IN THE COURT OF APPEALS OF IOWA

No. 3-047 / 92-1012

IN RE THE MARRIAGE OF DENISE MITCHELL AND TYLER MITCHELL

FILED
MAR 30 1993
CLERK SUPREME COURT

Upon the Petition of

DENISE MITCHELL,

Appellee,

And Concerning

TYLER MITCHELL,

Appellant.

Appeal from the Iowa District Court for Marion County, Richard D. Morr, Judge.

Tyler appeals from the economic and child support provisions of the parties' dissolution decree. **AFFIRMED.**

Bert A. Bandstra and Henry Kleifgen, Knoxville, for appellant.

Timothy McCarthy II of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellee.

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

180

OXBERGER, C.J.

Tyler and Denise Mitchell were married on May 16, 1969. They have three children: Joshua, born July 28, 1976; Tyler, Jr., born April 9, 1984; and Ryan, born June 19, 1986. On May 22, 1992, the district court dissolved the parties' marriage and awarded primary physical care of the children to Denise. The court set Tyler's child support obligation at $509 per month.

In dividing the parties' debts and property, the court determined the parties had acquired total assets valued at $38,250 and debts totaling $20,060. The court made Denise responsible for $13,990 of the parties' debts and Tyler responsible for $4200. Their home, which had a net equity of $32,000, was awarded to Denise. Finding that Denise had inherited $14,000 from her grandmother which was used as a down payment on the house, the court set this amount aside for her. To even the property distribution, the court ordered Denise to pay Tyler $6330.

One principle point of contention between the parties is the relationship Denise has had with Sam Bloom. The evidence reveals that Bloom is physically abusive and has a substance abuse problem. The district court noted Denise's continued relationship with Bloom would result in grounds for modification of custody. Denise testified she would not have continued contact with Bloom if she were given custody of the children.

After the court entered its findings, Tyler attempted to introduce evidence in support of a motion filed under Iowa Rule of Civil Procedure 179(b). Tyler wanted to show Denise had been living with Bloom and the two were subsequently married. Tyler contended this justified a change of physical custody. The district court denied the motion. Tyler appeals.

Scope of Review

Our review in cases such as these is 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. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

I. Child Custody

The key concern on appeal is the physical custody of the parties' three minor children. Tyler contends Denise's relationship with Sam Bloom is detrimental to the safety and well-being of the children. He contends Denise has not discontinued her relationship with Bloom. He stated he was prepared to present evidence of such at a hearing on his

182

Iowa Rule of Civil Procedure 179(b) motion but the hearing was canceled by the district court.

For the purposes of this appeal, we will assume, arguendo, Denise has continued contact with Sam Bloom. In so doing, we are not commenting on the accuracy of Tyler's statements nor on Denise's credibility regarding her statement she would discontinue her relationship with Bloom. We acknowledge the district court's statement that should Denise continue her relationship with Bloom, it would consider this grounds for modification of custody. However, we review this case de novo.

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), in In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983), and in 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). In addition, we consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1) (1991).

The record indicates Denise provided for most of the children's needs throughout the parties' marriage. She consumed drugs and alcohol excessively for a period of time prior to the dissolution, but indicates she has been chemical-free since the fall of 1991. Denise also provided for most of her family's economic needs throughout the marriage. She has encouraged the children's contact with Tyler.

Tyler was not employed during the early part of the couple's marriage. Evidence indicated he physically abused Denise and has been arrested for domestic abuse. In addition, Tyler discouraged the children's contact with Denise.

Based on this evidence, we conclude the district court was correct in awarding the physical care of the parties' minor children to Denise. We share the district court's concern regarding the influence Sam Bloom may have on the children. We encourage Denise to place the children's best interest always in the forefront in order to insure their optimal growth and development.

II. Property Distribution

Tyler next contends the district court erred in crediting Denise with $14,000 she inherited from her grandmother. He claims the money was used to purchase property now held in joint tenancy and, according to In re Marriage of Havran, 406 N.W.2d 450 (Iowa App. 1987), should be equally divided between the parties.

We recently overruled Havran to the extent it considered joint ownership controlling in dividing inherited property. In re Marriage of Wertz, 492 N.W.2d 711, 714 (Iowa App. 1992). The new rule is when either party inherits property or receives gifts prior to or during the marriage, the controlling factors in determining whether the property constitutes marital property for purposes of dividing the property at dissolution include: (1) the intent of the donor and (2) the circumstances surrounding the inheritance or gift. Id.

The trial court concluded the equity in this case required the inheritance be restored to Denise. Tyler presented no evidence to indicate the donor's intent or circumstances surrounding the gift required a contrary award.

We affirm the trial court's division of the parties' assets and liabilities.

AFFIRMED.