IN THE COURT OF APPEALS OF IOWA

No. 8-218 / 97-1315
Filed May 29, 1998

IN RE THE MARRIAGE OF MELANIE OSTRANDER AND KEVIN OSTRANDER

Upon the Petition of
MELANIE OSTRANDER,
Appellant,

And Concerning
KEVIN OSTRANDER,
Appellee.

Appeal from the Iowa District Court for Mitchell County, Gilbert K. Bovard, Judge.

The petitioner appeals, and respondent cross-appeals, from various child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Ann M. Troge of Sutton & Troge's Law Office, Charles City, for appellant.

Russell H. Schroeder, Jr. of Schroeder Law Office, Charles City, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Melanie Ostrander appeals from the physical care provisions of the decree dissolving her marriage to Kevin Ostrander. Kevin cross-appeals the property distribution decreed by the district court. We affirm as modified.

I. Background Facts and Proceedings.

Kevin and Melanie Ostrander were married on April 27, 1991. They have two children: Danielle, age five; and Mariah, age three.

Kevin was thirty-eight years old as of the decree date. He has worked as a deputy sheriff for Mitchell County since 1985. His net monthly income as of trial date was $1760.

Melanie was twenty-seven years old as of the date of the decree. She has no post secondary education or training. Her work experience is mainly clerical. Melanie's net income as of trial date was $743 per month.

Melanie initiated these proceedings in January 1997. Melanie was awarded temporary physical care of the children and moved from the family home to an apartment in Osage. Because Melanie worked days and Kevin worked evenings, temporary primary care and visitation was structured to accommodate their respective work schedules.

The disputed issues at trial included physical care and visitation of the children. The parties were also unable to agree on an equitable division of their assets and liabilities.

Melanie testified she was the primary care provider for the children during the marriage. She claimed Kevin's stated interest in child care was recently acquired and only coincident with these proceedings. Melanie also testified Kevin's frequent absences from the home to attend to professional obligations and recreational interests left him little opportunity to acquire the insight and skills essential to physical care. She also cited Kevin's hostile temperament and oppressive behavior during the marriage as factors distinguishing her as the preferred physical care provider for the children.

Kevin disputed Melanie's claims. He testified the burdens of the children's physical care were shared during the marriage. Kevin also denied Melanie's allegations of oppressive or abusive behavior. Melanie's arrest for assaulting Kevin, her termination from employment for misconduct, and relationship with another man were cited as character flaws compromising her custodial claims.

In its decree, the district court concluded "that either parent would be a suitable custodian for the children but in matters of stability, maturity, exercise of sound judgment, industry, and role model characteristics, the children's best interests will be served by awarding physical custody to Kevin." The parties were awarded joint custody. Kevin was awarded physical care subject to Melanie's right to visit the children as provided. Melanie was also ordered to pay $200 monthly child support based on the foregoing income figures.

Kevin was awarded $92,676 of the parties' property and assigned debts of $37,110. Melanie received property valued at $40,547 and debts of $5429. The assets and liabilities distributed included property and debts accumulated before the parties were married.

On appeal, Melanie contends the best interests of the children requires their placement in her physical care. In the event the district court's physical care award is affirmed, she requests imposition of more structured visitation. Kevin cross-appeals citing the inequity resulting from the district court's inclusion of premarital debts and assets in its property division.

II. Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of facts, but we do give them deference because of the district court's trial perspective. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995).

III. Physical Care.

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). 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).

The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated the primary caretaker upon its dissolution. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). This role is, however, critical to the children's maturity and careful consideration should be given to allowing the children to remain with the parent who has been the primary caregiver. *Id.*

In this case, the district court stated:

> It is the opinion and belief of this Court that the respective parties have shown equal degrees of poor judgment. Neither is as exemplary as they purport to be, but neither is as bad as the other party says . . . .
>
> The court is further of the opinion and belief that both parties undoubtedly love the children and that either party would be capable of providing for the creature comforts of the children . . . .

Our review of the record confirms this assessment of the parties' character and motives underlying their custodial demands. We are, however, unable to reconcile this assessment with the district court's physical care award.

Melanie's claims of greater primary care experience are amply supported by the record. She has, for the duration of the marriage, diligently and appropriately attended to the daily details of primary care. While we share the district court's

concerns about Melanie's episodic poor judgment, none of the examples cited were of immediate negative consequence to the welfare of the children. We agree with Melanie's assertion that the long-range consequences of her regrettable behavior have been overstated. Under these circumstances, Melanie's greater primary care experience distinguishes her as the preferred physical care taker.

In reaching this decision, we do not intend to minimize Kevin's past or future parental role. The comfort and security these children enjoy is in large measure attributable to the strength of his character and parental commitment. The fact that we do not award him physical care does not imply that his children will be deprived of the benefit of his considerable parental qualities. As joint custodian, Kevin has the right to continuing physical and emotional contact with his children and is entitled to share the rights and responsibilities of raising them. *See* Iowa Code § 598.41(5)(1995); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). His faithful attendance to these rights and obligations is essential to the welfare of these children.

Our decision to modify the physical care provisions of the district court's decree necessitates modification of its child support and visitation provisions. Because the decree contains the parties' preferred alternative awards based on this outcome, we deem it expedient to remand the issues of child support and visitation to the district court for entry of appropriate judgment.

IV. Property Division.

Kevin contends the district court's property division is inequitable. He argues the district court improperly included Melanie's premarital student debts of $3820 and $1609 as marital obligations. Kevin also argues he brought property valued at $35,394 to the marriage and that amount should have been set off to him. We disagree.

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determine what is fair and equitable. *Id.* Further, the property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1)(1995). *Id.*

Property which a party brings into the marriage is a *factor* to consider in making an equitable division. Iowa Code § 598.21(1)(b). In some instances, this factor may justify a full credit, but it is not required. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). A premarital asset is not otherwise set aside like gifted or inherited property. *Id.* Moreover, in considering accumulations of premarital assets, we do not limit our focus to the parties' direct contributions to the increase. *Id.* Rather, we broadly consider the contributions of each party to the

overall marriage, as well as other factors. Iowa Code § 598.21(1). Financial matters make up only a portion of a marriage, and must not be emphasized over other contributions in determining an equitable contribution. *Miller*, 552 N.W.2d at 465.

Premarital property does not merge with and become marital property simply by virtue of the marriage. *See In re Marriage of Miller*, 452 N.W.2d 622, 624 (Iowa App. 1989) (the purpose of section 598.21(1)(b) is prevention of one spouse from obtaining an interest in property for which he or she made no contribution to acquiring). In making our decision, we must therefore recognize property a party brings into the marriage as a factor in making an equitable division. *See* Iowa Code § 598.21(1)(b).

Our review of the district court's property division indicates Melanie is responsible for her student loans. Kevin's request for a set off of his premarital assets conflicts with the foregoing authorities and was properly denied. Moreover, the district court made a porportionate allocation of premarital property based on its identity and increase during the marriage. We find the district court properly considered the foregoing factors and arrived at an equitable property division. We affirm on this issue.

V. Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the

request, and the ability of the other party to pay. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Melanie $1000 appellate attorney fees.

The judgment of the district court is affirmed as modified. This case is remanded to the district court for entry of judgment in conformity with this opinion.

AFFIRMED AS MODIFIED.