IN THE COURT OF APPEALS OF IOWA

No. 5-002 / 93-0920

FILED
APR 28 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF PEGGY ERIKSEN AND STEPHEN ERIKSEN

Upon the Petition of

PEGGY ERIKSEN,

Appellee,

And Concerning

STEPHEN ERIKSEN,

Appellant.

Appeal from the Iowa District Court for Crawford County, Michael S. Walsh, Judge.

Stephen Eriksen appeals the provisions of the parties' dissolution decree. **AFFIRMED.**

Stephen A. Eriksen, Rockwell City, pro se, for appellant.

No appearance by appellee.

Considered by Donielson, C.J., and Hayden and Sackett, JJ.

DONIELSON, C.J.

Respondent, Stephen Eriksen, appeals the entry of a dissolution decree. Our review of this equity action is de novo. Iowa R. App. P. 4. After a review of Stephen's arguments, the record and the applicable law, we affirm.

I. CONCILIATION -- § 598.16.

Peggy Eriksen filed a petition for dissolution of the parties' marriage on February 27, 1992. Paragraph 8 of her petition alleged the appointment of a conciliator would not preserve the marriage. On May 4, 1992, Stephen filed an affidavit of indigency and an uncaptioned appearance and response to the petition. Neither of those documents referred to the issue of conciliation.

Due to Stephen's incarceration, a guardian ad litem was appointed to represent his interests. Iowa R. Civ. P. 13, 14. The guardian ad litem filed an appearance and answer on July 23, 1992. The answer contained the following response to paragraph 8 of the petition -- "Paragraph No. 8 is denied." Other than this response, the answer contained no reference or objection to the waiver of the appointment of a conciliator.

On September 21, 1992, Stephen filed a request for the appointment of a conciliator. Peggy filed a resistance to the request. She contended conciliation would not be practical due to Stephen's incarceration. On September 28, 1992, the district court entered a ruling overruling Stephen's request for the appointment of a conciliator. The court concluded "conciliation would serve no useful purpose and would unnecessarily delay the trial of this case."

Stephen argues the district court erred by denying his request for the appointment of a conciliator pursuant to Iowa Code section 598.16. That statute provides in relevant part --

> Upon the application of the petitioner in the petition or by the respondent in the responsive pleading thereto or, within twenty days of appointment, of an attorney appointed under section 598.12, the court shall require the parties to participate in conciliation efforts for a period of sixty days from the issuance of an order setting forth the conciliation procedure and the conciliator.
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> At any time upon its own motion or upon the application of a party the court may require the parties to participate in conciliation efforts for sixty days or less following the issuance of such an order.

Iowa Code § 598.16 (1993).

The language of section 598.16 is straightforward. "Conciliation is mandatory if requested in the petition or responsive pleading but is discretionary if sought later." *In re Marriage of Schroeder*, 393 N.W.2d 808, 809 (Iowa 1986). To invoke mandatory conciliation, a party's responsive pleading must contain sufficient language to constitute a request for conciliation. *See, e.g., Schroeder*, 393 N.W.2d at 809 (respondent's answer alleged he felt conciliation would preserve marriage); *In re Marriage of Penney*, 203 N.W.2d 380, 381 (Iowa 1973) (respondent's answer stated she objected to dissolution and would like to make a legitimate attempt at reconciliation).

Neither the pro se documents filed by Stephen nor the answer filed by his guardian ad litem constitute a responsive pleading in which conciliation is requested. The denial of allegation 8 of Peggy's petition, without more, is not sufficient to invoke mandatory conciliation. *See In re Marriage of Ried*, 212 N.W.2d 391, 393 (Iowa 1973) ("a mere allegation in respondent's answer to the effect the marriage has not failed, coupled with an expression of belief it can be preserved, may not be construed to constitute a statutorily qualified conciliation waiver objection").

Since mandatory conciliation was not invoked by Stephen's responsive pleading, it was within the district court's discretion whether to grant Stephen's

subsequent application for the appointment of a conciliator. In light of Peggy's resistance to the application and Stephen's incarceration and the circumstances attendant thereto, we find it was well within the district court's discretion to deny the request.

II. DIVISION OF PROPERTY.

Stephen argues he did not receive an equitable division of the parties' property and the trial court erroneously based its property division on the issue of fault rather than equity. Stephen further argues he should have been awarded the tools of his trade which he now alleges Peggy sold in violation of a court order prohibiting the disposition of the parties' property.

"The distribution of the parties' property should be equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1)." *In re Marriage of Wertz*, 492 N.W.2d 711, 713 (Iowa App. 1992). What constitutes an equitable division of marital property must be determined under the specific facts of each case. *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa App. 1984).

We find the division of property by the district court was equitable. At the time of the dissolution Stephen was incarcerated for a term not to exceed twenty years and Peggy's only source of income was ADC benefits. Peggy had the responsibility for providing for her minor children. The parties did not have many assets and had a considerable amount of debt. Under these circumstances the property award was equitable.

Contrary to Stephen's assertions, we do not find the district court failed to set aside inherited or gifted property. We also do not find the property award was predicated on fault. Stephen's incarceration was relevant to the parties' financial

situation, and consideration of this factor was not indicative of a fault-based decision.

Stephen alleges Peggy sold his tools in violation of a court order. That order specifically excepted the sale of property to provide for the necessities of life. The record does not indicate there was any disposition of the parties' property in violation of the court's order.

III. INJUNCTION.

Stephen claims the decree improperly enjoined him from having any direct contact with Peggy or with her children. Peggy filed an application for an injunction on October 28, 1992. The record indicates this application was served on Stephen's guardian ad litem, and he filed a resistance to the application.

The application did not distinguish whether Peggy was seeking temporary and/or permanent injunctive relief. Temporary injunctive relief was granted on November 23, 1992. On May 12, 1993, the dissolution decree was amended to include permanent injunctive relief.

"The grant or denial of injunctive relief is largely within the sound discretion of the trial court under the facts of the particular case." *In re Marriage of Knight*, 507 N.W.2d 728, 731 (Iowa App. 1993). Stephen was alleged to have sexually abused Peggy's children and was convicted and incarcerated as a result. When he attempted to have continued contact with Peggy and her children, Peggy sought injunctive relief. Her application could reasonably be interpreted as seeking both temporary and permanent injunctions. Under these circumstances, we find no abuse of discretion in the grant of permanent injunctive relief.

AFFIRMED.