IN THE COURT OF APPEALS OF IOWA

No. 1-398 / 91-514

FILED
OCT 29 1991
CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHERRY L. HESTER AND RICHARD E. HESTER, JR.

Upon the Petition of

SHERRY L. HESTER,

Appellant,

And Concerning

RICHARD E. HESTER, JR.,

Appellee.

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Appeal from the Iowa District Court for Des Moines County, David B. Hendrickson, Judge.

The petitioner appeals from the district court's decree dissolving the parties' marriage. The petitioner claims that the district court erred in awarding physical custody of the parties' son to the respondent, abused its discretion in finding that the petitioner had signed a number of charge receipts on a third party's missing credit card, and erred in awarding the parties' homestead to the respondent. The respondent seeks attorney fees on appeal. **AFFIRMED.**

H. Craig Miller and Steven S. Hoth of Hirsch, Adams, Hoth, Krekel, Putnam & Cahill, Burlington, for appellant.

Michael J. Schilling, Burlington, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

The parties, Sherry and Richard Hester, were married in December 1986. They have one son, Gregory, who was born on August 19, 1987. At the time of the dissolution proceeding, Sherry was twenty-two years old and Richard was twenty-eight years old. Sherry was employed as a bookkeeper in her parents' business and worked part-time in a grocery store. Richard was employed by the U.S. Army Reserves.

The district court entered a dissolution decree placing Gregory in the parties' joint custody, but awarding his physical care to Richard. In accordance with the parties' agreement, the district court also awarded the homestead to Richard because he was charged with Gregory's primary physical care.

Sherry has appealed the custody provisions of the district court's decree. First, Sherry contends the court erred in granting Richard the primary physical care of Gregory. Second, Sherry contends the court erred in finding that she had been involved in the theft of a wallet. Third, Sherry requests that, if we grant her primary physical care of Gregory, we also award her the family's home. Finally, Richard requests an award of appellate attorney fees.

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).

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). From our examination of the record in this case, we find the district court grant to Richard of Gregory's primary physical care is in the child's long-term best interests.

While we agree with the trial court's evidentiary findings with regard to Sherry's involvement in the theft

of a wallet, we need not base our decision on that evidence.

Finally, concerning Richard's request for an award of appellate attorney fees, 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 are to 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). Each party shall be responsible for his or her own appellate attorney fees.

The costs of this appeal are taxed to Sherry

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.