IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1-465 / 00-1595
Filed November 16, 2001

IN RE MARRIAGE OF MELODY ANN BROBSTON AND DANIEL LEE BROBSTON

Upon the Petition of
MELODY ANN BROBSTON,
Petitioner-Appellant,

And Concerning
DANIEL LEE BROBSTON,
Respondent-Appellee.

Appeal from the Iowa District Court for Van Buren County, Daniel Wilson, Judge.

Melody Brobston appeals from the decree dissolving her marriage to Daniel Brobston. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, Ottumwa, for appellant.

Craig R. Foss of Foss, Kuiken, Gookin & Cochran, P.C., Fairfield, for appellee.

Heard by Huitink, P.J., Zimmer, J. and Habhab, S.J.*
*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

ZIMMER, J.

Melody Brobston appeals the custodial provisions of the parties' dissolution decree. We affirm the trial court's decision to award primary physical care of the children to Daniel Brobston.

I. Background Facts and Proceedings

Melody and Daniel were married in 1982. They have three children: Aaron, born in 1987; Amy, born in 1989; and Alexander, born in 1993.

Melody filed a petition for dissolution of marriage in July of 1999. The following month, the district court awarded Daniel temporary physical care of the children pending trial. Trial was held in July of 2000. At the time of trial, Daniel was forty-one and Melody was thirty-six.

The custodial provisions of the dissolution decree awarded the parties joint legal custody of the children. The district court awarded primary care of the children to Daniel. The court awarded Melody liberal visitation and ordered her to pay child support. The court ordered the parties to pay their own attorney fees.

Melody petitioned for modification and enlargement of the court's judgment pursuant to Iowa Rule of Civil Procedure 179(b). The court overruled the motion and Melody appeals. She contends the court erred in awarding Daniel primary care of the children and in failing to order him to pay her trial attorney fees.

II. Scope of Review

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 Stark*, 542 N.W.2d 260, 262 (Iowa Ct. App. 1995) (citing *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 re Marriage of Griffin*, 570 N.W.2d 258, 259 (Iowa Ct. App. 1997).

III. Primary Physical Care

Melody contends the district court's decision to award primary physical care to Daniel is not supported by the evidence and is not in the best interests of the children. The parent who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives is chosen as the primary physical caregiver. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). 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 party should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

We identify numerous factors to help to determine which parent should serve as the primary care-taker of the children in a divorce. *In re Marriage of Berry*, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998) (citing *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997)). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the facts of each case. *See Daniels*, 568 N.W.2d at 54. Pursuant to Iowa Code section 598.41 and prior case law, domestic abuse is a factor in determining the custodial parent. *Id.* Domestic abuse is, in every respect,

dramatically opposed to a child's best interest. *Id.* at 55. The court also considers a parent's status as a primary care-giver during the marriage but it does not ensure an award of physical care. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). Moral misconduct also weighs in the analysis, but most heavily in those cases where the misconduct occurred in the presence of the children. *In re Marriage of Grandinetti,* 342 N.W.2d 876, 879 (Iowa Ct. App. 1983). With these principles in mind, we now address the facts of this case.

The trial court gave the following reasons for awarding primary physical care to Daniel:

> The placement of the physical care of the children with Dan is based on the totality of the evidence submitted in this case. The court specifically concludes that Dan has the more stable life style at this time as between Dan and Melody; Dan is in a better position to provide a stable life for the three children with as little disruption as is possible under these difficult circumstances; both Dan and Melody are capable of raising the children, but at this stage in the lives of the three children and the two parties to this case, Dan is better suited to provide for the children; Melody has demonstrated poor judgment in several respects in the last year and a half, which lack of judgment has affected her marriage, and has adversely impacted on the children; the children are thriving in their present placement with Dan, including visitation with Melody, which placement has been in effect for almost eleven months at the time of the trial of this case; Dan has demonstrated that he places the needs of the children above his own.

Our de novo review of the record convinces us the district court correctly awarded primary physical care to Daniel. We acknowledge, as the district court did, that Melody and Daniel were both significantly and meaningfully involved with raising their children prior to their separation. Both parents are suitable caretakers for the children. Daniel, however, is better suited to be the primary physical caregiver.

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The evidence supports the trial court's finding that Daniel is in a better position to provide stability for the children. Daniel has maintained long-term employment as a foreman at Riverside Plastics. He has kept the children in their family home, and has been able, with considerable effort, to maintain the lifestyle the children enjoyed before the parties separated. Daniel has done an excellent job of caring for the children since the parties separated. The record reveals the children are doing very well in school and are for the most part happy, healthy, and well adjusted.

Melody works as an LPN at a retirement home. She works the 10 p.m. to 6 a.m. shift and has obligations every other weekend. Her responsibilities include supervising other staff members. Melody developed a relationship with a co-worker, Matthew Kelsey, in the summer of 1999. Although Melody was living with her parents at the time of trial, she and Matthew have lived together for much of the time since Melody separated from Daniel. Melody and Matthew plan to marry at some unspecified time in the future. Matthew is ten years younger that Melody. He is a high school dropout. Matthew has a prior criminal record in Iowa and Missouri. He has been convicted of public intoxication, misdemeanor criminal mischief, and writing bad checks. He also has a history of drug abuse. According to his testimony, he has had no criminal charges in the last four years and has not used illegal drugs in the past five years. He has plans to attend nursing school.

The record reveals Melody engaged in an ill-advised "pen pal" relationship with a Texas prison inmate. The record reflects the inmate has responded to correspondence from Melody by expressing in detail sexual activities he would

like to engage in with her. Melody has stopped writing letters to the inmate, but still receives correspondence from him.

Melody contends the trial court erred in concluding there was no history of domestic abuse between Melody and Daniel. In interpreting what is sufficient to constitute a "history of domestic abuse" the district court must weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just be a counter of numbers. *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). Melody alleges Daniel pushed her on one occasion six years prior to trial and bruised her arms by holding her too tightly in the summer of 1999. Daniel denied the allegations of abuse. The record reflects that Melody dismissed domestic abuse charges she filed against Daniel in 1999 shortly after the district court awarded him temporary physical care of the children. Further, Melody told Daniel's mother that Daniel never beat, hit, or hurt her. The evidence in this case simply does not establish a history of domestic abuse between the parties.

Viewing the record as a whole, we conclude the district court carefully weighed all factors before it and established a suitable custodial arrangement that is in the best interests of the affected children. In making this assessment, we give considerable weight to the sound judgment of the trial judge who had the benefit of hearing and observing the parties first hand. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

IV. Attorney Fees

Melody appeals from the trial court's decision to deny her an award of trial attorney fees. An award of attorney fees rests in the sound discretion of the trial

court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). The controlling factor in awards of attorney fees is the ability to pay the fees. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 663 (Iowa 1989). We decline to disturb the trial court's decision not to award trial attorney fees.

Both parties request an award of attorney fees for this appeal. In considering such a request, we look to 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 Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We award no attorney fees on appeal.

AFFIRMED.