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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-377 / 89-1315

291

IN RE THE MARRIAGE OF RENA KRUG AND RAYMOND KRUG

Upon the Petition of

RENA KRUG,

Petitioner-Appellee/Cross-Appellant,

And Concerning

RAYMOND KRUG,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge, and L. Vern Robinson, Judge on remand.

This is an appeal and cross-appeal from a dissolution decree. Both parties sought to modify the child custody and visitation provisions of the decree. Petitioner also sought to modify the awards of attorney fees, alimony, and child support. We remanded the matter to the district court for consideration of unresolved issues which arose after entry of the original decree. We now affirm the district court's ruling on remand. **AFFIRMED.**

Ray Sullins, Des Moines, for appellant.

Kevin Shea, Cedar Rapids, for appellee.

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

DONIELSON, J.

The parties, Rena and Raymond, were married in Iowa in 1978. They had two girls who were born in 1979 and 1985, respectively. Rena petitioned for divorce in February 1988. Trial on the matter was held January 23-27, 1989, and the dissolution decree was filed July 3, 1989. Raymond appealed, Rena cross-appealed, and we remanded the matter to the district court for consideration of certain unresolved issues which had arisen after entry of the original decree.

Raymond was fifty-six at the time of trial, in good health, and employed by the City of Cedar Rapids as a planning administrator. He earned approximately $32,000 annually. Rena was forty-one at the time of trial, in good health, and worked as a child care provider in her home earning $235 per month. Rena came to America in 1958 from Italy. She began seventh grade in Madrid, Iowa, graduated from high school, and received a certificate in floral design from Kirkwood Community College. She worked at various baby-sitting, housekeeping, and sales jobs prior to her marriage to Raymond.

This was the second marriage for Raymond, the first for Rena. Raymond has a child by his first marriage. Raymond's first marriage was dissolved in 1975, with custody of that child being awarded to Raymond's first wife. Allegations were made then, and are being made now, that Raymond has been engaged in homosexual activities.

The district court noted that no proof had been offered to show that such conduct had occurred.

The court indicated Raymond had failed to follow through on a court-ordered psychological evaluation; however, the court had records available which demonstrated Raymond has a history of receiving psychological and psychiatric counseling.

Neither party is contesting the divisions of property or debts. Both parties challenged the court's decision that Raymond pay $650 monthly for child support, $260 monthly for alimony, and $250 monthly toward Rena's attorneys fees which exceed $5,000. Raymond seeks to decrease the payments. Rena seeks to increase them.

The parties' primary dispute on appeal concerns custody of their children. The district court awarded joint custody and awarded primary physical custody to Rena because "[s]he has a long-standing history of being the children's primary caretaker. She has been intimately involved with them since their birth and has provided most of the care that they have needed." The district court also found Rena's involvement in professional baby-sitting, and the confidence of other parents in Rena as a child caretaker, supported the custody arrangement. The court also awarded Rena the marital residence.

The district court found Raymond to be a conscientious and concerned father. The court went on to note, "Even if his current attentiveness is partially the result of the

pendency of the dissolution, it appears that he is working diligently to make a good impression, and in doing so, has behaved admirably toward the children." The district court awarded Raymond extensive visitation: every other week from 6:00 p.m. Wednesday until 6:00 p.m. Sunday, one half of all holidays, and six weeks during each summer.

As noted previously, the decree was filed in July 1989. Raymond filed two motions to enlarge the court's findings, which were both denied. On September 1, 1989, Raymond filed his appeal from the dissolution decree and on September 5, 1989, Rena filed a cross-appeal. On September 8, 1989, Rena filed an application to show cause in the district court, alleging Raymond had failed to pay child support, both temporary and permanent, had failed to pay alimony, and had failed to return the children from a visitation period ending on August 19, 1989. She also sought the suspension of all visitation until hearing on the contempt action.

In support of her motions Rena submitted an affidavit in which she alleged concern for the safety of the children "because of Raymond's violent nature and unpredictability." She further expressed concern because she had heard rumors that Raymond had quit his job and was planning to leave the state with the children. With regard to her fear of Raymond absconding with the children, Rena alleged "[o]n or about August 16, 1989, he did just that." She alleged Raymond was located, with the children, in

Lexington, Kentucky, where he was arrested. Rena alleged Raymond and the children had been staying at a Salvation Army center. Rena further alleged the "Lexington authorities have cautioned [Rena] that they feel Mr. Krug is dangerous and that on his return to Iowa [Rena] should be careful as they are afraid of what he may do." The children were placed in a foster home until Rena could pick them up.

On September 13, 1989, the district court ordered the suspension of further visitation "until such time as a hearing can be held to determine how, if at all, the respondent's visitation shall be afforded to him in the future."

The hearing scheduled for the application to show cause was continued until January (to allow appointment of counsel for Raymond), and on January 4, 1990, the district court indicated Raymond had pled guilty to, and was awaiting sentencing for, the offense of Violation of a Custodial Order, a class D felony. The district court found Raymond in contempt of the support orders of the dissolution decree and ordered Raymond to be jailed for thirty days unless Raymond purged the contempt by payment of $3,000 toward his arrearage in support.

No further order relating to visitation appeared in the record, leaving this court unsure as to the status of Raymond's visitation rights.

Therefore, on October 24, 1990, we remanded this matter to the district court for consideration of certain unresolved issues. We did so in light of Raymond's actions subsequent to the filing of the dissolution decree, the seriousness of allegations of violence and of concern for the safety of the children, and the silence of the record relating to the present status of visitation rights and Raymond's employment. We retained jurisdiction pending resolution of this matter in the district court.

We did not address Rena's requests for additional attorney fees and increased alimony and child support. We taxed the costs of the appellate proceedings to appellant, Raymond Krug.

On remand, evidence was presented to the district court on June 6, 1991, and the court filed its ruling on June 14, 1991. The court found that Raymond, now fifty-eight years old, rents a house in Cedar Rapids. The house has been converted to apartments, and he rents out two of the units. He has only received a nominal sum in rent from these boarders. At the time of the original trial, Raymond was employed by the city of Cedar Rapids earning approximately $32,000 per year. In May, 1989, before the decree of dissolution was entered, he retired from that employment, and his pension only pays him $619 per month. This is subject to income tax. He has had a number of short-lived, part-time jobs since his retirement, but his income derived from these jobs has been $20 to $40 per

week. Despite Raymond's claim that he is unable to work at regular employment due to nerve problems, the court found he is simply not interested in seeking fulltime employment.

Approximately one and a half months after the original dissolution decree was entered, Raymond violated the district court's custody order and removed the two minor children to the state of Kentucky. He subsequently pled guilty to a criminal offense and remains on probation for that crime. Despite his assertions that he would have returned the children to the state of Iowa, the court found no credibility in Raymond's testimony on this matter. The children had been enrolled in the Kentucky school system, and it was clear that he was defying the custody order.

Rena is now forty-four years old. She also lives in Cedar Rapids. Her parents have purchased a mobile home for her, and she pays the lot rent, insurance, and taxes. Rena's present source of income is ADC.

The two children, now eleven and five years old, reside with Rena. The court found that both children were extremely intelligent and were doing well socially and academically. Rita, in chambers, told the court she did not want to see her father and she was fearful that he might kidnap her again.

The district court further found that neither party had any property. After the original property division, all real estate holdings had been foreclosed. The parties have an acrimonious relationship. Each has made statements to,

or in the presence of, the children belittling the other parent. Finally, the district court stated that it was extremely concerned about Raymond's criminal charge.

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 witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). We affirm the district court's ruling on remand.

I. **Custody.** 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) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and 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).

The district court changed the joint custody ruling of the original decree and ordered sole custody be placed with Rena, subject to limited visitation by Raymond. The court determined that it had been proven by clear and convincing evidence that joint custody is inappropriate under the circumstances, and that Raymond is not a suitable custodian. Rena has, alone, actively cared for the children for the last several years.

The court considered Raymond's voluntary retirement, his willful violation of the custody order, the fact that he has had little contact with the children for the past two years, the desire of the children to have no contact with Raymond, his insistence that he will not abide by certain visitation provisions, and the fact that he is behind, possibly as much as $20,000, in his support obligations.

The district court changed the visitation provisions of the original decree to provide for supervised visitation. The court stated that only after Raymond has satisfactorily re-established a relationship with the children and has demonstrated to the court that he will not violate court orders, will visitation be liberalized.

The court found that the children's physical, psychological, and emotional safety and well-being would suffer if they had more contact with Raymond than

supervised visitation. The court found that the parties are unable to communicate with each other concerning the children's needs. Neither parent can support the other's relationship with the children. We find the district court's award of custody and visitation is appropriate.

II. **Child Support and Alimony.** It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to consider are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4).

When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981).

The district court in the original decree ordered Raymond to pay $650 per month as child support and $250 per month as alimony. On remand, the district court changed the alimony and child support provisions of the decree finding Raymond's present income insufficient to justify the amounts of support originally ordered.

The court considered the fact that Raymond had voluntarily reduced his income and found that Raymond should be able to work half- to three quarters-time at minimum wage. The court found the uncertainty of Raymond's income made application of the child support guidelines impracticable. The guidelines were also found to be unworkable because the court was unaware of the amount of alimony payments Raymond is required to make to his first wife, and Raymond is not currently providing medical insurance for the children.

The district court ordered Raymond to pay $350 per month as child support. When there is only one child eligible for support, the amount is to be reduced to $250 per month. The court also ordered Raymond to pay $50 per month to Rena as alimony. We find the alimony and child support awards to be appropriate.

III. **Attorney Fees.** Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of

attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). The original trial court's order that Raymond pay $250 per month toward Rena's trial attorney fees is reasonable. We find no abuse of discretion.

The costs of this appeal are taxed to appellant, Raymond Krug.

The district court's ruling on remand is affirmed. The district court's original dissolution decree is affirmed as changed by the district court on remand.

AFFIRMED.