

FILED

OCT 27 1992

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-354 / 91-1785

IN RE THE MARRIAGE OF NINA MARIE GOMES
AND EDWARD THOMAS GOMES

Upon the Petition of

NINA MARIE GOMES,

Appellant,

And Concerning

EDWARD THOMAS GOMES,

Appellee.

Appeal from the Iowa District Court for Wapello County,
Phillip Collett, Judge.

The wife appeals the provisions of a district court
decree of dissolution. **AFFIRMED.**

Dwight W. James of Dwight W. James & Associates, P.C.,
Des Moines, and CeCelia C. Ibson of Brown, Winick, Graves,
Donnelly, Baskerville & Schoenebaum, Des Moines, for
appellant.

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa,
for appellee.

Heard by Donielson, P.J., Hayden, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

KEEFE, S.J.

Nina and Edward Gomes were married on April 24, 1987. The parties met while attending Maharishi International University. One child was born of the marriage, Tara Marie Gomes, on October 28, 1987. The parties resided in Fairfield during the marriage.

Edward is a successful commodities broker. From 1986 through 1989, Edward earned from \$170,000 to \$400,000 with the International Trading Group (ITG). In 1990, when ITG began experiencing financial and legal difficulties, Edward left the company. ITG later went out of business. Edward began selling futures as an independent contractor. The district court determined his present net monthly income was \$4,500. Edward apparently is in good health.

Nina is a self-employed graphic designer with considerable experience. She testified her earning capacity was about \$30,000 per year but thought she could make considerably more if she relocated to the east coast. Nina also is apparently in good health.

In January 1989 the parties separated. Nina filed a petition for dissolution of marriage. In February 1989, the Department of Human Services (DHS) filed a petition alleging that Tara was a child in need of assistance (CHINA). The petition was based on Nina's accusations that Edward was physically abusive to her. Nina also claimed that Edward had sexually abused Tara, or had at least "groomed" her for sexual abuse by inappropriately touching

her. In particular, Nina claimed she had seen Edward place his tongue in Tara's mouth.

The parties stipulated that Tara was a child in need of assistance. DHS placed Tara with Nina, and Edward was allowed only supervised visitation. Edward was required to attend counseling. Edward was evaluated by a psychiatrist and a psychologist. These examinations showed Edward did not have the personality traits often associated with those who sexually abuse children. Tara was subjected to several physical examinations, none of which revealed any evidence of sexual abuse. After investigation, the DHS did not find that any of the sexual abuse reports were founded.

Edward continued having supervised visitation until January 1991, when a juvenile court reviewing the CHINA proceedings allowed Edward to have unsupervised visitation. Nina appealed. We affirmed the juvenile court judgment allowing unsupervised visitation. In re T.M.G., No. 1-609/91-197 (filed Feb. 25, 1992) (Unpublished). We concluded Edward had adequately shown no harm would come to Tara as a result of unsupervised visitation. Id. We also found that Nina's concern that Tara had been or would be sexually abused by Edward was in no way supported by the evidence. Id.

The dissolution hearing was held over several days in July 1991. Following trial, the district court filed its findings of fact and conclusions of law on August 13, 1991. The court noted that extensive evidence had been

presented concerning the question of whether Edward was a sexual abuser. Much of the evidence was the same as that presented in the juvenile proceedings. The court found that while some of Edward's early conduct with Tara was inappropriate, the problems were due to deficiencies in parenting techniques rather than an attempt to sexualize Tara. The court noted that one and one-half years of supervised visitation and eight months of unsupervised visitation passed without any incidents to support Nina's claims. Unsupervised visitation continues to this date. The court then awarded joint custody of Tara to both parties, with Nina having physical care. Edward was allowed reasonable, and unsupervised, visitation.

The court ordered Edward to pay child support of \$1,026 per month. No alimony was awarded. Nina was awarded a 1985 Jaguar, her jewelry, furs, and a 1990 Jeep Wrangler. Edward was awarded some real estate lots, his jewelry, some investment jewelry, and the 1989 Voyager. Both parties were awarded the bank accounts and household good in their possession.

Nina and Edward both filed motions pursuant to Iowa Rule of Civil Procedure 179(b). Nina alleged the 1990 Jeep was actually owned by her boyfriend, Thomas Rose. No evidence was produced at trial to support this claim. The court noted a rule 179(b) motion was an inappropriate vehicle for reopening the record for additional evidence. The court denied the post-trial motions. A decree of

dissolution reflecting the findings and awards was entered on October 22, 1991. Nina has appealed.

I. SCOPE OF REVIEW

Our review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Id. The district court is in the best position to judge the credibility of witnesses because it is able to listen to them and watch them in person. In re Marriage of Drury, 475 N.W.2d 668, 670 (Iowa App. 1991).

II. CUSTODY

We first note that although Nina has not specifically asked for sole custody, in essence this appears to be what she is seeking. Her position is that Edward should be denied any access to Tara until he admits his prior sexual abuse and obtains in-patient counseling for sexual abusers. Nina asks us to suspend Edward's visitation until such time as it is proven that Tara can be guaranteed a future free from abuse by Edward.

In order to assure a child maximum continuing physical and emotional contact with both parents, joint custody is favored whenever reasonable and in the child's best interests. In re Marriage of Bulanda, 451 N.W.2d 15, 18 (Iowa App. 1989). To deny joint custody requires a finding by clear and convincing evidence that joint custody is not

reasonable and not in the best interest of the child to the extent the legal custodial relationship between the parent and the child should be severed. In re Marriage of Holcomb, 471 N.W.2d 76, 79-80 (Iowa App. 1991).

Nina has already presented her accusations against Edward in the juvenile court and the appeal of that proceeding, as well as before the district court in this dissolution action. In all of these proceedings there has been no finding that Edward has sexually abused Tara or that Edward was "grooming" Tara for sexual abuse. The trial court was in the best position to judge the credibility of witnesses. See In re Marriage of Hanson, 475 N.W.2d 660, 662 (Iowa App. 1991). We conclude Nina has not shown Tara is in any danger of sexual abuse from Edward.

We conclude Nina has not shown by clear and convincing evidence that joint legal custody is not in Tara's best interests. We affirm the district court's award of joint legal custody to the parties.

III. VISITATION

Nina also contends Edward should not be allowed to have unsupervised visitation with Tara. In addition to her allegations concerning sexual abuse, she claims Edward tends to be manipulative and controlling. Nina argues that Edward's lack of sensitivity leads him to inappropriate parenting decisions.

In determining visitation rights the governing consideration is the best interest of the child. In re Marriage of Drury, 475 N.W.2d 668, 670 (Iowa App. 1991). Liberal visitation rights are in the best interest of the child. Id. A child should be assured the opportunity for the maximum continuing physical and emotional contact with both parents. Id. at 671. Unless visitation with the noncustodial parent will in some way injure the child, visitation is not to be prohibited. In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa App. 1991).

We agree with the district court's finding that Edward sometimes used inappropriate parenting techniques in the past. However, Edward has now taken parenting classes. He also received ongoing advice from Jean Behnke, the DHS worker who supervised his visitation for more than one year. During unsupervised visitation Nina made one additional claim of sexual abuse by Edward. This was called to the attention of the trial court, and again was found to be unsubstantiated. We find Edward's parenting skills are now adequate to allow him to have unsupervised visitation with Tara. We affirm the district court's decision to allow Edward unsupervised visitation.

IV. CHILD SUPPORT

Nina contends that in calculating Edward's child support obligation the district court undervalued his income earning potential, which resulted in a reduced award of child support. Prior to 1990 Edward had a higher-

paying job. However, he left that job and is now paid only on commissions. Nina believes Edward's child support obligation should be based on his average income over the last four years.

In applying the child support guidelines, the court must determine the parent's current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parent's income. Id.

In this case, we conclude Edward's decrease in income was not voluntary. Edward presented evidence to show ITG went out of business, which precludes him from returning to his lucrative position there. An involuntary reduction in income results in a decrease in earning capacity. See In re Marriage of Drury, 475 N.W.2d 668, 672 (Iowa App. 1991). We affirm the district court's award of child support.

V. ALIMONY

Nina asks to be awarded a reasonable amount of rehabilitative alimony. She points out that Edward still has a greater earning capacity than she does and that her standard of living has decreased since the parties separated. Nina states her earning capacity would be enhanced if she obtained a graduate degree or additional training.

Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. Id. Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

Nina currently has the ability to earn at least \$30,000 per year. She testified that if she moved to the East Coast she could earn \$100 per hour with her present qualifications. We also note that this was a relatively short-term marriage, lasting slightly less than two years. We affirm the district court's decision to deny Nina's request for rehabilitative alimony.

VI. PROPERTY DISTRIBUTION

Nina challenges the district court's property distribution.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular case. Id.

A. Nina first claims that she received certain jewelry as gifts from her parents or Edward. The district court determined the parties purchased this jewelry as an

investment, and awarded it to Edward. Nina also states that the jewelry and furs which were awarded to her by the district court were actually items which she brought to the marriage, and should have been set aside to her as her separate property.

Nina asks that all the property she brought to the marriage and the gifts she received be set aside to her. Her argument does not take into account that fact that Edward brought substantial assets into the marriage as well. In view of the circumstances here, we believe the district court correctly considered the jewelry and furs as marital assets to be divided between the parties.

B. Nina next claims that the Jeep Wrangler should not have been considered a marital asset because it was actually owned by her boyfriend, Thomas Rose. The Jeep was listed on the parties' stipulation of assets and liabilities. Nina did not present any evidence at trial to show she did not own the Jeep. Nina raised the issue of the ownership of the Jeep in her rule 179(b) motion. Rose filed a supporting affidavit stating he owned the Jeep.

Rule 179(b) is an inappropriate vehicle for reopening the record for additional evidence to correct omissions made in the trial of an issue. In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). We agree with the district court's conclusion that it was unable to consider the new evidence in Rose's supporting affidavit. Based on the evidence presented at the dissolution hearing, we

conclude the district court correctly considered the Jeep a marital asset.

C. Nina also claims that the district court undervalued certain real estate lots awarded to Edward and overvalued the Jaguar she received in the property distribution.

The purpose of determining value is to assist the court in making equitable property awards and allowances. In re Marriage of Dennis, 467 N.W.2d 806, 808 (Iowa App. 1991). Where the value placed on assets by the trial court is well within the permissible range of evidence, we will not disturb the finding on appeal. In re Marriage of Hanson, 475 N.W.2d 660, 662 (Iowa App. 1991). We conclude the values the district court placed on the real estate lots and the Jaguar are well within the permissible range of the evidence, therefore, we will not disturb the district court's findings.

After considering all of the arguments raised by Nina, we affirm the property distribution as set forth by the district court.

VII. ATTORNEY FEES

Finally, Nina asks for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 475 N.W.2d 99, 103 (Iowa App. 1991). We conclude each party has sufficient financial resources to pay his or her own

attorney fees. We order the parties to pay their own attorney fees. Costs of this appeal are assessed to Nina.

AFFIRMED.