IN THE COURT OF APPEALS OF IOWA

No. 1999-364 (9-617) / 98-1915
Filed March 15, 2000

IN RE THE MARRIAGE OF DERRICK PAUL DISNEY AND CHERYL RAE BARBIERI-DISNEY

Upon the Petition of
DERRICK PAUL DISNEY,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CHERYL RAE BARBIERI-DISNEY,
Respondent-Appellant/Cross-Appellee.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

A wife appeals and husband cross-appeals various economic provisions of their dissolution decree. **AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.**

Paige E. Fiedler of Wiggins & Anderson, P.C., West Des Moines, for appellant.

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellee.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Derrick and Cheryl Disney appeal district court orders dividing their marital estate and setting child support and visitation. Upon our de novo review, we affirm the trial court's property division and visitation schedule. We remand for the limited purpose of recalculating child support.

I. Background Facts and Proceedings. Derrick and Cheryl married in June of 1988. They have one daughter, Kali, born in 1990. This was Derrick's first marriage and Cheryl's third.

Cheryl and Derrick began dating in 1983. They lived together for a period of time in 1983 or 1984. They began living together again in the fall of 1987 and continued to do so until their marriage. Cheryl's father purchased a house in April of 1987. He transferred title in the home to Cheryl shortly before the marriage. Cheryl assumed the outstanding mortgage. The trial court found the marital home had $5000 dollars in equity at the time of the marriage.

Derrick filed a petition for dissolution in January 1998. The main issues at trial concerned (1) the amount of Derrick's child support obligation, (2) the value of the marital home, and (3) the division of marital property. The parties agreed Cheryl would have primary physical care of Kali subject to Derrick's right to reasonable visitation. On the weekend after trial, Derrick moved to an apartment the parties had been renting in Lebanon, Indiana, since 1995.

The district court entered a dissolution decree in September 1998. As agreed, Cheryl and Derrick were awarded joint custody of Kali, with primary physical care to Cheryl. Derrick was granted visitation and ordered to pay child support of $438.86 per month. The court divided the marital property and debts

and made each party responsible for his or her own attorney fees. No alimony was awarded. Cheryl appeals and Derrick cross-appeals.

II. Summary of the Issues. Cheryl's appeal raises four issues: (1) the transportation responsibilities for Derrick's monthly visitation; (2) the determination her home had $5000 in equity at the time of the marriage; (3) the calculation of Derrick's child support obligation; and (4) appellate attorney fees. On cross-appeal, Derrick argues: (1) the division of marital assets is inequitable; and (2) the visitation provisions of the decree should be modified to award him extended visitation on alternating Thanksgiving holidays.

III. Scope of Review. Dissolutions of marriage are heard in equity. *In re Marriage of Fields,* 508 N.W.2d 730, 731 (Iowa 1993). Our standard of review is, therefore, de novo. *See* Iowa R. App. P. 4. In such cases "[w]e examine the entire record and adjudicate anew rights on the issues properly presented." *In re Marriage of Beecher,* 582 N.W.2d 510, 512-13 (Iowa 1998). In doing so, we give weight to the factfindings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Beecher,* 582 N.W.2d at 513.

IV. Visitation-related Transportation Expenses. The district court provided Derrick one weekend visit per month and additional visitation during school breaks, holidays, and Kali's summer vacation. For the monthly visits, the parties were ordered to meet in Knoxville, Illinois, located halfway between Des Moines and Derrick's residence in Lebanon, Indiana. The distance between these two cities is about 490 miles. Transportation for any other visitation provided for in the decree is solely Derrick's responsibility. Cheryl contends it

was inequitable for the trial court to require her to share in one-half the visitation-related transportation expenses for Derrick's monthly visitation. Under the circumstances presented by this case, we disagree.

There is no bright line rule for assigning the responsibility for transportation expenses to one or both parents. A resolution of the issue is largely fact-dependent. Cheryl argues it was Derrick's decision to move from Des Moines to Indiana, so he should bear the entire burden. The record reveals the parties had a long-standing plan to move to Indiana. They began renting an apartment in Lebanon in 1995 and made plans to sell their home in Des Moines and move there. They separated on several occasions during their marriage, once for about nine months. During that time, Derrick lived in Lebanon, and Cheryl and Kali remained in Des Moines. During that separation, the parties met in Knoxville, Illinois, to exchange Kali for purposes of Derrick's visitation. Under the somewhat unusual circumstances presented by this case, we believe it was equitable for the trial court to require Cheryl to share in a portion of the visitation-related transportation expenses and responsibilities. We affirm the decision of the trial court on this issue.

V. Valuation of Equity in the Marital Home. Cheryl contends the district court erred in finding the marital home had only $5000 in equity at the time of her marriage to Derrick. She asserts the home had $25,000 in equity at that time.

Cheryl's father purchased what became the marital home for approximately $46,000 in April of 1987, shortly before the parties' marriage. Cheryl contributed approximately $5000 toward the downpayment. Her father obtained a mortgage for the balance of the purchase price. Cheryl and Derrick

moved into the home in September of 1987. Six or seven weeks before the marriage, Cheryl's father transferred title of the home solely to Cheryl, and she assumed the mortgage.

There is no dispute the home was in need of repair at the time of its purchase. Cheryl's father made a number of repairs at an approximate cost of $1500. No estimates were received into evidence regarding the value of the remodeling. Our de novo review of the record reveals no basis for concluding the work done by Cheryl's father increased the value of the marital home by $20,000, as she asserts. We conclude the trial court's valuation of the net equity in the home at the time of the marriage is well within the permissible range of evidence, and we will not modify it here. *See In re Marriage of Driscoll,* 562 N.W.2d 640, 643 (Iowa App. 1997); *see also In re Marriage of Huisman,* 532 N.W.2d 157, 160 (Iowa App. 1995). We affirm the decision of the district court on this issue.

VI. Calculation of Child Support. The district court found Derrick's net income was $1950.47 per month and Cheryl had the ability to earn net income of $1077 per month. Based on the child support guidelines, the court set Derrick's monthly child support at $438.86. Child support was calculated using a guideline worksheet provided by Derrick which indicated he was working at Iowa Glass in Des Moines and earning $16.48 per hour. During trial, Derrick confirmed he had quit his job in Des Moines and was moving to Indiana where he had a new job paying $22.32 per hour plus benefits.

Cheryl contends the trial court should have used Derrick's rate of pay in Indiana to calculate child support. We agree. Derrick testified he was moving to

Indiana the Saturday following trial. He knew his rate of pay would immediately increase by $5.84 per hour. Derrick suggests his child support obligation should be based on his former employment in Des Moines because he may experience layoffs at his new job. We do not find the possibility of future layoffs to be a reasonable basis for calculating support based on a job Derrick no longer has. We conclude child support should be calculated based on Derrick's current income in Indiana. *See In re Marriage of Foley,* 501 N.W.2d 497, 500 (Iowa 1993) (using present salary, not former income, to calculate child support where husband's reduction of income was not voluntary); *see also In re Marriage of Flattery,* 537 N.W.2d 801, 803 (Iowa App. 1995) (citations omitted) (stating that before using earning capacity rather than actual earnings to calculate child support, court must make findings that if actual earnings were used, substantial injustice would result).

Cheryl's brief raises a second issue regarding child support. The trial court awarded the tax dependency exemption for Kali to Derrick. The court based its child support calculation on a child support guideline worksheet offered into evidence by Derrick. Cheryl points out that Derrick's worksheet incorrectly allocates the dependency exemption to her. Derrick acknowledges his net income for purposes of calculating child support is decreased as a result of this error. We remand with directions to the district court to calculate Derrick's child support obligation based on his current employment with the tax exemption for Kali allocated to Derrick.

VII. Derrick's Cross-Appeal. A. Division of Property and Debts. Derrick contends it was inequitable for the trial court to assign $8000 of medical

bills to Cheryl. The bills arose out of a disputed work-related injury. Derrick asserts this particular debt should play no part in the division of the parties' marital estate. He suggests Cheryl's testimony regarding the bills and her current medical condition was not credible. He also assumes that if Cheryl's injury is real, she will be compensated for these bills by her former worker's compensation insurance carrier at some point. The trial court was in the best position to evaluate the credibility of the parties. Giving due deference to the trial court's findings, we conclude, after a de novo review of the evidence, that the division of property and debts was equitable. We affirm the district court on those issues.

B. Thanksgiving Visitation. Derrick argues that in alternate years he should be entitled to visitation before and after Thanksgiving, as well as Thanksgiving Day itself. Cheryl contends it is not necessary to modify the decree to accomplish this. Derrick already has visitation one weekend a month, including extra time when there is no school. We agree with Cheryl that nothing in the decree prevents Derrick from combining his Thanksgiving and weekend visitation. Doing so would save driving time and reduce the time Kali must travel to visit her father. We decline to modify visitation.

VIII. Appellate Attorney Fees. Cheryl requested an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson,* 545 N.W.2d 252, 258 (Iowa 1996). We are to 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 district court's decision on appeal. *In re*

Marriage of Wood, 567 N.W.2d 680, 684 (Iowa App. 1997). We award Cheryl no attorney fees on appeal.

IX. Summary. We affirm the trial court decree except we determine child support should be recalculated based on Derrick's employment in Indiana. On remand the trial court shall modify the decree consistent with this opinion. Costs of this appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.