IN THE COURT OF APPEALS OF IOWA

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No. 7-436 / 97-413

IN RE THE MARRIAGE OF RICKIE R. CLEMENT AND BONNIE R. CLEMENT

Upon the Petition of
RICKIE R. CLEMENT,
Appellant,

And Concerning
BONNIE R. CLEMENT,
Appellee.

FILED
NOV 25 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jasper County, Jerrold W. Jordon, Judge.

Rickie Clement appeals various provisions of a dissolution decree, **AFFIRMED AS MODIFIED.**

Patrick H. Payton of Patrick H. Payton & Assoc., P.C., Des Moines, for appellant.

DuWayne J. Dalen of the Brierly Law Office, Newton, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

On appeal from the entry of a dissolution decree, Rickie Clement argues: 1) he should have been awarded the physical care of the parties' daughter; 2) the district court erred in not equally dividing the parties' property; 3) the court erred in awarding Bonnie Clement the family home; and 4) the court erred in its valuations of the parties' property. Bonnie requests an award of appellate attorney fees.

Background facts. Rickie and Bonnie Clement were married on October 25, 1980. They have one child, Ashley, born December 30, 1981. Rickie filed a dissolution petition in June 1996. Ashley lived with Bonnie during the parties' separation, although their relationship was strained and their disagreements sometimes became profane and violent in nature.

A dissolution trial was held on January 7, 1997, and Ashley testified she wished to live with her father. On January 7, the court entered an "Order for Decree" awarding Bonnie the physical care of Ashley and dividing the parties' property. The court awarded Bonnie the family home and she received a total of $45,800 in assets. Rickie was awarded $25,710 in assets. Rickie filed a motion to reconsider. On March 4, 1997, the court filed a "Decree of Dissolution of Marriage" which incorporates the court's January 7 order and denies Rickie's rule 179(b) motion.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the

issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

I. Primary physical care. Rickie argues he should have been awarded the physical care of Ashley because Bonnie's attempts to discipline her are physically and verbally abusive. He disputes that Bonnie was Ashley's primary caretaker and contends it is in Ashley's best interests that she be placed in his care.

The controlling consideration regarding placement of the children is their best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The court determines placement according to which parent can minister more effectively to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253.

The trial court, after listening to the testimony of the witnesses and observing their demeanor, gave a thoughtful analysis of the family dynamics and made the difficult decision to continue to have Ashley reside with Bonnie. The court recognized Bonnie was the default disciplinarian as Rickie worked regular hours at

Maytag and worked on his mother's farm in the evenings. That left Bonnie with the care and supervision of Ashley during some admittedly trying times. We conclude the trial court's decision should be upheld; we accordingly affirm on the issue of primary physical care.

II. Property division. Rickie also argues the court's division of property was inequitable because Bonnie was awarded a disproportionate amount of the assets. He contends the trial court awarded her 70 percent of the property and it should have been divided equally. He claims the fairest distribution would have required the parties to sell all of their assets, including the family home, and divide the proceeds. However, he alternatively argues awarding him a $19,477.36 lien against the family home would award him an equity interest in it and would equalize the property distribution.

In making an equitable distribution of assets, the court must first determine what assets are available to be allocated between the spouses. *In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa App. 1997). To do this, the court must identify and value the assets of the parties, both jointly and separately. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). The value of the assets should then be determined as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLauglin*, 526 N.W.2d 342, 344 (Iowa App. 1994). Next, a determination must be made as to the allocation of those assets. Assets are

equitably, not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1) (1995); *see In re Marriage of Roberts*, 545 N.W.2d 340, 344 (Iowa App. 1996).

We find the trial court appropriately awarded the marital home to Bonnie, as Ashley will also continue to reside there. *See In re Marriage of Lovetinsky*, 418 N.W.2d 88, 89 (Iowa App. 1987). The trial court recognized the difficulty in valuing the parties' property; nonetheless, determined the value of the farm, hunting, and fishing equipment at $9,100. With that finding, the asset distribution following a sixteen-year marriage was $25,710 to Rickie and $45,800 to Bonnie. Although the division of assets is to be equitable, not necessarily equal, the trial court failed to find reasons for the disparity and apparent inequity in this division. We therefore direct the district court to enter judgment against Bonnie and in favor of Rickie in the amount of $10,545. This judgment shall be payable ninety days following the date of Rickie's final child support obligation for Ashley, including support which may be ordered under Iowa Code section 521.21 (5A).

III. Valuation of home and pension. Rickie argues the trial court undervalued the parties' homestead by accepting Bonnie's valuation and by reducing it by the amount of a realtor's sales commission. He also contends the court erred in valuing his pension.

In examining property valuations, we have generally upheld values set by the trial courts if they are "within the permissible range of evidence." *See In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994).

A. Homestead. Bonnie had a competitive market analysis prepared by a real estate agent, which analysis involved a comparison of five different market values. Rickie's valuation was based on his own personal knowledge and what a realtor told him (considering comparable properties in the neighborhood). We are unable to conclude the trial court's valuation of the home was not within the permissible range of evidence. We accordingly affirm the trial court's valuation of the home. Moreover, we find the 6 percent real estate commission was appropriately deducted from the net equity of the home. *See, e.g., In re Marriage of Pitman*, 346 N.W.2d 33, 36 (Iowa 1984) (stating that if a party "sold the house, a 7 percent realtor's fee must be deducted from the net equity."); *accord In re Marriage of Richards*, 439 N.W.2d 876, 882 (Iowa App. 1989).

B. Pension. The trial court valued Rickie's pension at $18,000 and valued Bonnie's pension at $17,000. Yet, both testified their pensions were nearly equal, and Rickie's financial affidavit listed his pension at $17,000. While it may be true Rickie's pension has a marginally higher value than Bonnie's, nowhere in the record does the $18,000 figure appear as the value for Rickie's pension. Without more

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specific information in the record, another figure should not have been used. We therefore modify the value on Rickie's pension to $17,000.[1]

IV. Appellate attorney fees. Bonnie requests that this court award her $1500 attorneys fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We determine the parties must each pay their own appellate attorney fees. Costs are assessed one-half to each party.

Having carefully considered all issues before us, we affirm the trial court with respect to the primary physical care of Ashley with Bonnie. We modify the property distribution, the pension amount, and direct the district court to enter judgment against Bonnie, consistent with this opinion.

AFFIRMED AS MODIFIED.

Mahan, J., concurs; Sackett, P.J., concurs in part and dissents in part.

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[1]We have accounted for this modification in determining the amount of the judgment against Bonnie.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. I would order the obligation of Bonnie to Rickie payable when Ashley graduates from high school or is eighteen years old, whichever is later.