IN THE COURT OF APPEALS OF IOWA

No. 6-744 / 96-1293

**IN RE THE MARRIAGE OF VALERIE J. CLEAVELAND AND BARRY A. CLEAVELAND**

**Upon the Petition of**
**VALERIE J. CLEAVELAND,**

Petitioner-Appellant,

**And Concerning**
**BARRY A. CLEAVELAND,**

Respondent-Appellee.

FILED
JAN 29 1997
CLERK SUPREME COURT

---

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

On appeal from the entry of a dissolution decree, appellant challenges: (1) the award of the children's physical care to their father; (2) the denial of her request for rehabilitative alimony; (3) the valuation and distribution of the parties' assets; and (4) the district court's post-trial modification of the record to include Exhibit D (respondent's proposed division of assets). **AFFIRMED AS MODIFIED.**

A. W. Tauke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

T. J. Pattermann of Smith Peterson Law Firm, Council Bluffs, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

**HABHAB, C.J.**

Valerie and Barry Cleaveland were married on November 16, 1991. They have two children, Alexander born May 15, 1992, and Elizabeth born August 8, 1993. Valerie filed a petition for dissolution of marriage on July 24, 1995. She and the children moved out of the family home in February 1996.

Prior to the marriage Valerie had attended college and studied accounting. She did not complete her degree. She had been employed and earned approximately $25,000 per year. During much of the marriage Valerie was a homemaker and the children's primary caretaker. She held some outside employment involving the sale of children's toys, horse training, and riding lessons.

At the time of the dissolution hearing, Valerie was twenty-five years old and was employed twenty hours per week at an animal hospital. She earned approximately $8.00 an hour. Barry was forty-three years old and was employed in the insurance industry earning approximately $75,000 a year.

A trial was held June 13, 1996, and the court filed a dissolution decree on July 12, 1996. The court found Barry was in the best position to provide a stable, consistent, and conventional home for the children and awarded him their physical care. With Barry's acquiescence, the court deviated from the child support guidelines and ordered Valerie to pay only $10 per month for child support.

The court denied Valerie's request for rehabilitative alimony citing several factors, including her good health, her ability to earn a living without assistance from

Barry, her obligation to pay only nominal child support, and Barry's obligation to pay the parties' marital debts. Valerie appeals.

Subsequent to the trial and the submission of appellate proof briefs, the district court filed an order modifying the trial court record. The court's order does not reference Iowa Rule of Appellate Procedure 10(d) (correction or modification of record). The order states the court "considered Exhibit D [Barry's proposed division of the parties' assets] as submitted and accepted into evidence; however, no specific mention of the acceptance of Exhibit D into evidence is noted on the record." The court directed that a "supplemental record indicating the specific acceptance of Exhibit D into evidence be certified and transmitted to the Clerk of the Supreme Court with the remaining trial record."

On appeal, Valerie argues: (1) she should have been awarded the physical care of the children; (2) she should receive rehabilitative alimony; and (3) the court did not correctly value and equitably distribute the parties' assets.

In response, Barry argues Valerie's failure to file a rule 179(b) motion constitutes a waiver of some of her objections to the court's valuation and distribution of the property. Barry cites Exhibit D in support of the court's findings that Valerie had a horse trailer and premarital debt. Barry requests an award of appellate attorney fees and claims those fees to date have totaled $4853.

In her reply brief, Valerie argues the district court erred in considering Exhibit D and in modifying the trial court record to include it. She contends this exhibit was

never mentioned, offered, or admitted into evidence during the trial and should be stricken from the trial record. She argues she never had any notice the court would order the inclusion of the exhibit in the record, and she presumes its inclusion was the result of an ex parte communication between Barry and the court.

*I. Primary Physical Care.* In reviewing the terms of an original decree, our review is de novo. Iowa R. App. P. 4. Valerie asserts, as she stayed at home and provided the majority of the care for the children during the marriage, it is in their best interests that primary physical care be awarded to her.

From our de novo review of the record, we find that while the evidence indicates both Valerie and Barry appear to be good and loving parents to the children, the trial court properly awarded primary physical care of the children to Barry. Valerie has indicated she would enjoy working on a ranch in Montana and evidence in the record indicates she was actively pursuing such employment. The court found "the advantages of having an extended family and several relatives in the area favor the choices and objectivity available to Barry in his care of the children."

In awarding Barry primary physical care, the court found Barry would provide religious education and training to the children, while Valerie did not indicate any interest in doing so. Valerie indicated a preference for "home schooling" the children and Barry believes they should attend a preschool setting where they are able to interact with other children. The court also found:

000103

> [B]oth [parties] love their two children while each parent has different ideas about the priorities of life and manner in which the children should be reared which bears significantly upon the choice of physical custodian. . . . After giving careful consideration to the abilities of both parents, the court concludes that Barry is in the best position to provide a stable, consistent and conventional home for the minor children which will be in the best interest of the children and superior to the choices which would be made by Valerie.

In cases such as this, we believe it is especially important to give deference to the findings of the district court. "The district court had the parties before it and was able to observe and evaluate the parties as custodians." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). "One who personally observes holds a clear advantage over us who learn the case from a cold record. The first-hand observer can translate that advantage into a more just disposition." *In re Marriage of Wegner*, 434 N.W.2d 397, 400 (Iowa 1988)(Harris, J. dissenting). We affirm the trial court's award of primary physical care for the children to Barry.

***II. Rehabilitative Alimony.*** Valerie contends she should have been awarded rehabilitative alimony as support to enable her to re-enter the workforce. Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *Id.* We consider property division and alimony together in evaluating their individual sufficiency. *Id.*

In denying Valerie's request for rehabilitative alimony, the court took into consideration the assignment of all of the credit card debt to Barry. The trial court noted, "Valerie is in good health and capable of earning a living without assistance from Barry." Furthermore, the court fixed Valerie's child support obligation at only $10 per month. The only debt assigned to Valerie was the encumbrance on the vehicle awarded to her. In our de novo review, we find the district court's denial of Valerie's request for rehabilitative alimony is equitable given the circumstances present, and we affirm the trial court's decision in this regard.

***III. Valuation of Assets.*** Valerie argues the district court's valuation of several martial assets was incorrect. Specifically, she maintains the court's valuation of the marital home at $91,000 was too low and the actual value was closer to $125,000. She also maintains the court erred in the valuation of various items of personal property including the automobile awarded to Valerie, two horses and the tack, Valerie's checking account, household furniture and appliances, and the credit card balances. Valerie also argues there is no evidence that shows she brought any debt into the marriage or the existence of a third horse and horse trailer awarded to her.

We have considered each of the assertions of the appellant and conclude, after our de novo review of the record, that when the final distribution of the assets and liabilities are taken into consideration, the result reached by the trial court is just and equitable.

Valerie takes issue with the district court's award of the children's beds and dresser to her, contrary to a stipulation entered into by the parties in which they agreed these items would be awarded to the party to whom primary physical care was awarded. We agree with Valerie these items should follow the children. We modify the decree by awarding these items to Barry.

We assume, without deciding, the district court also correctly valued and awarded the third horse and trailer to Valerie relying on Exhibit D. Even assuming arguendo the trial court improperly considered Exhibit D, in our de novo review of the record we find, even absent the information contained in this document as previously noted, equity supports the district court's valuation and division of the marital property. We find the division was equitable even if Valerie had no premarital debt and there is no third horse and trailer.[1]

*IV. Restoration of Maiden Name.* Valerie asserts the district court erred in restoring her to her former name of Adams when she had made no request for the restoration of this name in her petition or at trial. We believe Valerie should be able to retain the name of Cleaveland if she so desires. Therefore, we modify the decree accordingly.

---

[1] We also reject Valerie's contention we should not accord any weight to the findings made by the trial court. In equity cases, especially when considering the credibility of witnesses, we give weight to the district court's fact findings, although we are not bound by them. Iowa R. App. P. 14(f)(7).

*V. Appellate Attorney Fees.* Barry requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 679, 690 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Barry.

**AFFIRMED AS MODIFIED.**