IN THE COURT OF APPEALS OF IOWA

No. 5-634 / 95-713

IN RE THE MARRIAGE OF JANET SUE HEWITT AND CHARLES ALAN HEWITT

FILED
FEB 28 1996
CLERK SUPREME COURT

Upon the Petition of
JANET SUE HEWITT n/k/a **JANET SUE STRICKLAND**,

Petitioner-Appellee,

And Concerning
CHARLES ALAN HEWITT,

Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, Michael J. Streit, Judge.

Charles Hewitt appeals from the child custody and property distribution provisions of the parties' dissolution decree. **AFFIRMED.**

Joseph W. Seidlin of Berger & Culp, P.C., Des Moines, for appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellee.

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

CADY, J.

This case involves a father's appeal from certain provisions of the parties' dissolution decree. The father requests the case be remanded for a further hearing on the issue of physical care of the parties' children. He also asks us to modify the court's allocation of responsibility for the parties' debts. We affirm the district court.

Janet and Charles Hewitt were married on March 3, 1978. They have two children, Eric, born in October 1979, and Jessica, born in November 1981.

Janet was thirty-five years old at the time of the dissolution hearing. She has a high school education. She was employed by National Propane, and earned about $13,000 annually. Her net monthly income was about $945.

At the time of the dissolution hearing, Charles was thirty-eight years old. He has a high school education, plus training as a computer technician. He had many different jobs during the marriage and was employed by Diamond Crystal Specialty Foods at the time of the divorce. His annual income was about $16,000, with net monthly income of about $1,144. Charles has a problem with alcohol.

On August 15, 1994, Janet was awarded temporary physical care of the children. Charles was ordered to pay child support of $62 per month. Charles paid his child support during the pendency of the case, but made no other payments on the parties' joint debts. Janet made the payments on the parties' mobile home, as well as the payments for Charles' vehicle and his car insurance.

At the dissolution hearing, Janet testified Charles often came home intoxicated. She also testified Charles was physically and emotionally abusive to her. In addition to giving her a black eye and some bruises, she stated Charles was very demanding and controlling. She related Charles would take her paycheck and then pay the parties' debts, so she had no control over the family's finances. Janet admitted Eric expressed a preference to live with Charles, and Jessica was torn on the issue.

Janet's sister testified she has seen Charles grab Janet by the hair and hold her down on the floor. Two neighbors testified they saw bruises on Janet's arms. Janet's supervisor also stated she had seen bruises on Janet's arms.

Charles admitted he gave Janet a black eye. He also stated he pushed Janet, which caused her to fall into a door frame and become bruised. Charles stated he had told Janet if she wanted to stay married to him she had to have meals on the table at the right time and she should have the laundry and dishes done before she went to social functions. Furthermore, he admitted he controlled the family finances.

Charles subpoenaed Eric and Jessica to testify at the hearing. Janet objected, which the court overruled. Jessica, who was thirteen, testified first. Apparently, she began to cry at the first question, which was to state her name, and continued crying while she was asked several questions about her school and church activities. The court then sustained Janet's objection. The court found there was no useful purpose for Jessica to continue testifying. Charles' attorney stated that under the circumstances, they would not call Eric to testify.

The district court entered a decree of dissolution for the parties. The court awarded them joint legal custody of the children, with primary physical care to Janet. The court found Janet had been the primary caretaker of the children during the marriage, and she would be better able to meet the children's emotional and material needs. The court stated Charles' alcohol consumption and temperament would not serve him well as the primary caretaker. The court also found Charles was not supportive of Janet's role as a parent, and had tried to alienate the children from her. Charles was ordered to pay child support of $350 per month. He was also ordered to maintain health insurance for the children and to pay two-thirds of any medical expenses not covered by insurance.

The parties agreed to a stipulation of assets. Janet received the mobile home and its debt. She was also awarded her vehicle. Charles received his vehicles. Each party was awarded the household goods and bank accounts in their possession. The court ordered Charles to pay debts of $9,874. Janet was ordered to pay a debt of $1,000 to her sister. Charles has appealed the custody decision and distribution of debts.

I. 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 fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. Charles claims the district court abused its discretion by not allowing the children to state their custodial preference. He believes the court should have continued with Jessica's testimony and should have allowed Eric to testify. He asserts the court did not give adequate weight to their preferences by not allowing the children to testify. He asks us to remand the case for the purpose of receiving further evidence on the children's preferences.

The best interest of the children dominates our consideration in child custody cases. *In re Marriage of Brainard,* 523 N.W.2d 611, 614 (Iowa App. 1994). Numerous factors exist to supplement the best interests standard, which are enumerated in Iowa Code section 598.41(3). *Id.* The critical issue in determining the best interests of the child is which parent will do better in raising the child into a healthy, content, well-adjusted young adult. *Id.*

We first note Charles did not call Eric as a witness. We conclude Charles waived his right to contest on appeal Eric's failure to testify. We also note Jessica was very emotionally upset during her testimony, and we believe the district court properly limited her testimony for this reason.

Furthermore, the preference of the children, taking into consideration their age and maturity, is only one factor to consider. *See* Iowa Code § 598.41(3)(f). In the present case, even if we assumed both of the children preferred to live with Charles, we still find the other factors would lead us to conclude the children should be placed in the physical care of Janet. Janet can better meet the children's emotional needs,

and is better able to support the children's relationship with Charles. We agree with the district court's conclusion that Charles' alcohol consumption and history of spousal abuse would not serve him well with having primary physical care of the children.

We, therefore, find it is unnecessary to remand the case for additional evidence on the issue of the children's preferences. We affirm the district court decision placing the children in Janet's physical care.

III. Charles contends the court's division of the parties' debts was not equitable. He states it was unequitable to require him pay $9,874 in debt, and to only require Janet to pay $1,000. He believes it would be more equitable to require each party to pay one-half of their accumulated debts.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell,* 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*

Janet is responsible for a $1,000 debt to her sister, and the debt on the mobile home. Charles' financial affidavit, filed on February 16, 1995, lists the debt on the mobile home at $21,911. We also note that while the dissolution was pending, Charles did not contribute towards the parties' joint debts. Under these circumstances, we find the distribution of debts was equitable.

IV. Janet seeks attorney fees for this appeal. 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 Hunt,* 476 N.W.2d 99, 103 (Iowa App. 1991). We 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. *Id.* at 104. We order Charles to pay $1,000 for Janet's attorney fees for this appeal.

We affirm the district court on all issues raised in this appeal. Costs of this appeal are assessed to Charles.

AFFIRMED.