IN THE COURT OF APPEALS OF IOWA

No. 7-637 / 97-455 000089

IN RE THE MARRIAGE OF HEATHER LEIGH DEIST AND SHAWN ALLISON DEIST

Upon the Petition of
HEATHER LEIGH DEIST,

Petitioner-Appellant,

And Concerning
SHAWN ALLISON DEIST,

Respondent-Appellee.

FILED
DEC 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Audubon County, Timothy O'Grady, Judge.

Petitioner appeals from the entry of the dissolution decree. **AFFIRMED AS MODIFIED.**

Kermit L. Dunahoo and Jeff Mains of the Dunahoo Law Firm, Des Moines, for appellant.

William W. Ranniger of the Ranniger Law Office, Manning for appellee.

Heard by Cady, C.J., and Sackett, and Huitink, JJ.

CADY, C.J.

Heather Deist appeals the child custody and property distribution provisions of the district court's dissolution decree. She claims the trial court erred in granting Shawn primary physical care of the parties' two children and in failing to award her an equitable share of marital assets. We affirm as modified.

Shawn and Heather Deist divorced in February 1997, after approximately five and one-half years of marriage. They have two children, Caleb, born December 9, 1990, and Brock, born August 20, 1995.

Heather attended nursing school during the marriage and earned LPN and RN degrees. Heather currently works as a registered nurse, earning a net monthly income of $1362. She works from 3:00 p.m. until 11:00 p.m. with every other weekend off.

Shawn currently operates his own cleaning business. He earns a net monthly income of approximately $1027. He primarily works during the day. Due to the nature of his business, Shawn is generally available to take Caleb to school in the morning and stay with the children after school.

The trial court awarded Shawn primary physical care of the children. Heather received liberal visitation and was required to pay child support in the amount of $400 per month. The district court awarded Shawn a net property award of $16,329, including the family home and the cleaning business. Heather received a net award of $2271, including her car, checking account, and pension.

On appeal Heather asserts the district court erred in awarding primary physical care of the parties' children to Shawn and in failing to achieve an equitable distribution of property.

I. Standard of Review

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Primary Physical Care

In resolving child custody issues, the best interests of the children is the first and governing consideration. *See In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41. *See* Iowa Code § 598.41 (1995). The critical issue in determining the best interests of the children is which parent will do better in raising the child. *See In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. *See Fynaardt*, 545 N.W.2d at 892-93. The objective should always be to place the children in the environment

most likely to bring them healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

Heather maintains she is in a better position to care for the children than Shawn. Specifically, she claims the trial court erred in focusing on the parties' job schedules and overlooking her ability to care for Brock during the day. She also alleges incidences of domestic abuse occurred.

In this case, both parties participated equally in raising their children. Additionally, both are capable of providing a good stable home for them. Regardless of the parties' work schedules, both are excellent parents that can effectively care for the children. In this situation, we feel compelled to give weight to the trial court's ability to listen to and observe the parties. Both parties are able to adequately care for the children and maintain a good relationship with them. The decision is close. Under all the circumstances, we decline to disturb the district court's determination of primary physical care.

We have also considered all of Heather's evidence supporting her claim for primary care, including her allegations of domestic abuse toward her and the children. Her claims of abuse by Shawn were not supported by convincing evidence. Heather has failed to establish Shawn engaged in the type of conduct that would adversely impact his ability to properly care for the children. Consequently, we find no reason to alter the district court's physical care arrangement.

III. Property Distribution

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determines what is fair and equitable. *Id.* Further, the property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1). *Id.*

Heather claims the trial court erred in failing to award her a cash settlement for her interest in the marital home. Shawn received $80,100 in gross assets and $63,771 in liabilities. This resulted in a net award to him of $16,329, which includes the family home and the business. Heather received $5611 in gross assets and $3340 in liabilities. Heather's net award totaled $2271.

Shawn maintains he received a $4000 gift from his parents. Generally, gifts or inheritances received by a party during the marriage are not subject to a property division unless failure to do so would be inequitable to the other party. *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993). Because Shawn's parents intended to give him the $4000, and it would not be inequitable to Heather to set aside this gift, we set aside $4000 for Shawn. This reduces his net amount of marital property to $12,329.

Heather worked to support the family while Shawn began his new business. While both parties contributed to the family's income, Heather received substantially less marital property than Shawn. In order to achieve an equitable distribution of property, we award Heather a cash settlement of $5000 to be paid in annual amounts of $1000, without interest, over a period of five years commencing thirty days after the issuance of the procedendo. This award increases Heather's net award to $7271 and reduces Shawn's net award to $7329, resulting in a more equitable distribution of property.

AFFIRMED AS MODIFIED.