IN THE COURT OF APPEALS OF IOWA

No. 0-666 / 90-626

IN RE THE MARRIAGE OF DONNA L. JENS AND JOHN M. JENS

Upon the Petition of

DONNA L. JENS,

Petitioner-Appellant/Cross-Appellee,

And Concerning

JOHN M. JENS,

Respondent-Appellee/Cross-Appellant.

FILED
DEC 27 1990
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mills County, Glen M. McGee, Judge.

Donna appeals the custody, visitation, and division of property provisions of the decree of dissolution entered for the parties in district court. John cross-appeals for attorney fees. **AFFIRMED AS MODIFIED.**

Jon H. Johnson of Johnson & Graeser, P.C., Sidney, for appellant.

Bruce D. Fleming of Pogge, Root, Fleming & Tinley, Council Bluffs, for appellee.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Donna Jens and John Jens were married in September 1977. They had three children during the marriage: Michelle, born in July 1979; Brian, born in December 1981; and Kristina, born in October 1986. Donna and John lived on a farm near Glenwood, Iowa, during their marriage.

At the time of the dissolution, Donna was 32 years old and John was 39 years old. Donna did not work outside the home until after the parties separated in the summer of 1989, she now works as a dental assistant in Glenwood. John has farmed since he received a degree in agriculture from Iowa State University in 1972.

The decree of dissolution entered by the district court, awarded the parties joint legal custody of the children and placed primary physical care with John. The court pointed out that the children wanted to stay with John and they were accustomed to farm life. Donna was awarded $113,233 in the property division. Donna appeals and John cross-appeals.

Donna contends the court should have placed physical care of the children with her because she can better care for their needs and John is overprotective. Donna points out that once she receives the property settlement she can provide better housing for the children than she could prior to the settlement. In the alternative, Donna requests increased visitation.

Donna also contends the court erred in not considering $65,000 worth of stored grain in its calculation of the marital assets. Donna seeks one-half the value of the grain.

In his cross-appeal, John requests attorney fees for this appeal.

We review this equity case de novo. Iowa R. App. P. 4. 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). Prior cases carry little precedential value, and we base our decision primarily on the particular circumstances of the parties before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interests of the children are our first and governing consideration. Iowa Code section 598.41(3) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974) enumerate the factors to consider in awarding custody. 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 children. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of children 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).

After evaluating the record we see no reason to disturb the trial court's decision to place the physical custody of all three children with John. The trial court had the benefit of evaluating the demeanor of witnesses and our review of the record leads us to believe both John and Donna are capable of properly caring for the children.

We do find the visitation schedule provided by the trial court overly limited. The best interests of the children include liberal visitation with Donna. In re Marriage of Athy, 428 N.W.2d 310, 313 (Iowa App. 1988)(citations omitted). We do not favor over night visitation during the week due to the potential disruption to the children's schedule with respect to school. Therefore, we will not disturb the trial court's visitation order regarding one weekday evening visitation during alternate weeks but we do note that as the children become older, the 7:30 p.m. deadline should be extended to a later time appropriate to the children's age. We do favor extended periods of visitation with a noncustodial parent during the summer months, therefore, we expand the district court's visitation order to include six consecutive weeks every summer with Donna. Otherwise, we affirm the visitation orders of the district court in its March 20, 1990 ruling.

Partners in a marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The financial affidavit filed by Donna showed $65,000 worth of stored grain as a marital asset. John never presented evidence rebutting this assertion. Consequently, we order John to pay Donna half of the value of the stored grain, $32,500 in addition to the trial court's property division orders. We affirm the balance of the property division ordered by the district court.

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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). After considering the financial position of both parties we order each party to pay their own attorney fees and half of the costs of this appeal.

AFFIRMED AS MODIFIED.