inflicted on any members of the family.

The court also specifically noted that it had

> also considered from the evidence the moral fitness of the parents; the respective environments offered by each

> parent; the emotional relationship between child and parent; the age, sex and health of the parties and children; the effect on the children as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the children; children's preferential desire; and the general health, welfare and social behavior of the child.

The court found both parents to be fit and proper, and recognized that both expressed love and concern for the children. The court pointed to testimony from Callie's counselor as indicative of the interest both parents have in helping the children to cope with the normal difficulties associated with the dissolution of the familial circumstances.

The court specifically recognized that Danelle's military service had resulted in a great deal of stress in the marriage, not only because of the actual military obligations, "but also [because of] the manner in which the military career has been addressed by the parties." The court recognized the conflict in the testimony, wherein Danelle asserted that the problem was Colby's lack of support and Colby asserted that the problem was Danelle's "being deceitful and putting her own interests above that of her family." The court recognized the specific untruths evident in the record concerning Danelle's reenlistment and "perplexing" representation that she was going to Virginia instead of Texas for training.

The court also recognized the issues related to Danelle's weekend training drills. The court found that they "turned into a circumstance of [Danelle's] taking the children and a teenage babysitter to Lincoln" instead of leaving the children "at their home with [Colby]." The court recognized Colby's testimony that Danelle would schedule the weekends without notifying him and leaving him with the choice of either staying in Grand Island or accompanying Danelle, the children, and the teenage babysitter to Lincoln and staying at the motel with the teenage babysitter, which Colby felt was "inappropriate."

The court found that Danelle had chosen throughout the marriage to "rely upon the teenage babysitter to assist her with

the children as opposed to giving [Colby] every opportunity to do so."

The court specifically noted that it had reviewed the testimony of the witnesses and had been present for and viewed their testimony. The court specifically indicated that its decision "does include the Court's weighing the credibility of the witnesses' testimony." The court specifically indicated that it was "concerned about the credibility of [Danelle and her] portrayal of the parties' involvement with the children." The court specifically "question[ed] the credibility of [Danelle's] testimony concerning [the] amount of involvement of [Colby] with the children" and noted the evidence adduced by Colby and "the inconsistencies in the evidence concerning [Danelle] and her propensities to be truthful in the relationship involving her family."

The court noted Danelle's dating relationship with her boss and her plans to move to Kearney. The court compared Colby's plans to remain in the marital home and his consistent employment situation.

The court specifically questioned Danelle's reliance on the teenage babysitter to help her care for the children. The court also recognized that Danelle's military service and decision to reenlist, with the uncertainty of deployment, impacted her ability to provide a stable environment for children of this age.

The court concluded that Colby could provide the more stable environment for the children. Thus, the court awarded custody of the children to Colby.

Danelle filed a motion for new trial or to alter or amend the decree. She alleged that the court had overlooked her role as primary caregiver and that the court erred in disregarding her assertions Colby had chosen not to be involved with the children and in disregarding Colby's attitude toward child rearing.

Danelle then filed an amended motion for new trial or to alter or amend the decree. In the amended motion, she made the same assertions as in the initial motion, but also added assertions that the court had erred in disregarding § 43-2929.01(3). Danelle asserted in her amended motion that

the statute "precludes the Court from considering" her military service in making its custody determination.

In response to Danelle's amended motion, the district court entered a journal entry denying her relief. In the journal entry, the court made specific findings that it had not failed to consider the statute and that Danelle's military service was not, by itself, the basis for the court's custody determination. The court specifically held that the bulk of the evidence adduced at trial had been the testimony of the parties and that credibility was a significant factor in the court's decision. The court specifically noted that each party's testimony had been in stark contrast to the other's and that the court's finding Danelle lacked credibility had been a significant factor in the court's decision.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Danelle asserts on appeal that the district court abused its discretion in awarding custody of the parties' minor children to Colby and in violating § 43-2929.01(3).

IV. ANALYSIS

On appeal, Danelle challenges the court's award of custody to Colby. She asserts that she was the primary caregiver for the children throughout the marriage and that awarding Colby custody will result in instability for the children. She also asserts that the district court's custody award was based on her military service, in violation of § 43-2929.01(3). We find no merit to these assertions.

1. Award of Custody to Colby

Danelle first asserts that the district court abused its discretion in awarding custody to Colby. She argues that the evidence adduced at trial demonstrates that she was the primary caregiver to the children throughout the marriage, that she was the primary caregiver after the parties separated, and that awarding custody to Colby will result in instability for the children. Our review of the record reveals substantially conflicting testimony, credibility issues related to Danelle, and sufficient evidence such that we cannot find the

district court's custody award to be untenable or an abuse of discretion.

[1,2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. See *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[3] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). In this case, the court found that both parties are fit and proper to have custody. Neither party disputes this conclusion. Thus, the focus of this appeal is on the best interests of the children.

[4,5] Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; [and]
>
> (c) The general health, welfare, and social behavior of the minor child.

See *Pohlmann v. Pohlmann, supra*. In addition to these factors, the Nebraska Supreme Court has previously held that in determining a child's best interests, courts

> "'may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each

> parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.'"

Davidson v. Davidson, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998).

The present case is, in essence, one where the parties have presented conflicting evidence concerning the best interests of the children. Both parties were found to be fit and proper. As set forth in more detail above in the factual background portion of this opinion, the parties provided substantially conflicting evidence concerning their parenting strengths and weaknesses and about which party would better serve the children's interests as physical custodian.

Although Danelle asserted that she was essentially the only caregiver for the children and that Colby was uninvolved, Colby testified that responsibilities were shared and adduced testimony from other witnesses to support his assertions. Although Danelle asserted that her parents cared for Callie during the first two deployments, Colby testified that he provided care; the parties eventually stipulated that he provided care for part of the time. Although Danelle testified that her participation in the military was resented by Colby and led to fights, Colby testified that the fights were caused by her lying to him about her service. Danelle acknowledged lying to him.

[6] Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). In fact, in contested custody cases, where material issues of fact are in dispute, the standard of review and the

amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Id*.

In this case, there was sufficient evidence to support the court's custody determination. The court specifically indicated, both in the decree and in its journal entry overruling the motion for new trial or to alter or amend the decree, that it was heavily influenced in this case by the credibility of the witnesses and that it did not find Danelle to be credible. In a case such as this one, where the testimony of the parties was substantially in conflict and where the court made specific findings that it found one party to lack credibility—especially where the record includes that party's acknowledgement of lying to the other party on multiple occasions—given our standard of review and deference to the trial court's determinations about credibility, we cannot say that the court's decision to award custody to Colby was clearly untenable or an abuse of discretion.

2. § 43-2929.01(3)

Danelle also asserts that the district court's custody award was based on her military service and that, as a result, it was in violation of § 43-2929.01(3). We find that even if we assume that § 43-2929.01(3), which took effect during the pendency of this action, is applicable in this case, the record demonstrates that Danelle's military service was not the only consideration in the court's custody award and, as a result, § 43-2929.01(3) was not violated.

[7] Section 43-2929.01(1) provides: "The Legislature finds that for children of military parents it is in the best interests of the child to maintain the parent-child bond during the military parent's mobilization or deployment." The remainder of § 43-2929.01 then includes a variety of provisions designed to carry out that recognition.

[8] Section 43-2929.01(3) provides:

> A military parent's military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders

> because of military duty *shall not, by itself, be sufficient to justify an order* or modification of an order involving custody, parenting time, visitation, or other access.

(Emphasis supplied.)

Danelle asserts on appeal that the district court disregarded § 43-2929.01(3) in considering her military service in its custody order. She also argues that in cases involving military parents, the district court should be required to issue specific findings about § 43-2929.01(3) as a matter of public policy.

Colby argues that it is not clear that § 43-2929.01 is even applicable to this proceeding, as it did not take effect until after the complaint seeking dissolution had been filed. He also argues that even if it is applicable, it was not violated in this case because the district court did not base its custody decision solely on Danelle's military service.

We decline to specifically determine whether § 43-2929.01 is applicable to actions in which the complaint was filed prior to its effective date but the decree was issued after its effective date. In this case, even if we assume that it is applicable, we find that the district court clearly did not violate the terms of § 43-2929.01(3).

The plain language of § 43-2929.01(3) provides that military service "shall not, *by itself*, be" the basis for a custody order. (Emphasis supplied.) The statute provides that military service alone cannot be the basis for the court's custody order—it does not provide, as Danelle attempted to assert to the district court in her motion for new trial or to alter or amend the decree, that the court is precluded from considering military service in making its custody order.

Danelle asserts on appeal that although the district court indicated in its order denying her motion for new trial or to alter or amend the decree that her military service was not the only consideration in the court's order, it did so "without disclosing what the other reasons might have been." Brief for appellant at 13. We disagree.

In the decree, the district court specifically indicated that it had given consideration to all of the relevant statutory and common-law factors set forth above concerning a determination as to the best interests of the children in custody

determinations. The court specifically listed all of those considerations. Although the court did not make specific and individual factual findings with respect to each consideration, the court did make specific findings about the conflicting evidence concerning the parenting of the children, made specific findings about the parties' relative employment and proposed living situations, made specific findings about Danelle's relationship with her boss, and made a specific finding about which parent the court felt could provide the more stable environment for the children.

Perhaps most important, the court went to some lengths to set forth specific findings about the credibility of the witnesses. As discussed above, the parties presented substantially conflicting testimony about the primary care of the children and the reasons for various parenting decisions during the marriage. Danelle acknowledged—and the court specifically found, emphasized, and relied upon—the fact that she had lied to Colby about her reenlistment in the military and about the location of her training. The court specifically indicated, both in the decree and in its ruling denying Danelle's motion for new trial or to alter or amend the decree, that it did not find Danelle to be credible and that its credibility determination was a significant factor in its custody award. There is nothing in the statute that would require any more specific findings than the court actually made.

On appeal, Danelle relies heavily on her own testimony and representations about the respective parenting roles during the marriage, about Colby's attitude toward her and the children, and about why awarding her custody would be in the best interests of the children. The district court made specific findings that it did not find her to be credible. We are in no position to disregard the court's findings or emphasis on the credibility of the parties and the witnesses.

A review of both the decree and the court's journal entry denying Danelle's motion for new trial or to alter or amend the decree demonstrates that the court did reference Danelle's military service in its award of custody. It did so, however, partly in reference to the difficulties that led to the breakdown of the marriage, partly in reference to the impact it

would have on future stability for the children, and partly in reference to Danelle's deceits and the impacts those had on her credibility. The court, however, also considered all of the relevant factors for a custody determination, and Colby presented sufficient evidence, as set forth above, to support the court's ultimate conclusion that the best interests of the children would be served by awarding him custody. The court's custody award was not based on Danelle's military service, on its own.

V. CONCLUSION

We find no merit to Danelle's assertions on appeal. The court's custody award was supported by sufficient evidence, including credibility concerns related to Danelle, and was not an abuse of discretion. The court also did not base its decision on Danelle's military service, on its own. We affirm.

AFFIRMED.

MARY BECERRA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA III, APPELLANT, V. MICHAEL SULHOFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA, SR., AND UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEES.

837 N.W.2d 104

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1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.