IN THE COURT OF APPEALS OF IOWA

No. 0-008 / 98-2113
Filed April 28, 2000

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF CRAIG GRAZIANO AND DIANE S. WEISSMAN

Upon the Petition of
CRAIG GRAZIANO,
Petitioner-Appellee/Cross-Appellant,

And Concerning
DIANE S. WEISSMAN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, J.W. Jordan, Judge.

The respondent appeals and petitioner cross-appeals from various child custody provisions of the parties' dissolution decree. Respondent contends the district court erred in awarding physical care of their minor children to respondent. On cross-appeal, petitioner asserts: (1) summer visitation should be modified to reduce the amount of strife between the parties; and (2) the district court's order awarding respondent a lien interest in the family home should be modified to substitute a market interest rate. **AFFIRMED AS MODIFIED.**

Jerry W. Foxhoven, Des Moines, for appellant.

Susan L. Ekstrom of Ekstrom & Burkey, Des Moines, for appellee.

Heard by Streit, P.J., and Miller, J. and Schlegel, S.J.,* but decided by Streit, P.J., Miller and Vaitheswaran, JJ.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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MILLER, J.

Respondent/Appellant Diane Wiessman[1] appeals the district court's award of physical care of the parties' adopted children to Petitioner/Cross-Appellant Craig Graziano. Craig contends on cross-appeal the summer visitation awarded Diane should be modified and the trial court erred in imposing an above market interest rate on the equity awarded Diane in the home, in the nature of a lien. We affirm on appeal, and affirm as modified on cross-appeal.

Background Facts and Proceedings

Craig and Diane were married on November 17, 1987, in Los Alamos, New Mexico. Two years later, they adopted two children, Patricia, born May 14, 1984, and Benjamin, born July 28, 1988. The children are biological siblings, from the Amazon rain forest area of Peru.

Craig filed this petition for dissolution in April 1996. A July 1996 temporary order granted the parties joint legal custody with physical care in Diane. Trial was held in January 1997. On February 3, the trial court filed written findings of fact in the form of an "Order for Decree." It dealt primarily with issues related to the children such as custody, physical care, visitation, and child support. It directed preparation of a formal decree which was filed February 25, 1997, and granted Craig and Diane joint legal custody, with physical care in Craig. Diane appealed. The supreme court dismissed the appeal as premature, on the ground the decree was not a final decree, and remanded to the district court for final disposition. *In re Marriage of Graziano*, 573 N.W.2d 598, 600 (Iowa 1997).

On September 25, 1998, Diane filed a motion requesting the record be re-opened to allow testimony of the children. The district court entered a "Final Decree" on October 18, 1998. That decree referred to the "Order for Decree" relating to the custody and physical care of the children entered February 3, 1997, reaffirmed the "Decree" which had been entered February 25, 1997, and overruled Diane's motion to reopen the record. The Final Decree also awarded Diane a judgment of $22,500 as her share of the equity in the family home, to be paid by Craig within ninety days after which interest would accrue at ten percent per year. Diane then moved the court for a partial new trial, and Craig filed a Rule 179(b) motion asking the trial court to make Diane's judgment a lien, payable upon occurrence of certain events. The trial court overruled Diane's motion for partial new trial, and modified its final decree to specifically award the parties' home to Craig and make Diane's equity interest a lien, payable upon occurrence of certain events. It reaffirmed the interest rate of ten percent per year. Diane appeals, and Craig cross-appeals.

Scope of Review

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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).

[1] We note throughout most of her brief, Patricia refers to the parties as "Appellant" and "Appellee." We prefer, as noted in the Rule of Appellate Procedure 14(d), that litigants minimize references to the parties as appellant and appellee.

Matters Not Properly Before This Court

Before addressing the merits, we note Diane repeatedly includes in her brief contents of materials that were not before the trial court when it made the decision and judgment from which she appeals, namely, affidavits she submitted in support of her post-trial, post-judgment motion for partial new trial. She relies heavily on the contents of those affidavits in arguing the trial court erred in placing physical care of the parties' children with Craig. Her motion for partial new trial was overruled by the trial court, and on appeal she makes no claim the trial court erred in overruling that motion. Although our review is de novo, it must be of the record as it was presented to the trial court. *Albright v. Moeckley*, 209 Iowa 1304, 1307, 230 N.W. 351, 352 (1930). Because the record presented to the trial court for deciding the issues now presented on appeal does not include those affidavits, we refuse to consider them. *Cf. Matter of Estate of Kelly*, 558 N.W.2d 719, 722 n.3 (Iowa App. 1996) (refusing to consider affidavits that were created after the fact and were not part of the record). We admonish counsel to refrain from including in appellate briefs matters that were not before the trial court in making the decision and judgment from which appeal is taken. *Cf. In re Marriage of Keith*, 513 N.W.2d 769, 771 (Iowa App. 1994) (admonishing appellate counsel to refrain from referring to matters not part of the record).

Child Custody

When reviewing child custody matters, we have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa 1998). The controlling consideration is the best interest of the children. *Id.*; Iowa R. App. P. 14(f)(15).

Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility, but we are not bound by them. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); Iowa R. App. P. 14(f)(7).

Patricia and Benjamin's best interests are paramount in this decision, and the court's objective is to place them "in the environment most likely to bring [them] to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining the best interests of the children is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996). Although certainly not controlling, careful consideration is given in custody disputes to allowing the children to remain with the parent who has been the primary caregiver prior to the dissolution proceedings. *In re Marriage of Roberts,* 545 N.W.2d 340, 343 (Iowa App. 1996); *In re Marriage of Burkel*, 525 N.W.2d 439, 441-42 (Iowa App. 1994). However, which party is awarded custody on a temporary basis is not a factor that the district court is to consider in determining the final custody arrangement. *In re Marriage of Denly*, 590 N.W.2d 48, 52 (Iowa 1999); Iowa Code § 598.41.

We identify numerous factors to help determine which parent should serve as the long-term primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted); *see* Iowa Code § 598.41 (1999). We give some factors greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case.

See Daniels, 568 N.W.2d at 54; *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). 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).

Diane complains that the trial court did not base its custodial decision on the principles enunciated above; rather, it was "really based upon the Trial Court's offense by the appellant's purchase of a dog for the children which the trial court believed was done for the purpose of manipulation of the Court's decision." It appears two weeks before the January 1997 trial, Diane bought a new dog for Benjamin. The trial court noted it was troubled because

> of the Respondent's possible motivation. Benjamin had lived with her in her home for several months. It is in the dead of an Iowa winter which seems a difficult time [to] house train a new puppy and knowing this hearing was scheduled within two weeks. That matter together with Diane's testimony that Benjamin loves this dog and it would be difficult for him [to] leave the dog smacks of manipulation.

We do not believe the trial court gave undue consideration to this incident. It instead appears the trial court noted this incident not as manipulation of the court, but instead an attempt by Diane to manipulate her child's feelings on the issue of physical care.

We have reviewed the facts and the trial court's findings. The trial court aptly found both parties care very deeply about the children, want what is best for them, can arrange their work schedules to accommodate the children's activities and visitation schedules, have supportive friends and/or family in the community, and that either party could serve as an effective custodial parent for the children. The record shows since the parties have had the children both have worked full

time at all or most times, in the early years both were involved in the children's care but Diane was more involved than Craig, and that since about mid-1994 both have been involved in their care but Craig has been substantially more involved than Diane (except for the period of several months the children's physical care was with Diane under the trial court's order on temporary matters).

Diane has in recent years directed foul language and personal criticism at Craig in the presence of the children and at family functions. She has been heavily involved in Bosnian refugee relief efforts starting in mid-1994, and in addition owned and operated a Bosnian food store during 1995 and part of 1996. These activities have occupied a large amount of her evening and weekend time, as she has also had a regular, full-time job. They have left her with only very limited time for home and family. They have caused the parties' children to think, and express the view, that she prefers these activities and other people to them.

Craig has for the last several years taken on the role of the children's primary caretaker, has done so willingly and with at least some degree of enthusiasm, and wishes to continue doing so. He has during recent years been the party who has more readily recognized the children's needs and taken steps to meet those various needs.

As noted by the trial court, "the issue of primary physical care is a very close issue in this case," and "both of these parents care for the children and both want to be the custodial parent for them." On our de novo review of the proper record on appeal, and giving deference to the trial court who listened to all the testimony and viewed the parties, we believe the trial court was correct. We

affirm the trial court's decision to place responsibility for the children's physical care with Craig.

Cross-Appeal

Summer Visitation Schedule

Craig complains on cross-appeal that the summer visitation schedule is contrary to the children's best interests, specifically, Craig contends that the summer visitation schedule does not provide "maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a). We keep in mind that "liberal visitation is the benchmark, [and] our governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation." *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994).

The decree entered in 1997 upon agreement of the parties provided visitation to Diane as follows:

> every Tuesday from 5:00 P.M. to 8:30 P.M., every other week beginning Thursday at 5:00 P.M. and ending Sunday at 6:30 P.M., holidays by agreement, the Petitioner to have three days of visitation with the Christmas holiday and the Respondent to have three days visitation over the Passover holiday. Summer visitation shall be agreed to by the parties and shall be four (4) weeks.

Although this visitation schedule was agreed to by the parties, it became apparent each parent had a different interpretation of the summer visitation schedule in relation to the weekend visitation. Craig understood the alternating weekends provided for in the decree would continue throughout the year, while Diane claimed four uninterrupted weeks of visitation during the summer.

The trial court modified its summer visitation order in July 1998, to break the four week period of summer visitation into two two-week visitation periods, and provide that neither party shall have more than two successive weekends with the children. However, the word "week" that caused confusion in the first decree was replaced with "14-day periods," thus meaning that there would be no weekend visitation with Craig while the children are on summer visitation with Diane.

Craig does not argue why this visitation schedule is contrary to the best interest of the parties' children specifically, but rather argues that "'uninterrupted' time is antithetical to the statutory preference" of maximum continuing physical and emotional contact with both parents. The Iowa appellate courts have not, however, found such an arrangement contrary to the statutory mandate. *See In re Marriage of Guslvig,* 498 N.W.2d 725, 727 (Iowa 1993) (modifying trial court decree to include four weeks of summer visitation to the non-custodial parent, with no summer visitation period to exceed two weeks at one time); *In re Marriage of Brainard*, 523 N.W.2d at 616 ("limiting summer visitation to four weeks, to be exercised in intervals of two weeks."); *In re Marriage of Dierling*, 421 N.W.2d 168, 171 (Iowa App. 1988) (holding six-week continuous summer visitation with non-custodial parent "maximizes the opportunity for the children and [the non-custodial parent] to develop a close relationship.").

Craig has not demonstrated how the current summer visitation schedule is not in the best interests of the children other than to say fourteen days is too long to foster "maximum continuing physical and emotional contact with both parents." He has not directed our attention to any special circumstances which indicate the

trial court's decree is inequitable or improper regarding summer visitation. We therefore affirm this portion of the trial court's decree.

Interest on Diane's Lien Interest in the Family Home

Craig also contends on cross-appeal that the ten-percent rate the trial court placed on the lien that represents Diane's equity interest in the home should be modified by substituting a market interest rate because "ten per cent is an above-market interest rate designed to encourage prompt payment in a delinquency context." Craig suggests a more equitable rate would be seven percent. We keep in mind that Iowa courts do not require an equal division or percentage distribution of property from a marriage. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Our review is de novo. Iowa R. App. P. 4.

The trial court modified its original grant of a money judgment in favor of Diane, to provide it would be a lien on the family home payable in full upon sale of the home, Craig's re-marriage, or the later of Benjamin's graduation from high school or attainment of majority. The trial court further reaffirmed the lien would carry interest of ten percent per year but provided Craig could apply any accumulated interest against any unpaid child support payable by Diane. Craig had requested the modification so the home and its equity would be available to the children during their minority and Diane's equity would provide security for her payment of child support.

Diane suggests the rate of interest applicable to this case, filed in 1996, is set by Section 535.3 of the 1995 Code of Iowa at ten percent. However, statutory provisions relating to interest on judgments are remedial and those in

effect at the time a judgment is entered generally apply, absent legislative intent to the contrary. *See Janda v. Iowa Industrial Hydraulics, Inc.*, 326 N.W.2d 339, 344-45 (Iowa 1982). On the date of judgment in this case, statutory provisions set the interest rate on judgments at a rate based on the coupon issue yield equivalent of certain United States treasury bills. Iowa Code §§ 535.3(1), 668.13(3) (1997). On the date of judgment, October 18, 1998, the statutory rate was 6.242%. *See* Iowa Code § 668.13(3), and State Court Administrator's October 16, 1998, "Monthly Notice of Treasury Bill Rate for Calculation of Interest on Certain Judgments."

This court has had previous occasion to say

> Iowa Code section 598.21(1) mandates that the district court shall equitably divide all property between the parties. Pursuant to that objective, we have permitted awards which do not bear interest. (citations omitted). Similarly, we believe that courts may award interest on property distribution awards less than that called for in Iowa Code section 535.3 if equity so dictates.

In re Marriage of Pertzsch, 451 N.W.2d 22, 24 (Iowa App. 1989). We believe that courts may also award interest on property distribution awards more than that called for in Iowa Code section 535.3 if equity so dictates.

Craig suggest a more equitable interest rate "would be a 'market rate,' such as seven per cent." The record does not establish what any "market rate" was at the time of judgment. However, the trial court gave no reason for setting the interest rate at almost four percent higher than the rate statutory provisions then applied to most judgments, and nothing in the record shows that equity dictates Diane's judgment should draw interest at that much higher rate. We

modify the trial court's judgment to set the interest rate on Diane's property distribution judgment at seven percent per year.

AFFIRMED AS MODIFIED.