IN THE COURT OF APPEALS OF IOWA

No. 3-041 / 92-784

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IN RE THE MARRIAGE OF MARY C. SCHLOZ AND DARYL E. SCHLOZ

Upon the Petition of

MARY C. SCHLOZ,

Appellant,

And Concerning

DARYL E. SCHLOZ,

Appellee.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

The wife appeals and the husband cross-appeals the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Arthur L. Buzzell, Davenport, for appellant.

Morton A. Teitle, Davenport, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

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SCHLEGEL, J.

Mary appeals and Daryl cross-appeals the child custody and economic provisions of the parties' dissolution decree. On appeal, Mary asserts the trial court erred in: (1) denying custody to the historical primary caretaker; (2) awarding her inadequate alimony; and (3) failing to award her attorney fees and expenses. On cross-appeal, Daryl urges the court to reduce Mary's alimony payments to a period of four years and to provide that alimony be terminated upon Mary's remarriage, cohabitation, or the death of either party.

Mary and Daryl Schloz were first married on August 25, 1973, and divorced on October 12, 1989. They have two children: Courtney, born December 11, 1977, and Cara, born January 17, 1982. After their first trial, the district court awarded Daryl primary physical care of the children. Mary moved to Arizona and later returned to Iowa.

Daryl maintained primary physical care of the children until the parties remarried each other on August 15, 1990. On May 30, 1991, Mary filed her petition for the parties' current dissolution. On April 9, 1992, the district court dissolved the parties' marriage for the second time. In its decree, the district court referenced the earlier findings and conclusions made by the court in the original dissolution decree of October 12, 1989.

Again, the district court awarded Daryl primary physical care of the children. Mary maintains physical custody of the children from June through August, as well as during the children's Christmas break and during major holidays in alternating years.

Mary is a high school graduate who was primarily a homemaker throughout the marriage. Daryl is a college graduate who works at the Deere Dubuque factory. The court estimated that Mary is capable of earning $4.65 per hour and determined Mary earns $275 per month in dividends and interest, thereby making her total net income $885 per month. Daryl's net monthly income is $4,710 per month. Under the facts of this case, the court believed that application of the child support guidelines would be unconscionable, and set Mary's child support obligation at $188 per month, excluding the months of June through August.

Referring to the original decree, the district court observed that alimony had been set at $500 per month, and the court ordered Daryl to pay Mary $500 per month in alimony for the next eighty months. In addition, the court ordered Daryl to pay Mary's health care benefit premiums as alimony. The court incorporated into the decree the parties' stipulation concerning division of their property and debts; the stipulation provided Mary with approximately $155,000 in liquid assets. Additionally, the court ordered Daryl to pay Mary $1,000.

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Because the court believed Daryl was in contempt of court by failing to comply with prior court orders, the court fined him $1,000. The parties were required to pay their own attorney fees, and two-thirds of the costs of the psychologists and the guardian ad litem were assessed to Daryl. In addition, the court ordered Daryl to pay the court costs. Mary appeals, and Daryl cross-appeals.

Our review in cases such as this is de novo. Iowa R. App. P. 4 (1993). 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) (1993). 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).

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) (1991), in Weidner, 338 N.W.2d at 355-56, 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

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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).

Mary first contends the district court erred in awarding Daryl physical custody of the parties' two children. We disagree. Having thoroughly examined the record in light of the above principles, we conclude the children's long-term best interests will be most adequately served if Daryl is awarded primary physical custody of the children with Mary receiving physical custody of the children each year from June 1 through August 31, as provided in the dissolution decree. The record reflects Daryl has been a good father and has actively participated in the children's upbringing throughout their lives. In addition, Daryl has successfully performed his duties as physical custodian since the parties' first divorce in October of 1989.

We also disagree with Mary's contention that the district court's alimony award is inadequate. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3)

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(1991). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981).

Under the facts of the present case, we believe the district court's alimony award of $500 per month for eighty successive months in addition to the payment of Mary's COBRA health insurance premiums is adequate. However, the alimony award shall terminate upon the occurrence of any of the following conditions prior to the expiration of the eighty months: (1) Mary's death; (2) Mary's remarriage; (3) Mary's cohabitation with a member of the opposite sex; or (4) Daryl's death.

Next, Mary argues the district court abused its discretion in failing to award her trial attorney fees and expenses. Iowa trial courts are permitted considerable discretion in allowing attorney fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974). 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 must be

Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and must be based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We hold the district court did not abuse its discretion in requiring Mary to pay her own attorney fees and to pay one-third of the costs of the psychologists and the guardian ad litem.

Finally, we address the issue of child support. Because neither party raised this issue on appeal, we cannot modify the district court's child support award on appeal. However, after reviewing the record, we do believe the district court's child support award is inadequate. Applying the district court's findings that Mary's net monthly income is $885 and Daryl's net monthly income is $4,710, the child support guidelines effective December 31, 1990 reveal that Mary, as the non-custodial parent, should pay $198.24 per month in child support (22.4% of her net monthly income) instead of $188 per month as determined by the district court.

In accordance with the above discussion, the district court's dissolution decree is affirmed as modified.

AFFIRMED AS MODIFIED.