IN THE COURT OF APPEALS OF IOWA

No. 0-407 / 99-1305
Filed October 25, 2000

IN RE THE MARRIAGE OF ANTHONY J. ROTONDI AND LESLIE L.P.J. ROTONDI

Upon the Petition of
ANTHONY J. ROTONDI,
Petitioner-Appellee/Cross-Appellant,

And Concerning
LESLIE L.P.J. ROTONDI,
Respondent-Appellant/Cross-Appellee.

FILED
OCT 25 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Leslie Rotondi appeals, and Anthony Rotondi cross-appeals, from the child custody and economic provisions of their dissolution decree. **AFFIRMED.**

Todd E. Babich of Babich, Cashatt & Renzo, P.C., Des Moines, for appellant.

Steven E. Howes of Howes Law Firm, P.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Leslie Rotondi appeals the physical care provisions of the parties' dissolution decree. She asks to have the children placed in her physical care. Anthony Rotondi cross-appeals, claiming the district court's property division was inequitable. He also seeks attorney fees for this appeal. We affirm.

I. Background Facts and Proceedings.

Anthony and Leslie Rotondi were married in 1989. They have two children, Adam, born in April 1990, and Kahlise, born in January 1993. Anthony is currently employed as a mechanical engineer with Truth Hardware in Owatonna, Minnesota, where he earns about $56,000 per year. Leslie lives in Fairfield, Iowa, and is self-employed in landscape work. She did not present evidence of her income.

The Rotondis separated in May 1996. Anthony filed a petition for dissolution of marriage. Leslie subsequently filed a petition for relief from domestic abuse. She claimed Anthony physically abused her throughout their relationship. The district court issued a temporary protective order prohibiting the parties from having contact with one another. The children remained in Leslie's care. A custody evaluation was completed in August 1998, which recommended the children be placed in Anthony's care. The court then ordered the children be placed in Anthony's temporary physical care pending its final decree.

In its June 1, 1999, decree the court determined the parties' children should be placed in Anthony's physical care. The court found Leslie's claims of physical abuse were not credible. Leslie was ordered to pay child support of $50

per month per child. The court awarded Leslie all of the parties' real property. Anthony was awarded his interest in a business he started, subject to any business debts. No alimony or attorney fees were awarded.

Anthony filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) seeking increased child support. The district court determined Leslie had the capacity to earn at least a minimum wage and increased her child support obligation to $156 per month. The court also ordered the child advocate to monitor the children indefinitely.

II. Scope of Review.

Appellate review of this equitable proceeding is de novo. Iowa R. App. P. 4. It is our duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Weinberger,* 507 N.W.2d 733, 735 (Iowa App. 1993). We give weight to the district court's fact findings, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Custody.

Leslie asks to have the children placed in her physical care. She argues Anthony's history of domestic abuse renders him unfit to serve as physical caretaker for the children. She also claims the children's needs would be better met in her care.

In child custody cases, our first and governing consideration is the best interests of the child. *In re Marriage of Buttrey,* 538 N.W.2d 322, 324 (Iowa App. 1995). The court's objective is to place the children in the environment most

likely to bring the children to a healthy physical, mental, and social maturity. *In re Marriage of Rodgers,* 470 N.W.2d 43, 45 (Iowa App. 1991).

Domestic abuse is a substantial factor in determining custody. Iowa Code section 598.41(3) sets forth several factors for the court to consider in making an award of physical care, including whether a history of domestic abuse exists. *See* Iowa Code § 598.41(3)(j).

In interpreting what is sufficient to constitute a "history of domestic abuse," the supreme court has held a "history" is not necessarily established by a single documented incident. *In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). Nor does more than one minor incident automatically establish a "history of domestic abuse." *Id.* It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers. *Id.* Furthermore, evidence of domestic abuse creates a rebuttable presumption against an award of custody. *See In re Marriage of Ford,* 563 N.W.2d 629, 632 (Iowa 1997).

The principal incident of alleged domestic abuse upon which Leslie relies occurred on February 18, 1996. Leslie testified that in an effort to force Anthony to leave their home, she ran outside and started hitting his car with a shovel. She stated she planned to run inside after he came outside and lock herself in. Anthony testified Leslie was angry with him and decided to damage his car, and when he tried to stop her, she grabbed his testicles and he hit her. Leslie testified Anthony then dragged her into the house and she suffered a broken jaw as a result of Anthony's physical abuse. Leslie called the police. Deputy Mark

Thomas, who responded to the call, testified he spoke with Leslie, Anthony, and Leslie's father, who was also present. Thomas stated that Leslie's father did not report any violence and did not appear upset. Deputy Thomas also testified he did not observe any injuries to either Leslie or Anthony.

Leslie testified Thomas's recollection was mistaken because after she called the police, she ran up to the attic to hide from Anthony. She stated Thomas actually spoke to her sister, Alise, and that is why he did not observe any injuries. In her affidavit, Alise stated she arrived at Leslie's home at about 11 p.m. that night and both Leslie and Anthony were sleeping. She said nothing about any conversation with Thomas. Alise further stated she saw bruises and cuts on Leslie's head. In his affidavit, Alise's husband, John, stated he saw Leslie's bruises later that week. Leslie claimed that due to the beating by Anthony on February 18, 1996, her lips, eyebrows, nose and forehead were severely swollen and bruised for several months.

Leslie was evaluated by a psychiatrist, Dr. James Beeghly, on February 26, 1996, eight days after these events. Records of his evaluation of Leslie do not refer to any bruising. Additionally, Leslie did not tell Dr. Beeghly she had been physically abused. Instead, Leslie told Dr. Beeghly she was experiencing stress due to conflicts with her first husband. Dr. Beeghly diagnosed Leslie with an adjustment disorder and prescribed medication.

Leslie had an x-ray in June 1996, which showed a healed fracture to her jaw. The record, however, does not disclose when the fracture occurred. At the

time of the dissolution hearing, Leslie was being treated for posttraumatic stress syndrome, which she claimed was caused by Anthony's abusive behavior.

We, like the district court, find Leslie's claims of domestic abuse are not credible. Two disinterested witnesses who observed Leslie after these events, Deputy Thomas and Dr. Beeghly, did not recall any obvious injuries. We also note the diagnosis by the professionals treating Leslie for posttraumatic stress disorder was based solely on Leslie's version of these events. We agree with the district court's conclusion, "Her credibility in regard to this issue is simply not good." We give deference to the district court's findings on credibility. *See* Iowa R. App. P. 14(f)(7). We determine there is insufficient credible evidence in the record to show Anthony has a history of domestic abuse. Therefore, the presumption against awarding him custody under section 598.41(2)(c) and (3)(j) is not implicated.

The evidence shows the children have thrived in Anthony's care. They are doing well in school. Their school attendance record has improved while in Anthony's physical care. The record also shows Anthony is better able to support the children's relationship with Leslie. The custody evaluator appointed by the court recommended the children be placed with Anthony. Among other concerns the evaluator expressed, was Leslie's effort to coach the children to report negative experiences with Anthony. Moreover, there are valid concerns about Leslie's mental stability. For all of these reasons, we affirm the district court decision placing the children in Anthony's physical care.

IV. Property Division.

Anthony contends the property distribution was inequitable to him. The parties owned three real estate properties--one each in Fairfield, Batavia, and Olin. All three of the properties were awarded to Leslie, as well as the associated debt. During the marriage, Anthony obtained a Small Business Association loan and used the Fairfield property as collateral. The dissolution decree requires him to repay the loan. Anthony asks to be awarded the Fairfield property.

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *In re Marriage of Wendell,* 581 N.W.2d 197, 199 (Iowa App. 1998). The property distribution should be made pursuant to the criteria codified in section 598.21(1). *In re Marriage of Gonzalez,* 561 N.W.2d 94, 98 (Iowa 1997).

There is not much information in the record concerning the parties' financial situations. The Fairfield property included two living units. Leslie was living in one and renting out the other for a minimal amount. We affirm the property distribution as set forth in the dissolution decree.

V. Attorney Fees.

Anthony asks for 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 Daniels,* 568 N.W.2d 51, 56 (Iowa App. 1997). Under the facts of this case, we determine each party should pay his or her own appellate attorney fees.

We affirm the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.