IN THE COURT OF APPEALS OF IOWA

214

IN RE THE MARRIAGE OF CINDY LOUISE KEEP AND CRAIG STEVEN KEEP

FILED
JUL 13 1982
CLERK SUPREME COURT

Filed July 13, 1982

UPON THE PETITION OF)
CINDY LOUISE KEEP,)
Petitioner-Appellee,)
vs.) 2-181
3-67260
AND CONCERNING)
CRAIG STEVEN KEEP,)
Respondent-Appellant.)

Appealed from Keokuk District Court — James D. Jenkins.

Respondent-husband appeals from the decree dissolving his marriage to petitioner-wife asserting: 1) that custody of the parties' minor son should have been awarded to him; 2) that, if custody is affirmed in petitioner, trial court's child support award is excessive; and, 3) that the property division is inequitable; petitioner seeks attorney fees on appeal. AFFIRMED WITH MODIFICATION.

Greg A. Life, Oskaloosa, for respondent-appellant.

John F. Heslinga of Heslinga & Heslinga, Oskaloosa, for petitioner-appellee.

Considered by Oxberger, C.J., Donielson and Johnson, JJ.

Respondent-husband, Craig Steven Keep, appeals from the decree dissolving his marriage to petitioner-wife, Cindy Louise Keep. He asserts: 1) that custody of the parties' minor son should have been awarded to him; 2) that, if custody is affirmed in petitioner, trial court's child support award is excessive; and, 3) that the property division is inequitable. Petitioner seeks attorney fees on appeal. We affirm with modification.

The parties were married on January 3, 1973. Their only child, Matthew, was born on June 19, 1973. At the time of trial, petitioner was 25 years of age, a high school graduate, and in good health. She was employed full-time as a checker in a local supermarket with a net weekly take home pay of approximately $140-$145. Respondent also was in his mid-20's, a high school graduate, and in good health. He was employed as a forklift operator and had net weekly earnings of $195-$205. When the parties separated in December, 1980, petitioner and the minor child moved to a 2-bedroom apartment. Respondent has lived with his elderly grandparents.

Trial court awarded custody of the minor child to petitioner and ordered respondent to pay $60 per week child support until the child is ten years old, and $85 per week thereafter. Trial court also awarded petitioner one of the parties' cars, valued at $150, and a $7,525 judgment. Respondent received the parties' other vehicles, with a net value of approximately $2,700, the parties' house trailer, and the five acres of land on which it was located. Respondent was directed to pay the parties' debts of $20,500, which encumbered the property he was awarded. The parties had made a satisfactory division of the remainder of their property.

I. Scope of Review. Since this is an equitable proceeding, our review is de novo. Iowa R. App. P. 4. We will review the facts, as well as the law, and determine rights anew from the credible evidence on those issues properly

preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7).

II. Child Custody. Respondent asserts that he can more effectively minister to the long range best interests of the minor child and that trial court's award to petitioner appears to be punishment for his not loving petitioner. We disagree.

Our first and governing consideration in determining custody is the best interests of the child involved. Iowa R. App. P. 14(f)(15). With this in mind, we note further that the status of children should be quickly fixed and, thereafter, little disturbed. In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974). In deciding this issue, we seek neither to punish one parent nor reward the other. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). No inference favoring one parent as opposed to the other, except that arising from the particular facts of the case, is permissible in determining which parent is the more fit custodian. Bowen, 219 N.W.2d at 688. Relevant factors in determining child custody are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), but the ultimate question is, based on the entire record, which of the parents can minister more effectively to the long-range best interests of the child. Id.; Iowa R. App. P. 14(f)(15).

Respondent alleges that trial court brushed aside all evidence regarding petitioner's sexual improprieties, her problems disciplining the minor child, and her inadequate care of the child during the period of separation. He asserts that the record is void of any immoral conduct on his part, that he, with the aid of his grandparents, would be able to provide a traditional stable home, that he has a good relationship with his son, and that he is able to discipline the boy more effectively than petitioner.

From our review of the record, we conclude that the evidence shows the child is healthy and has no major adjustment problems. While we do not believe petitioner's practice of having overnight male guests is particularly conducive to the child's well being, this alone is not determinative. Petitioner herself agrees that this practice is unwise. The important consideration, we believe, is contained in the following portion of trial court's findings and conclusion:

> Although respondent claims that he would like to have custody of the child, he offers no real alternative to the court. The evidence shows that he commutes to and works five days a week at Amana Refrigeration, presumably during the daytime hours, although the evidence is silent on that issue. He lives with his grandparents who are 82 and 79, respectively. His grandmother prepares his meals. He may marry his present paramour; he may not; his future plans are not now firm. The court finds that the petitioner is by far the better person to have the primary care, custody, and control of the minor child of the parties. She has demonstrated her ability to care for, clothe, house, feed, correct, and love Matthew since December 1980 and before.

We thus conclude that trial court properly awarded custody of the parties' minor child to petitioner.

III. Child Support. Since we have affirmed custody in petitioner, we must address respondent's assertion that the award of child support is excessive. Trial court ordered respondent to pay $60 per week child support until the minor child is ten years old (two years from now) and $85 per week thereafter. Respondent argues that child support in the amount of $50 per week is equitable considering the parties' present financial circumstances. We do not agree with either trial court's or respondent's position.

We note that petitioner's net income was between $140 and $145 per week and that her monthly expenses, as testified to at trial, were $710. Respondent's net income was between $195 and $205 per week with claimed living expenses of $641 per month. Respondent also was required to pay the parties' debts. In our review of the record, we fail to see the justification for significant portions of

respondent's claimed expenses. We also note that petitioner was awarded no alimony despite respondent's greater earning capacity. We therefore affirm trial court's award of $60 per week child support.

We, however, do not agree with trial court's increase to $85 per week after the child reaches age 10. While this is one way of approaching the problem of inflation, we believe the method established in In re Marriage of Stamp, 300 N.W.2d 275, 277-80 (Iowa 1981), is preferable and appropriate in this case. We modify trial court's decree, deleting the increase to $85 per week when the minor child reaches age 10, and include the following provision:

> On or before each anniversary date of this decree, the parties shall file a stipulation with the clerk of court providing for increased or decreased child support payments based upon the following: Child support payments shall be increased or decreased by the same percentage as the percentage change in the National Consumer Price Index as published by the United States Department of Labor for the most recent twelve month period for which data is available, provided that respondent's gross income for the like period has increased by at least the same percentage. If respondent's gross income increased by a lesser percentage, then the payments to petitioner shall increase by this lesser percentage. In the event respondent claims the benefit of the above limitation, he shall submit sufficient proof of his actual gross salary to petitioner for the relevant years. If the parties are unable to stipulate to the correct adjustment amounts, either may request that the court determine the same, either itself or by appointment of a special master. The cost of such proceedings shall be shared equally by the parties and any adjustment made shall relate retroactively if necessary to the appropriate anniversary date.

IV. Property Division. Respondent also contends that trial court's property division was inequitable. His primary challenge is to trial court's valuation of the trailer home, which the court valued at $30,000. Respondent alleges that this valuation is not justified by the record and is not in accordance with the testimony of either party. He asserts that the actual value of the trailer was $21,500. Based

upon these calculations, respondent argues that the $7,525 award to petitioner should be reduced to approximately $2,000. We disagree. Although there is evidence as to the $21,500 value, both parties' financial statement contains the $30,000 valuation. As a result, we find this valuation to be well within the permissible range of the evidence and, thus, will not disturb it. See Bare, 203 N.W.2d at 554.

V. Attorney Fees. Petitioner requests this court to award her attorney fees as a result of this appeal. Attorney fees are not recoverable as a matter of right, but depend upon the parties' relative financial positions. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). Applying this principle to this case, we conclude that no award is justified. We thus affirm trial court's judgment, except as modified above with regard to child support.

AFFIRMED WITH MODIFICATION.