IN THE COURT OF APPEALS OF IOWA

No. 4-251 / 93-1173

FILED
AUG 25 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF CLAYTON JOSEPH MYERS AND MICHELE DENISE MYERS

Upon the Petition of
CLAYTON JOSEPH MYERS,

Appellee,

And Concerning
MICHELE DENISE MYERS,

Appellant.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Respondent wife appeals from various provisions of the parties' dissolution decree. **AFFIRMED.**

Karla M. Wolff, Cedar Rapids, for appellant.

Patricia C. Kamath of the Kamath Law Office, Iowa City, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

CADY, J.

This is an appeal by Michele from the provisions of the district court decree for dissolution of marriage awarding Clayton (Joe) physical care of their child, dividing the marital property, denying alimony, and failing to award attorney fees. We affirm the decision of the district court, except we modify the decree to award Michele attorney fees.

Joe and Michele were married in 1986. Both were enlisted personnel in the United States Navy at the time. Shortly after their marriage, Michele received an honorable discharge. Joe was honorably discharged in 1987. They lived in California for a short time and then moved to Cedar Rapids.

In 1988, Joe obtained a job with Archer Daniels Midland (ADM) in Cedar Rapids as a machine operator in the fructose department. Joe works the second shift, from 2:30 p.m. until 11:00 p.m., and earns approximately $562 gross per week. Michele obtained a degree in accounting from Kirkwood Community College in December 1990. From 1991 to February 1992, Michele worked at Apache Hose and Belting, earning $6.50 per hour. She then obtained employment with Swiss Valley Farms, and ultimately accepted a position with Crest Information Technologies as an accounting clerk, earning $7.50 per hour. Her net monthly income is $684.

Joe and Michele bought a home in 1991 for $57,000. Their child, Stephanie, was born on July 5, 1991. Michele

stayed at home for six weeks following Stephanie's birth to care for her before returning to work and school. Joe and Michele generally shared in the child care responsibilities.

Joe and Michele began experiencing marital problems soon after Stephanie was born. Joe subsequently learned Michele was having an affair with a professional photographer. Michele's relationship with the man was ongoing at the time of trial.

Joe and Michele have different interests. Michele is a vegetarian and exercises regularly. Joe enjoys cooking and socializing with family members and friends. Joe is financially conservative. Joe was 30 years old at the time of trial. Michele was 27 years of age.

Joe and Michele seperated in July 1992. Stephanie primarly resided with Michele in an apartment until trial. Joe maintained regular visitation.

The district court awarded physical custody to Joe. Michele appeals.

Michele contends the district court erred in awarding Joe physical custody of Stephanie. Michele argues there was no evidence she was not meeting Stephanie's emotional, social, moral, material or educational needs. Michele maintains the district court focused solely on her affair in awarding Joe physical custody. Michele also argues the district court should have awarded her rehabilitative alimony since her income potential was much less than

Joe's. Michele additionally asserts she should have been awarded a greater share of the marital property. Finally, she contends she should be awarded attorney fees and expenses for the trial, and appellate attorney fees.

I. Standard of Review

Our standard of review is de novo. Iowa R. App. P. 4. We examine the record made at trial and determine the issues presented on appeal anew. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). The findings of the trial court, however, are recognized and given weight, especially when considering credibility of witnesses. Iowa R. App. P. 14(f)(7). Having never seen the parties or heard their voices, we recognize the favorable perspective of the trial court. See In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974).

II. Custody

The best interest of the child is the paramount consideration in child custody cases. There are numerous factors used to assist in determing custody, are set out in Iowa Code section 598.41(3) (1993). See also In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In the end, the court strives to determine 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 record is scoured for evidence of which parent will do better in raising the child into a stable, healthy, young adult. See

In re Marriage of Rodgers, 470 N.W.2d 43, 44 (Iowa App. 1991). Gender of the parent is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

The thrust of Michele's argument is the trial court improperly emphasized her extramarital affair in awarding Joe primary care of Stephanie, and failed to judiciously consider the recognized custody factors. Having fully examined the record anew, we disagree.

An extramarital affair does not preclude an award of custody to the spouse engaged in the relationship. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). It is only a factor to consider along with all other circumstances, and is relevant to the extent the relationship or conduct may impact the welfare of the child. See In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa App. 1983). In this case, the evidence revealed some aspects of Michele's extramarital relationship which would clearly impact upon the welfare of Stephanie. Michele's boyfriend frequently spends nights in Michele's apartment sleeping in her bed while Stephanie is present in the home. Stephanie has called him "daddy" on occasions. Michele's boyfriend is also a generation older than Michele and lives with another woman in a home he owns. Michele is amenable to the arrangement, as is the other woman. Michele is hopeful her 15 month relationship with the man

will continue. The trial court observed no signs of a permanent relationship. These circumstances clearly impact on Stephanie and are properly considered in determining the difficult issue of child custody.

From our de novo review of the record, we believe the trial court correctly concluded Joe was "more capable and willing to administer to the long-term emotional and physical needs of Stephanie." There is an abundance of evidence which shows Joe is a caring and alert parent. He maintains a close relationship with family members in the area, who can assist him. He is stable, and has shown himself to be capable of caring for the expanding day-to-day needs of a young child. He is also supportive of Michele's relationship with Stephanie. We affirm the decision of the trial court.

III. Property Division

The property of the parties to a dissolution of marriage proceeding should be distributed equitably after considering all relevant criteria in Iowa Code section 598.21(1). In re Marriage of Whelchel, 476 N.W.2d 104, 107 (Iowa App. 1991). This does not necessarily require an equal division of the property or a percentage division. In re Marriage of Hoak, 364 N.W.2d 185, 194 (Iowa 1985).

The parties had relatively little property to divide. The record does not support Michele's claim in her brief that the parties had marital net assets of approximately $16,000. Their personal property was divided at the time

of separation. Michele claimed Joe received an income tax refund following the separation, but there was no evidence this money existed at the time of trial. Michele received a cash award of $3,000. Joe received the house. We conclude the division was equitable under the circumstances. The equity in the home was based on a rough estimate of the value of the house. Furthermore, the award to Michele provides her liquidity.

IV. Alimony

Michele seeks rehabilitation alimony. Rehabilitation alimony serves to provide support to an economically dependent spouse through a limited period of additional education or training following the divorce. In re Marriage of Grauer, 478 N.W.2d 83, 85 (Iowa App. 1991). Michele received an associates degree in accounting and has generally worked during the marriage. She is employed on a full-time basis. We have considered all the relevant factors set forth in Iowa Code section 598.21(3) and conclude the trial court correctly declined to award alimony.

V. Attorney Fees

An award of attorney fees depends in a large part on the needs and resources of the parties. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). We review on an

abuse of discretion, and are unable to conclude the trial court abused its' discretion.

We decline to award appellate attorney fees.

AFFIRMED.