FILED
JAN 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF KATHY LYNN MORTON AND CALVIN LLOYD MORTON

Upon the Petition of	)	102
KATHY LYNN MORTON,	)	Filed January 28, 1987
Petitioner-Appellant,	)	
And Concerning	)	
CALVIN LLOYD MORTON,	)	6-446 86-382
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County (CD 48-28479) Rodney J Ryan, Judge.

Petitioner appeals from the judgment and decree dissolving the parties' marriage and from the amended decree. **AFFIRMED AS MODIFIED.**

Daniel Jacobi of Rosenberg, Rosenberg & Reade, Des Moines, Iowa, for petitioner-appellant.

Richard D. Hermann of Dick Hermann Law Office, Ankeny, Iowa, for respondent-appellee.

Heard by Donielson, P.J., Snell, and Hayden, JJ.

Petitioner, Kathy Morton, and respondent, Calvin Morton, were married in 1975. At the time of the marriage, Kathy had a daughter, Jamie Lynn, by a prior marriage, who Calvin subsequently adopted. A second child, Sara, was born to the parties in 1976.

Kathy, who filed a dissolution petition in December 1984, is employed part-time as a secretary. She works thirty hours a week at a wage of $6.00 an hour. She has a high school education. Calvin, who is a commercial artist, received a Bachelor of Arts degree in Fine Arts from Drake University in 1975. He is employed at Garner Publishing where he works 36.3 hours a week at a wage of $14.79 an hour. Calvin often works overtime for which he is compensated from 1-1/2 to 2 times his normal hourly rate. Calvin's gross monthly income is around $2,300 while Kathy's is approximately $600. At trial in May of 1985, Kathy was 34 years old, Calvin was 32, Jamie was 12, and Sara was 9.

Prior to trial the parties agreed on a joint custody arrangement which gave Kathy physical custody of the children, subject to Calvin's visitation rights. At trial Kathy's attorney objected when Calvin's attorney asked Kathy if she was cohabiting with anyone. The objection was overruled. The trial court then advised the parties that it would not approve of a joint custody arrangement if either party was cohabiting with someone without the benefit of marriage.

The evidence at trial revealed that during the course of the marriage Kathy received inheritances totaling about $15,000. She used part of this money to purchase a new car for herself and used the remainder to pay family expenses, to fix up the parties' home, and to buy certificates of deposit for the children. Throughout the parties' marriage Calvin earned the majority of the family income while Kathy was the primary caretaker of the children.

The trial court divided the marital property such that each party received a net amount of $13,535. Regarding the parties' custody agreement, the court stated: "Under such agreement, the parties should not cohabit with partners of the opposite sex; and future evidence of same, even for one night, shall be cause for the court to review the custodial arrangement herein." The court ordered Calvin to pay weekly child support of $130 for the two children. It also provided that Calvin's weekly child support obligation would be reduced to $80 when Jamie attained age 18 or graduated from high school, whichever occurred later, and that his child support obligation would end when Sara reached a similar status. In addition, the court ordered Calvin to pay an additional $250 to Kathy for her attorney fees at trial. It awarded the parties' residence to Kathy, subject to a lien in Calvin's favor.

On September 16, 1985, Kathy filed a motion to enlarge and amend findings and conclusions pursuant to Iowa Rule of Civil Procedure 179(b). In an amended decree filed February 19, 1986, the trial court ruled that Calvin should provide the children with health and dental insurance and pay 75 percent of the doctor bills not covered by insurance. The court also ruled that Calvin was to keep his present life insurance in force, with the children named as beneficiaries, as long as he was obligated to make child support payments. Regarding the parties' custody agreement, the court modified the provision in the original decree by entering the following:

> In the event the petitioner should cohabit with an unrelated adult male, then this court will entertain application to review the custody of the children, with the respondent being required to show a material change in circumstances. Cohabitation shall be deemed to be the staying overnight of an unrelated adult male in the home of the petitioner while the children are present, or in the event the children have knowledge of such. Staying overnight shall be strictly construed upon evidence of presence during nighttime hours without legitimate purpose.

Petitioner contends the trial court erred in: (1) making her right to physical care of the children conditional; (2) the amount of child support awarded; (3) the property division; and (4) not awarding her alimony. Petitioner requests respondent be ordered to pay an additional $699.75 for her attorney fees at trial and all of her attorney fees on appeal. Respondent requests petitioner be ordered to pay his attorney fees on appeal.

Since dissolution actions are equitable proceedings, our review is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). As with all dissolution cases, precedent is of little value, and therefore our decision must ultimately depend on the particular facts relevant to each issue. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984).

I.

Petitioner argues the trial court erred in incorporating in the dissolution decree the provision making her right to custody conditional. We agree.

Moral misconduct is an element of the following factors from In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974):

> 2. The emotional, social, moral, material, and educational needs of the child.
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> * * *
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> 4. The capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children.
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> * * *
>
> 8. The nature of each proposed environment, including its stability and wholesomeness.

[emphasis added.] Parents' moral misconduct, having overnight guests, is a factor to be accorded weight in a child custody determination. In re Marriage

of Welbes, 327 N.W.2d 756, 758 (Iowa 1982). Moral misconduct has been weighed most heavily only in those cases where the misconduct occurred in the presence of the children. In re Marriage of Stom, 226 N.W.2d 797, 799 (Iowa 1975); In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983). See also In re Marriage of Hubbard, 315 N.W.2d 75, 81 (Iowa 1982), and Hagen v. Hagen, 226 N.W.2d 13, 16 (Iowa 1975).

Prior to trial the parties agreed to joint custody with petitioner having physical custody of the children. Allegations regarding petitioner's supposed cohabitation were brought out during respondent's examination of petitioner regarding her finances. Beyond mere inference and allegations, no record regarding the alleged cohabitation was presented to the court. We recognize the fact that moral misconduct is a factor to consider when determining child custody. In the present case the issue of custody was not before the court, but beyond this failure no record was created on which any finding of moral misconduct could be made. We also reassert the right of either party to bring an action to modify the trial court's determination. The trial court's order is modified to strike any provision conditioning the parties' custodial arrangement and respondent's lien on the family residence on either parties' participation in a cohabitational relationship.

II.

Petitioner next asserts the trial court erred in its rulings as to the financial aspects of the dissolution, including division of property, child support, and alimony. We disagree.

Initially, we consider the property division. Generally, petitioner contends the trial court's division was inequitable. Specifically, he contends the court erred in: (1) not properly considering the parties' disparate earning capacities;

(2) failing to set aside certain property inherited by petitioner; and (3) allowing respondent to maintain a lien on the family residence.

A justified property division is one that is equitable under all the circumstances presented. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976). There is no mechanical rule which dictates an equal division. In re Marriage of Stewart, 356 N.W.2d 611, 612 (Iowa Ct. App. 1984). We have reviewed the parties' contentions and the trial court's order and find the distribution an equitable one. In support of the trial court's decision, we note the requirement to set aside the property which has been inherited is not absolute; division may occur to avoid injustice. Iowa Code § 598.21(2); In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982). We also affirm the trial court's decision to attach a $7,145 lien in favor of respondent to the marital residence.

The criteria to be considered in awarding alimony have been codified in Iowa Code section 598.21(3) (1985). While payment of alimony is not an absolute right, it is awarded out of fairness, according to the peculiar circumstances of each case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Alimony is awarded based on the earning capacity of the parties and present standards of living balanced against the relative needs of the parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981). The spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible. In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). Two of the factors to be given great weight in such a determination are the duration of the marriage and the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In addition, where a spouse has sacrificed her earning ability in order to make a home for the family and the other spouse has profited thereby, alimony

is justified. In re Marriage of Sanders, 255 N.W.2d 109, 111 (Iowa 1977). However, once the dependent spouse's standard of living is assured there is no reason, in equity for the supporting spouse to provide still more.

Petitioner contends the court erred in not awarding her alimony. She has worked part-time throughout the marriage. Although she does not possess a higher education, it is apparent from the record petitioner has marketable skills. Upon considering her skills and her current employment, the trial court was correct in denying petitioner alimony.

In determining the proper level of child support, we consider the parties' age, present earning capacity, future prospects, amount of resources owned by each or both parties, contribution of each to the joint accumulations, the children, duration of the marriage, indebtedness of each or both, and any other relevant factors. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa Ct. App. 1984) (citing Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976)). Both parties were employed at the time of dissolution. Petitioner received the family residence and the children, because of her lower earning capacity, she requires child support to maintain a reasonable standard of living. The trial court ordered respondent to pay approximately $520 child support per month or $130 per week. Although petitioner requests a $45 per week increase in support, we conclude the trial court's award of $130 was equitable. We also consider the trial court's award regarding health benefits and life insurance to be reasonable, and therefore affirm.

III.

Finally, petitioner asserts she should have been awarded all attorney fees at trial and should now be given all attorney fees on appeal. We again disagree.

Trial courts have considerable discretion in granting attorneys' fees in dissolution cases. In re Marriage of Lochmiller, 229 N.W.2d 228, 229 (Iowa

1975). The allowance of attorneys' fees incurred on appeal is generally based upon the parties' respective financial resources. In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984). We also consider whether the party making the request for fees was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981).

In the present case, regarding the fees awarded at trial, we defer to the trial court's discretion and affirm. On appeal we look to the outcome of the appeal and conclude that the parties shall be responsible for their own fees on appeal.

AFFIRMED AS MODIFIED.