IN THE COURT OF APPEALS OF IOWA

No. 2-192 / 91-1490

FILED
JUN 25 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF XANTHEA JOHNSON AND KEITH JOHNSON

Upon the Petition of

XANTHEA JOHNSON,

Appellee,

And Concerning

KEITH JOHNSON,

Appellant.

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Appeal from the Iowa District Court for Delaware County, William Klotzbach, Judge.

Appellant appeals the district court's dissolution decree awarding primary physical care of the children to appellee, ordering appellant to pay child support, awarding appellee a property settlement of $7500 (a noninterest bearing amount which does not have to be paid until there is no obligation to pay child support), and ordering appellant to pay $1000 of appellee's attorney fees. **AFFIRMED.**

Linda H. Robbins of Irvine & Robbins, Cedar Rapids, and John A. Stitely of William F. Olinger Law Firm, Cedar Rapids, for appellant.

John J. Goen of Jenk & Goen, Cedar Rapids, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

FACTS

Keith and Xanthea Johnson were married on December 31, 1977. The parties have four children: Troy, born February 14, 1981; Derek, born February 22, 1982; Brennan, born June 17, 1983; and Neal, born April 11, 1988. Keith is white and Xanthea is Afro-American.

The parties lived near Delhi, Iowa, on a farm. By reason of Xanthea's minority status, the couple was able to secure financing to purchase 119 acres from Keith's parents. Keith raises pigs on contract. Xanthea worked on the farm until June 1988 when she began working at Rockwell Collins.

Xanthea filed a petition for dissolution on January 22, 1991. On February 14, 1991, the district court awarded the parties temporary joint legal custody. Keith had custody of the children on Monday, Tuesday, Thursday and Friday until 5:00 p.m. Xanthea had custody of the children on Wednesday, Friday night, Saturday and Sunday.

Since February 1991, Xanthea has lived in a home in Delhi located one-half block from school. Keith remains on the farm, five miles from Delhi.

After a hearing, the district court filed its findings of fact, conclusions of law and judgment on August 24, 1991. The court awarded primary physical care of the children to Xanthea. However, the court noted a special relationship existed between Troy and his father. The

court found Xanthea had primary responsibility for the children prior to starting her job. In addition, the court referred to testimony of a psychologist and the maternal grandmother. Both individuals felt it was important for the children to know about their racial heritage.

The court found the parties had acquired very little property during the marriage. The farmland had very little equity. Xanthea earns a net income of $285 a week from Rockwell-Collins. Xanthea also earns $35 a week giving piano lessons. The court ordered Keith to pay $135 per week in child support. The court based its computation on net income for Keith, before depreciation, of approximately $17,000 a year which factors in capital gains on the sows. Xanthea was allowed to claim the children as dependents for purposes of federal and state income tax.

The court awarded the real estate and farm to Keith. The court awarded Xanthea a property settlement of $7,500, which does not have to be paid until there is no obligation to pay child support. Finally, the court ordered Keith to pay $1,000 of Xanthea's attorney fees.

Keith filed a rule 179(b) motion which was overruled by the court. The court found that the net worth of the parties exceeded the amount that Keith stated in his financial statement. The court pointed out that it elected to leave the farm assets with Keith. The court also stated that the child support was based upon income for a

deduction of depreciation and the court assumed that the income of the parties was equal.

Keith appeals from the findings of fact, conclusions of law and judgment and the ruling on the 179(b) motion.

Xanthea requests the court to assess the cost of the appeal to Keith.

SCOPE OF REVIEW

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

ANALYSIS

I. **Custody.** Keith argues he should be awarded primary physical care of the children. He argues the district court based its decision to award Xanthea primary physical care of the children on race and gender. We disagree.

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

For two days, the district court heard testimony from a number of witnesses. The district court determined from the testimony that placing the children in the primary physical care of Xanthea was in their best interest. In making its decision, the district court considered the factors set forth in Winter, 223 N.W.2d at 166-67 (Iowa 1974) and In re Marriage of Wahl, 246 N.W.2d 268, 270-71 (1976).

We note, as did the district court, Troy has a strong attachment to his father and life on the farm. Nevertheless, both parties stated in oral arguments the children should not be separated. This is consistent with Iowa law which presumes siblings should not be separated absent good and compelling reasons. In re Marriage of

Ellerbroek, 377 N.W.2d 257, 260 (Iowa App. 1985)(citing In re Marriage of Grandinetti, (Sackett, J., writing for the majority) 342 N.W.2d 876, 878-79 (Iowa App. 1983)). "The underlying rationale is that split custody deprives the children of the benefit of constant association with each other which, as innocent victims of marital bankruptcy, they should not be subjected to." Id. We agree with the parties in this case that the children should not be separated.

We are unable to conclude the district court considered race and gender in determining Xanthea should have primary physical care of the children. Based on the factors in the Winter case, we hold it is in the best interest of the children for Xanthea to have primary physical care of the four children. We affirm the district court on this issue.

II. Child Support. Keith argues the child support of $135 per week ordered by the district court is unreasonable as applied to his income. We disagree.

It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). Each parent's ability to contribute must be determined using the child support guidelines adopted by the Iowa Supreme Court. See

In re Marriage of Powell, 474 N.W.2d 531, 533 (Iowa 1991). The text of the guidelines provides in pertinent part:

> The court shall not vary from the amount of the child support which would result from the application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria:
>
> (1) Substantial injustice would result to the payor, payee, or child;
>
> (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor or payee under the special circumstances of the case; and
>
> (3) Circumstances contemplated in Iowa Code section 234.39.

Depreciation is a factor that must be taken into consideration when determining net income. If an accelerated method is used in reaching the amount of depreciation to be taken for income tax purposes, that method should be converted to straight-line to arrive at net income for child support guideline purposes. See In re Marriage of Gaer, 476 N.W.2d 324, 329 (Iowa 1991).

The district court, in its decision, stated that it assumed net income before depreciation. Later, in its ruling on the 179(b) motion, it stated that child support was based upon income for a deduction for depreciation. The court further stated it assumed the income of Keith and Xanthea were about equal and that it applied the guidelines in determining the amount of child support. We affirm the district court's award of child support. Keith's child support obligation remains at $135 per week.

III. Property Distribution. Keith argues the district court's division of the marital property was inequitable. We disagree. We find the value placed on the assets by the district court to be well within the permissible range of evidence and will not disturb them on appeal. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973) (citations omitted); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). We find the distribution of the property by the district court to be equitable under the circumstances. Therefore, we affirm the district court on this issue.

IV. Tax Exemption. Keith argues the tax exemption of the minor children should be awarded to him. The district court provided otherwise. From our de novo review, we agree with the district court's order granting Xanthea the tax exemption.

V. Attorney Fees. Keith argues the district court abused its discretion in awarding Xanthea $1,000 for attorney fees. We disagree.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250

N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982) (citation omitted).

We are unable to conclude the district court abused its discretion in ordering Keith to pay $1,000 of Xanthea's attorney fees. We affirm the district court on this issue. The parties shall each pay their own attorney fees on appeal.

CONCLUSION

After considering all issues presented, we affirm the district court.

Costs of this appeal are assessed to the appellant.

AFFIRMED.

Hayden, P.J., concurs, and Sackett, J., concurs and dissents.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I would split the physical care of the children and provide Zanthea have physical care of Derek and Brennan and Keith have physical care of Troy and Neal. Both parents have been loving and caring parents, and the children have thrived under their joint parenting.

Troy's and Neal's relationships with their father and his extended family are exceptionally strong. Troy, who is eleven, expresses a strong preference for his father and has had difficulties with his mother.

I agree with the majority that Iowa courts have long subscribed to the theory that siblings should rarely be split. The theory that siblings should not be split was established at a time when in custody disputes mothers had a preference for custody, nearly always received custody, stayed at home to care for their children, and entered the work place outside the home in small number. Children had generally been primarily cared for by their mothers prior to parents' separation. Today, where both parents work outside the home, they frequently, as here, have both assumed custodial responsibilities. Additionally, the time they can devote to their children's care after the dissolution is limited by employment responsibility. We need to be ready to assess old theory under current conditions.

The result of the trial court and majority's decision is to put custodial responsibilities for four young children with a single parent working outside the home. The custodial responsibilities she assumes under the decree are considerably more substantial than the responsibilities she assumed while married, when Keith and his parents assumed substantial custodial responsibilities.

I am mindful of the responsibility four young children put on a parent and recognize that the responsibilities this decree places on the mother will tax her, while the father, also an excellent parent, is relieved of these responsibilities and the children are deprived of the attention he had given them. The fact there are four children distinguishes this case from In re Marriage of Ellerbroek, 377 N.W.2d 257 (Iowa App. 1985) (two children), and In re Marriage of Grandenetti, 342 N.W.2d 876 (Iowa App. 1983) (two children).

I seriously question whether under these facts sibling bonding is more important than individual parental attention.

I would adjust child support to provide for the change.

I would provide for visitation to be structured to maximize the time the four children are together.