IN THE COURT OF APPEALS OF IOWA

No. 0-188 / 99-1381
Filed June 14, 2000

IN RE THE MARRIAGE OF MICHAEL NUTTING AND PEGGY L. NUTTING

Upon the Petition of
MICHAEL NUTTING,
Petitioner-Appellant/Cross-Appellee,

And Concerning
PEGGY L. NUTTING,
Respondent-Appellee/Cross-Appellant.

FILED
JUN 14 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Michael Nutting appeals, and Peggy Nutting cross-appeals, from the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

J.E. Tobey III, Davenport, for appellant.

Linda L. Allison of Allbee, Barclay, Allison, Denning & Person, P.C., Muscatine, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Michael Nutting appeals, and Peggy Nutting cross-appeals, from the child custody and economic provisions of the parties' dissolution decree. Michael contends the district court erred in: (1) granting physical care of their minor child to Peggy; (2) inequitably dividing the marital property; and (3) awarding Peggy excessive trial attorney fees. On cross-appeal, Peggy contends the district court erred in (1) inequitably dividing the marital property and debts, and (2) failing to order each party to contribute one-half toward a health insurance premium for their minor child and all non-covered medical expenses. Peggy also requests appellate attorney fees. We affirm as modified.

Peggy and Michael met in Alcoholics Anonymous. They moved in together in June 1991. Michael had an alcoholic relapse and required detoxification in August of that year. A month later, the couple married. Both had been married previously. Peggy and Michael have one son, Alex, who was born on August 4, 1993. Michael has an adult son from a previous marriage. Peggy has three children from her previous marriages. Her eldest son lives with her and her two youngest children live with her second husband. Peggy is delinquent in her child support payments by $6000.

Michael has a bachelor of arts degree in business administration. In 1989, Michael began purchasing and rehabilitating rental properties in Davenport. In addition to his rental property, he operated recovery houses for individuals with alcohol dependency. By the time he moved in with Peggy in 1991, he had

acquired six properties. Since 1994, he has also been employed with Sears, selling appliances on commission.

Prior to her marriage to Michael, Peggy worked as a dispatcher for the West Liberty Police Department, and for Proctor and Gamble in Iowa City. Peggy earned $24,000 per year at Proctor and Gamble. Peggy has been sober since March of 1990. When Peggy started dating Michael she worked for a youth shelter. She quit this position approximately one month after she married Michael. During the parties' marriage, Peggy assisted with remodeling and restoring the rental properties. She also worked part-time as a waitress. In 1994, Peggy decided to finish her associate of arts degree and enrolled in Scott Community College. She graduated in 1995, and transferred to the University of Iowa, where she obtained a bachelor of science degree in sociology in 1998.

Michael and Peggy applied for and were accepted into a master of social work program at St. Ambrose. Peggy thought she would be unable to secure employment in the Davenport area. To Michael's surprise, she and Alex moved to Indianapolis, Indiana in June 1998. Peggy worked as a waitress until she secured employment as a social worker for Noble of Indiana, earning $25,000 per year. Shortly after the move, Michael began drinking again. He required inpatient hospitalization in the fall of 1998. At the time of entry of the decree, Michael was alcohol free and stated he believed he had recovered from the relapse.

After arriving in Indianapolis, Peggy met Alvin Hall. In the spring of 1999, she moved to Kingsport, Tennessee to live with him. Peggy has not been employed since moving to Kingsport and Alvin supports her.

Michael filed a petition for dissolution of marriage in September 1998. Peggy filed her answer in October, requesting primary physical care. In March of 1999, Michael filed an application for temporary physical care. The matter proceeded to hearing on May 27, 1999. On July 30, 1999, the district court entered the decree, awarding the parties joint custody of Alex, with Peggy assuming primary physical care. The court then proceeded to distribute the marital property. The court found the equity in the properties to be $125,304, after giving Michael a $42,624 credit for payments he made before the marriage. The court awarded Peggy $40,000 for her share of the property, and ordered Michael to pay $10,000 per year with interest. The court also divided Michael's 401k plan valued at $6289 by a qualified domestic relations order.

The court then awarded Michael the 1991 Ford truck, the 1977 Chevrolet Monte Carlo, and the 1984 Nissan 300ZX, and all remaining household property, with the exception of the Black and Decker heat gun, and painted chest of drawers which he awarded to Peggy. The court ordered Michael to assume all mortgages, the $3000 Visa bill, the $3000 Sears bill, and the Family Credit Union loan secured by the Toyota and Ford truck titles. The court granted Peggy the 1991 Toyota Camry, and ordered her to assume the $18,826 balance on her student loans, the $500 MasterCard bill, and the $500 Younkers bill. The court

also ordered Michael to pay $1500 toward Peggy's trial attorney fees. Michael appeals and Peggy cross-appeals.

I. Standard of Review. We review a dissolution proceeding de novo. *In re Marriage of Wagner*, 604 N.W.2d 605, 608 (Iowa 2000). While we give weight to the factual findings of the district court, especially with respect to credibility determinations, they do not bind us. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999).

II. Primary Physical Care. Michael contends the district court's award of primary physical care of Alex to Peggy is not supported by the evidence because (1) she has failed to encourage and provide him with regular visitation, and (2) she is delinquent on her child support payments for her sons from her second marriage.

In determining primary physical care, our primary concern is the best interests of the child. *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa App. 1998). We must decide whether Peggy or Michael can minister more effectively to Alex's long-term bests interests. *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa App. 1998). Our objective is to place Alex "in the environment most likely to bring [him] to healthy physical, mental, and social maturity." *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999) (quoting *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)). We will not consider the gender of the parents and neither parent bears a greater burden. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998). In making this decision, we consider the factors listed in Iowa Code section 598.41 (1997). *Barry*, 588 N.W.2d at 713.

While the district court acknowledged Alex spends a great deal of time in daycare, it noted both parents could provide a suitable living environment for him. The district court found as follows:

> Peggy is the more nurturing parent and better able to provide the kind of environment which provides Alex with emotional security and promotes his social and educational development. When weighing each environment carefully, the Court concludes that is most likely to occur where Peggy has primary physical custody of Alex and Michael has lengthy summer and holiday visitation rights.

A review of the record reveals Alex is a happy, enthusiastic, and well-adjusted child. While we do not condone Peggy's failure to notify Michael that Alex would be back in Davenport in December 1998, until after he had been in town for four days, this does not appear to be a repetitive problem. We also note Peggy stated she felt uncomfortable leaving Alex with Michael because he was not stable due to his recent alcoholic relapse.

We also reject Michael's contention he should receive primary care because Peggy is behind on her child support payments. The authority Michael cites does not support his contention. Failure to cite authority in support of an issue may be deemed a waiver of that issue. Iowa R. App. P. 14(a)(3); *In re J.J.A.*, 580 N.W.2d 731, 740 (Iowa 1998); *Hollingsworth v. Schminikey*, 553 N.W.2d 591, 596 (Iowa 1996). Given Michael's omission "and the fact that our research has not revealed any support for this proposition, we deem the matter waived." *J.J.A.*, 580 N.W.2d at 740.

Although we find the issue of primary care is close, we agree with the district court Peggy can better meet Alex's needs. Therefore, we affirm the district court.

III. Property Division

Michael contends the district court failed to consider the effect of Peggy's education on her lifetime earning capacity and should have only awarded her $10,000 in real estate equity. On cross-appeal Peggy contends the district court erred in: (1) failing to award her one-half of the non-premarital real estate equity; (2) neglecting to address the distribution of uncollected small claims judgments on the rental properties; and (3) ordering her to assume her entire $18,826 student loan debt.

The parties of a marriage are entitled to a just an equitable division of property accumulated during their marriage. *In re Marriage of Miller*, 552 N.w.2d 460, 463 (Iowa App. 1996). An equitable division does not necessarily mean an equal division. *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa App. 1998). We consider the value of the assets as of the date of the trial. *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa App. 1997).

A. Real Estate. At trial, the district court found the equity in the properties to be $125,304. The court gave Michael a credit for payments made on the property before the marriage, totaling $42,624. After crediting Michael for his premarital contributions, the court divided the equity, and awarded Peggy $40,000, payable in yearly increments of $10,000 plus interest. The district court found: "[b]oth parties have worked very, very hard during the marriage to improve their life situation. Both Peggy and Michael have contributed to the homemaking and child care aspects, so there is not any disproportion in value to be placed on those services." The record reflects testimony supporting the

contention Peggy contributed to the rental properties. We conclude the court's distribution of the real estate is equitable especially when considering the property division as a whole.

B. Uncollected Smalls Claims Judgments. On cross-appeal Peggy contends the district court failed to address the distribution of the uncollected small claims judgments on the rental properties. Michael and Peggy filed a statement of assets and liabilities on June 30, 1999, which includes the small claims judgments. The documents list the agreed upon value as "unliquidated." At trial, the parties stipulated to an equal division of any small claims judgments, which are collected. The decree does not address how these assets should be distributed. In accordance with the parties' stipulation, we modify the decree to require the parties to split the proceeds of any small claims judgments, which had not been collected at the time of trial.

C. Student Loan Debt. Peggy next argues the district court should have ordered Michael to assume one-half of her student loan debt because her student loans were not used to pay for her educational expenses, but rather to pay marital debts. The district court rejected her contention, finding "there is no indication Peggy has done anything on Michael's behalf which would increase his earning power; however, it is clear that the reverse is true." The court found Peggy garnered a benefit from her education because her maximum earnings during the marriage had been $7000 per year. Peggy argues her training did not increase her marketability because she earned $24,000 per year at Proctor and Gamble prior to the marriage. The district court implicitly rejected her contention,

finding she received a benefit by furthering her education. On our de novo review, we do not find the district court's decision to order Peggy to assume her student loan debt inequitable.

IV. Trial Attorney Fees. Michael contends the district court abused its discretion in ordering him to contribute $1500 toward Peggy's trial attorney fees.

To successfully overturn the award, Michael must prove the district court abused its discretion. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 854 (Iowa App. 1998). A party does not have a vested right to attorney fees, rather the decision to award attorney fees rests within the court's discretion. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998). We conclude the district court was within its discretion in awarding Peggy $1500 in attorney fees.

V. Health Insurance. On cross-appeal Peggy contends the district court erred in failing to require the parties to equally pay for the cost of health insurance for Alex, and equally pay for non-covered medical expenses. At trial, Peggy testified Alex needed medical insurance. She stated while Michael has health insurance through an HMO plan with Sears, the policy would only cover emergency room visits out of state. Peggy also reported she applied for state medical aid in Tennessee.

Iowa Code section 598.21(4)(a) provides:

> The court shall order as child medical support a health benefit plan as defined in chapter 252E if available to either parent at a reasonable cost. A health benefit plan is considered reasonable in cost if it is employment-related or other group health insurance, regardless of the service delivery mechanism. The premium cost of the health benefit plan may be considered by the court as a reason for varying from the child support guidelines. If a health benefit

> plan is not available at a reasonable cost, the court may order any other provisions for medical support as defined in chapter 252E.

Iowa Code § 598.21(4)(a). The decree does not mention how the parties should allocate Alex's medical insurance and uncovered medical expenses. Michael does have group health insurance coverage available through his employer. We conclude this situation is covered by section 598.21(4)(a), "which imposes a duty on the trial court to order that child medical support be provided if obtainable for a reasonable cost." *In re Marriage of See*, 566 N.W.2d 511, 512 (Iowa 1997). We reject Peggy's contention Michael must contribute to a second policy, which would cover Alex's medical expenses. The statute only requires a plan available to the parties at a reasonable cost. Iowa Code § 598.21(4). A plan is reasonable "if it is employment-related or other group health insurance." *Id.* We modify the decree to require Michael to provide the health benefit plan available to Alex through his employer. We also modify the decree to require each party pay one-half of the health care costs not covered by insurance.

VI. Appellate Attorney Fees. Peggy requests appellate attorney fees. In determining whether to award appellate attorney fees, we consider the needs of the requesting party, the other party's ability to pay, and whether the requesting party was obligated to defend the decision of the district court on appeal. *In re Marriage of Crotty*, 584 N.W.2d 714, 719 (Iowa App. 1998). After considering these factors, we award no appellate attorney fees. Costs of the appeal are taxed to Michael.

AFFIRMED AS MODIFIED.