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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-582 / 90-207

257

IN RE THE MARRIAGE OF JAMES D. SHAFFER AND PAMELA S. SHAFFER

Upon the Petition of
JAMES D. SHAFFER,

Appellee,

And Concerning
PAMELA S. SHAFFER,

Appellant.

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

Pamela Shaffer appeals the economic and custody provisions of the district court decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Gerald J. Kucera of the Tom Riley Law Firm, P.C., Cedar Rapids, for appellant.

Janice R. McCool of McCool & McCool, P.C., Cedar Rapids, for appellee.

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

DONIELSON, J.

Pamela and James Shaffer were married in 1967. Two children were born of the marriage: James Matthew (Matt), born June 2, 1974, and Samuel Lincoln (Sam), born August 22, 1980.

Pamela has approximately two years of college, and desires to return to college to obtain her degree. She is currently employed at Sears and Allstate. Her net income from Sears is approximately $450 per month. No net monthly income was available from All State but Pamela earns $5 per hour in that job.

James quit school in the tenth grade and is employed as a plant manager for Vincent Metals. His net income is approximately $2,100 per month.

The dissolution decree placed the two children in joint custody and in James' primary physical care. Matt's placement with his father was not contested by Pamela at trial and is not at issue here. The court ordered James to pay alimony of $200 per month for three years. The court also ordered the sale of the marital residence with the proceeds of the sale to be used to pay the marital debts and any remaining proceeds equally divided.

Pamela appeals. She contends: 1) she should have primary physical care of the parties' son, Sam; 2) the amount and duration of alimony should be increased to $750 per month for four years; 3) the property distribution is inequitable; and 4) James should be ordered to pay all of her trial and appellate attorney fees.

Our review of this equity proceeding 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, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Placement of Sam.** We are confronted with the "Solomonic burden" of determining the custody of a child. Quoting In re Marriage of Burham, 283 N.W.2d 269, 270 (Iowa 1979). In child custody determinations, our foremost concern is the long-term best interests of the child and our objective is placement in the environment most likely to bring the child to healthy physical, mental, and social maturity. Lambert v. Everist, 418 N.W.2d 40, 42 (Iowa 1988). "Determining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative for safeguarding the child's growth and development." In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). Unfortunately, we are confronted with such a choice in this instance.

Attempting to summarize the lengthy record in this case, including the many accusations and allegations of the parties, would be of little benefit. The district court heard controverted testimony from the parties, their selected witnesses, and the parties' children. The only uncontroverted evidence presented was that it is Sam's desire that he live with his mother and that he not live

with his father. The testimony of the witnesses was irreconcilably in conflict on several issues, including alleged physical abuse by James, the state of the relationship between James and his sons prior to the separation in 1988, Pamela's willingness to cooperate with court orders, and what was in Sam's best interest considering his expressed anxiety concerning his father. Only after several days of trial testimony and an opportunity to observe the witnesses did the district court grant James physical care of both of the boys.

Where so much controverted testimony is presented, credibility of the witnesses grows in importance.

> There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In Re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974). In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented. See Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 692, 145 N.W.2d 456, 460 (1966).

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). We find the trial court's conclusions concerning witness credibility in this case must be given much weight.

The trial court's decision sets forth many findings of fact. We consider the following fact findings particularly noteworthy: much of Pamela's testimony lacked credibility; Pamela had coached Sam in the accusations he leveled against his father and his father's girlfriend; Pamela was

lacking in skills involving the emotional health of Sam; Pamela had intentionally alienated Sam from his father; and if Pamela was awarded physical care of Sam, James would have no further opportunity to rebuild or re-establish a relationship with Sam.

In awarding the physical care of Sam to James, the court's decision was also informed by the testimony of Dr. John Brewer, a clinical psychologist who had met with all members of the Shaffer family, and the report and recommendation of Mr. Richard Boresi, the children's guardian ad litem. Both Dr. Brewer and Mr. Boresi recommended James be given the primary care of the children. Both professionals found it significant that Pamela had continuously, whether intentionally or unintentionally, interfered with the relationship between Sam and James. Both concluded Sam would have more opportunity to have a relationship with both parents if he would be placed in his father's care.

Iowa Code section 598.41(1) provides in part:

> The Court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

No one ignored Sam's emphatically stated preference of living with his mother, however, Mr. Boresi, Dr. Brewer, and the trial court all concluded that maximum continuing contact with both parents required placement of Sam with James.

Dr. Brewer was also of the opinion Sam's expressed anxiety and fear were due in large part to Pamela's own anxiety and her alienation of Sam from his father. Efforts had been made prior to trial to gradually reunite Sam and James in an attempt to minimize Sam's anxiety. However, these efforts were ineffective. Dr. Brewer opined that an abrupt change of placement might be of "short-term detriment" to Sam, but that Sam would not suffer any long-term harmful consequences. Further, Dr. Brewer recommended continuing counseling for Sam, regardless of Sam's permanent placement.

This court has exhaustively reviewed the entire record. We find no reason to disturb the trial court's decision regarding Sam's primary physical placement and visitation. We affirm.

We do not ignore the probable disruption in Sam's life resulting from this placement. This court sincerely hopes the parties will be capable of cooperation for Sam's sake. James shall make available any necessary counseling for Sam's emotional adjustment and well-being. This court cautions the parties to set aside their personal disagreements and dislikes in order to allow this now ten-year-old boy to once again be a child.

II. **Alimony.** 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). 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) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). An award of rehabilitative alimony has been described as a means of supporting an economically dependent spouse through a limited period of re-education creating incentive and opportunity of that spouse to become self-supporting. See In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989).

Pamela and James were married for over twenty-two years. Pamela had been employed part-time throughout much of the marriage and was primarily responsible for child care and homemaking. She has two years of college and wants to return to complete her degree. In order to do so, one of her two part-time jobs will have to go. Pamela testified part-time schooling would cost approximately $1,000 per semester and would take approximately three years to complete. The trial court awarded Pamela alimony of $200 per month for three years to allow Pamela time to develop new skills or training.

We agree with the trial court in its determination that Pamela should have the opportunity to increase her earning capacity through further training or education. However,

in view of the longevity of this marriage, the large disparity of the parties' present incomes, the present earning capacity of both parties, and James ability to pay, we conclude the amount of the trial court's award is inequitable. We modify the decree to award Pamela rehabilitative alimony in the amount of $400 per month for three years to enable Pamela to pursue her goal of completing her college degree. We affirm the alimony provisions of the decree to the extent it does not presently obligate Pamela to pay child support to James.

III. Property Division. The trial court awarded each party various personal property and awarded each party one-half the value of James' pension plan at the time of trial. The court found the parties' had incurred debts at the time of trial which required the marital residence be sold in order to pay these debts and still maintain each parties' disposable income sufficiently to afford the necessities of life.

Pamela contends James should be responsible for a larger portion of the debt load of the parties because he has a greater income. She argues that allowing the debts to be deducted from the sale of the home prior to any disbursement to the parties requires both she and James to contribute equally to the payment of debts. She argues this distribution of the debts is inequitable. We disagree.

The partners in the marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987).

Considering the property division and the modified alimony award together, we conclude the trial court's division of the marital property is equitable. We do, however, eliminate that provision of the decree setting the listing price of the house at $42,500. This court believes the parties should have the flexibility to maximize the gain from the sale of their house. Except for this minor modification, we affirm the property distribution.

IV. Attorney Fees. Pamela contends James should be required to pay all, or at least a part, of her attorney fees. She contends James' superior ability to pay requires this result. 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).

Pamela has failed to establish the trial court abused its discretion in its determination and therefore we affirm.

An award of attorney fees is not a matter of right. 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, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Based upon these factors, we order James to pay $500 toward Pamela's appellate attorney's fees.

Costs of this appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

Oxberger, C.J., concurs; Habhab, J., concurs in part and dissents in part.

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

I concur in part and dissent in part with the majority opinion. I would affirm the trial court in all respects.