IN THE COURT OF APPEALS OF IOWA

No. 4-032 / 93-0776

FILED
MAR 24 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHIRLEY LOUISE LUBBOCK AND DAVID L. LUBBOCK

Upon the Petition of
SHIRLEY LOUISE LUBBOCK,

Petitioner-Appellee,

And Concerning
DAVID L. LUBBOCK,

Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Van D. Zimmer, Judge.

The former husband appeals from the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED.**

Brian L. Gruhn and Robert J. Donahue of the Gruhn Law Firm, Cedar Rapids, for appellant.

Linda Robbins of Irvine & Robbins, Cedar Rapids, for appellee.

Considered en banc.

HABHAB, J.

The former husband appeals the child custody and economic provisions of the parties' dissolution decree. We affirm.

Shirley and David Lubbock were married on October 8, 1967. The parties have seven minor children: Stephanie, born March 10, 1976; Justin, born May 5, 1979; Rockford, born March 30, 1981; Ryan, born November 11, 1983; Katherine, born October 16, 1985; Spencer, born July 15, 1988; and Sara, born July 22, 1991. The parties' oldest child, Staci, is emancipated and currently attends the University of Northern Iowa.

David was born on July 8, 1947. He resides in a rural home in Shellsburg. He is employed by Hawkeye International Trucks as a mechanic. His net monthly income is approximately $1,500.

Shirley was born on August 6, 1949. She currently resides in Marion. Since 1989, Shirley has worked as a realtor with a fluctuating income. In 1990, Shirley earned a gross income of $51,000. In 1991, she earned a gross income of approximately $25,000. The district court concluded she had the ability to earn an income which is at least equivalent to David's.

Throughout most of the marriage, the parties' lived in rural Shellsburg. David worked outside of the home in the trucking and farming industries. Until 1989, Shirley took primary responsibility for the children and the home.

Shirley received substantial assistance from the oldest child, Staci.

In March of 1992, Shirley moved out of the family residence. David became the primary custodian of the children with the help of Staci and a baby-sitter, Corrine.

Shirley subsequently filed a petition for dissolution of marriage. In the court's dissolution decree it determined both parents would adequately care for the children and awarded them joint custody. It awarded Shirley primary physical care of Stephanie, Katherine, Spencer and Sara. It awarded David primary physical care of Justin, Rockford and Ryan. It concluded such a split custody arrangement would maximize parental contact while minimizing the necessity for and the expenses associated with child care. The court did not assess child support against either party. It ordered child support to be reassessed after each child is emancipated, turns nineteen, marries or dies.

The court found that neither party should pay alimony. It held each party responsible for their own attorney fees and assessed one-half of the court costs against each party. David appeals.

Our review in this matter is de novo. Iowa R. App. P. 4. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in In re

Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1933), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

David claims the trial court erred by not giving him primary physical care to the parties' three youngest children, Sara, Spencer and Katherine. He claims the trial court did not have a good and compelling reason to justify granting split physical care.

We agree with David that there is a presumption that siblings should not be separated. In re Marriage of Will, 489 N.W.2d 394, 398 (Iowa 1992) (citation omitted).

> We have long recognized that split physical care is generally opposed because it deprives children of the benefit of constant association with one another. The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children. Good and compelling reasons must exist for a departure.

Id. (citation omitted). However, we note that David, on appeal, does not seek primary physical care of Stephanie,

nor does Shirley cross-appeal for primary physical care of Justin, Rockford or Ryan. Therefore, if we follow the requests of the parents, whether we grant David or Shirley physical care of three youngest children, the result will be to separate siblings.

From our de novo review of the record, we determine both parents are equally capable of caring for Sara, Spencer, and Katherine. The district court found both parties are dedicated to their children's welfare and appear to love their children very much. The parties had agreed Stephanie would reside with her mother, because she had stated a preference to do so. The district court found there was a strong bond between Stephanie and the three youngest siblings, and especially between Stephanie and Sara. The court found that either party would have great difficulty caring for all seven children. It recognized that split physical care arrangements were not favored, but found the best interests of the children required it in this case. We affirm the district court's award of primary physical care of Sara, Spencer and Katherine to Shirley.

David next argues the district court erred in finding Shirley's delinquent temporary child support obligation had been satisfied. The district court recognized that Shirley still owed David temporary child support at the time of the dissolution hearing. It therefore offset Shirley's delinquent child support obligation against her interest in the proceeds from the sale of joint marital assets that

David had appropriated for his own use after the parties' separation. The property disposed of by David included a used semi and certain livestock grain trailers. In addition, David was released from his obligation to pay child support for Stephanie[1] during the time Stephanie is finishing her senior year of high school. The final result of the district court's decision was to find Shirley's delinquent temporary child support obligation satisfied. Shirley does not cross-appeal on this issue.

We have compared the amount Shirley owed in delinquent temporary child support, the amount David should pay Shirley under the child support guidelines for permanent child support, and Shirley's interest in the marital assets David disposed of during the parties' separation. We determine Shirley's delinquent temporary child support obligation has been satisfied.

Neither this opinion nor the district court's opinion affects any obligation either parent might have to support Stephanie under Iowa Code section 598.1(6), if Stephanie decides to attend college.

AFFIRMED.

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1. David was awarded three of the parties' children and Shirley was awarded four of the parties' children, so David was obligated to pay child support under the child support guidelines. Stephanie is the parties' oldest minor child.