FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF NELDON P. BRYANT AND SHEILA KATE BRYANT

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UPON THE PETITION OF
NELDON P. BRYANT,

Petitioner-Appellee,

AND CONCERNING
SHEILA KATE BRYANT,

Respondent-Appellant.

Filed August 27, 1986

6-239
85-1257

Appeal from the Iowa District Court for Story County (D-4151), David R. Hansen, Judge.

Respondent-wife appeals from the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Julie F. Holland, Student Legal Services, Ames, for appellant.

Jere C. Maddux of Newbrough, Johnston, Brewer, Maddux & Nadler, Ames, for appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J. 12

In this appeal, we review several provisions of the trial court's decree in the underlying dissolution proceeding. Respondent Sheila Bryant appeals from the decree asserting that the trial court erred in the following particulars: (1) in granting petitioner Neldon Bryant physical care in the joint custody arrangement concerning the parties' minor children; (2) in refusing to grant the request of the parties' children that their court-appointed attorney be removed; (3) in dividing the parties' property in an inequitable manner; (4) in failing to award Sheila an adequate amount of alimony; and (5) in granting Sheila an insufficient award of attorneys fees. After a careful review of the evidence available on appeal and the pertinent authorities, we modify the decision of the trial court.

Neldon and Sheila Bryant were married in 1965. At that time, Neldon was seventeen years old and Sheila was fifteen. Sheila had not completed high school, and Neldon was in his first year of college. Neldon did not finish college, but subsequently became employed at the F.W. Woolworth Company. He is currently the manager of a Woolworth store in Ames. Sheila received her GED and worked primarily as a housewife in addition to holding various intermittent jobs. At present, Sheila is unemployed and is seeking training as a beautician.

Five children were born of the marriage: Sandra, now aged nineteen; Amber, aged fourteen; Leslie, aged twelve; RaShell, aged ten; and Matthew, aged seven. The physical custody of the latter four minor children forms the central issue in this appeal.

I. Standard of Review

The standard of review employed in an equitable proceeding of this nature is de novo. Iowa R. App. P. 4. At the same time, we give weight to the trial court's findings of fact, particularly where those findings involve a determination of the credibility of witnesses.

II. Physical Custody of the Children

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We first address the appellant's contention that the trial court erred in granting physical custody of the children to Neldon. Sheila contends that the trial court's decision to name Neldon the physical custodian was erroneous for the following reasons: (1) because it was contrary to the recommendation of clinical psychologist; (2) because it was contrary to the expressed preferences of the children; and (3) because Sheila had traditionally served as the homemaker and the primary caretaker of the children.

The three considerations cited by Sheila in this appeal are only individual items among all of those enumerated in Iowa Code section 598.41(3)(1985) and in In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). All of these factors are properly considered in conjunction based upon the particular circumstances of the case; none are necessarily accorded special or greater weight. The trial court explicitly set forth its findings of fact with respect to each of these factors. The court then concluded:

> The Court firmly believes that the children need more structure, more discipline, and better defined limits on their behavior than Sheila has given to them. The Court also concludes that Neldon is probably better able and more likely to make the necessary changes required in his parental practices than Sheila is for the reason that Sheila is unable to shake her emotional immaturity. The Court hastens to point out to all concerned and especially to the children that it is not severing their relationship with their mother but in reality it is insuring that they will have the continuing opportunity to benefit from both of their parent's influences, a feature the Court does not believe would be available if Sheila were named the primary care parent. . . .

Based upon the record before us, we conclude that the trial court correctly contemplated each of the requisite factual and legal considerations in determining which parent should have physical custody of the children. Accordingly, we affirm the court's decision.

III. Failure to Remove Court-Appointed Counsel

1.1

Sheila next contends that the trial court erred in refusing to remove the attorney appointed pursuant to Iowa Code section 598.12 (1985) to represent the children. We agree with the trial court that the evidence establishes only that the children requested the removal of their attorney because he recommended that they be placed with their father despite their expressed wishes to the contrary. The relevant inquiry, then, is whether Iowa Code section 598.12 requires the appointed counsel to represent the wishes of the children or what he perceives to be in their best interest.

Iowa Code section 598.12 (1985) empowers a court to appoint an attorney to represent the interests of a minor child in a dissolution proceeding. This is to insure that in the bitterness and anger of a custody battle, the interests of the child will not be overridden by those of the parents and to guarantee that "the children have representation separate and apart from either parent." In re Marriage of Joens, 298 N.W.2d 326, 329 (Iowa 1979).

The appellant contends that the proper role of an attorney acting pursuant to section 598.12 is that of an advocate espousing the views of his client. We agree with this assertion only to a limited extent; we believe that the attorney's ultimate responsibility is to assert the position representative of the child's best interest. If the child is of sufficient age and maturity to formulate an opinion as to which parent he prefers to live with, the attorney should remain cognizant of this fact. His overall responsibility, however, is to collect and present evidence indicative of how the child's best interests are to be served. See In re Marriage of Joens, 284 N.W.2d at 329; see also Gunden, Separate Legal Representation of Children, 11 Harv. C.R.-C.L. L. Rev. 565, 588-89 (1976).

Certainly it would be an abdication of an attorney's responsibility to exercise his professional judgment if he simply asserted the preferences of young children without employing some degree of scrutiny. A child's preferences are often

influenced by which parent provides him with more gifts, which parent has spent more time with him, or which parent provides him with a less disciplined environment. Moreover, one or both parents may deliberately have colored his opinion. It is evident that these considerations have little bearing upon determining which parent is more capable of providing the child with a healthy environment. Ascertaining the latter is the proper role of the child's attorney. See Veazey v. Veazey, 560 P.2d 382, 389-90 (Alaska 1977); see also Gunden, supra, 11 Harv. C.R.-C.L. L. Rev. at 588-89. Based upon these principles, we find that the attorney appointed to represent the children properly executed his responsibilities and we conclude that the trial court did not err in denying the children's request that he be removed.

It must be noted that this delineation of the attorney's role in no way abdicates the court's responsibiity to analyze carefully a child's custody preference. "Preferences of minor children while not controlling are relevant and cannot be ignored." In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985)(quoting In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979). As noted in part II of this opinion, we are satisfied that the trial court properly ascertained the amount of weight accorded to the children's preferences and considered the same in determining the more appropriate custodial parent.

IV. Property Division

We next address Sheila's contention that the property division made by the court was inequitable. The following table represents the breakdown of the parties' assets as divided by the trial court:

Neldon

1975 Datsun 280-Z valued at $1500
1975 Chevrolet Station Wagon valued at $1200

Furnishings in residence
(values not provided)

Life Insurance coverage of
$105,000 and pension plan coverage of
$350/month upon retirement
(disputed cash surrender value)

1/2 equity in house and
right to occupy (total equity valued at $25,000)

—Debts of parties: marital debts of approximately $5000
fees of children associated
with dissolution of
approximately $4000

Sheila

1976 Chevrolet Monza valued at $700
1976 Datsum pickup valued at $1700
Bedroom furnishings, linens,
Kitchen utensils to furnish
apartment (values not provided)

1/2 equity in house upon
majority of youngest child

In examining the above information in light of the factors enumerated in Iowa Code section 598.21(1), the following facts are of particular importance. First, we note that the trial court placed responsibility for the parties' debts upon Neldon. In addition, Neldon was required to pay for the custody evaluation and in excess of $3000 for the children's attorneys fees. Moreover, he will bear complete responsibility for the costs associated with raising the children. Sheila estimated that the total expenses she would incur if she were awarded physical custody would be approximately $2342 per month; Neldon's average monthly income is approximately $3000. Given these considerations, we find that requiring Neldon to remit to Sheila the value of one-half of the contents of the home or the value of one-half of the equity in the home would work an inequitable hardship upon Neldon.

Although we agree with the trial court that the life insurance policy and pension plan should be set-off to Neldon as provided in the decree, we think that, when the potential value of these assets is considered, Sheila has received a

very small percentage of the assets. This is especially true considering that Sheila cannot enjoy her share of the equity in the home for ten years. A more equitable result would be to allow Sheila to be given the value of the interest accrued annually on her share of the equity in the home. Accordingly, we conclude Sheila should be paid the sum of ten percent of her share in the equity of the home annually until the home is sold.

V. Alimony

Sheila also asserts that the trial court granted her an inadequate alimony award. The trial court directed Neldon to pay Sheila $300 per month in alimony. Over the last five years, Neldon's total income has varied from $38,714 to $68,691, generally totaling approximately $45,000. Sheila contends that she should receive $1000 per month for one year as rehabilitative alimony to help her pay for the training she needs in order to become a beautician. She requests that this amount be reduced to $500 per month for the two following years, and then reduced to $300 per month until she either remarries or dies.

We recognize that Sheila has been out of the job market for the majority of the marriage and that she needs training in order to pursue the career she has chosen. On the other hand, Sheila testified that it would take her only six months and cost her only $1600 to attend cosmetology school. After that, she estimated her earnings at approximately $1000 per month. Given this testimony, we find the trial court's award sufficient to allow Sheila to pursue her career and become self-supporting at a standard of living comparable to that enjoyed during the marriage. She is not required to contribute to the support of the children, and the alimony award is of substantial duration. See In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982). As such, we find that it adequately serves the purposes for which alimony has been established. We therefore conclude that the alimony award should be affirmed.

VI. Attorneys Fees

Sheila's final contention is that the trial court directed Neldon to pay an inadequate amount of her attorneys fees. Sheila incurred a total of $7627.51 in attorneys fees in the underlying proceeding. In addition, she was taxed one-third of total costs of the proceeding, which included $4933.30 in attorneys fees for the children. Sheila requests that Neldon be required to pay an increased proportion of her fees, and that he pay an equitable amount of the fees and costs associated with this appeal.

Trial courts are vested with considerable discretion in allowing attorneys fees in dissolution cases. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). The proper amount of attorneys fees awarded in such actions depends upon the relative financial circumstances of the parties. In re Marriage of Vrban, 359 N.W.2d 420, 428 (Iowa 1984).

In the instant case both parties will face difficulty in paying the attorneys fees. We find, however, that the fee award provided by the trial court is equitable. While Neldon's income is much greater than Sheila's, his debts and expenses also much greater. We think that the record adequately supports the trial court's determination.

In addition, neither party should be required to pay the attorneys fees incurred by the other in this appeal. The costs of this appeal are divided equally between Neldon and Sheila.

AFFIRMED AS MODIFIED.