IN THE COURT OF APPEALS OF IOWA

No. 6-489 / 96-182

FILED
NOV 27 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF WILLIAM S. GRIFFITH AND TERESA J. GRIFFITH a/k/a TERESA J. AUGUSTINE

Upon the Petition of
WILLIAM S. GRIFFITH,

Appellee,

And Concerning
TERESA J. GRIFFITH a/k/a TERESA J. AUGUSTINE,

Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Teresa appeals from the district court's order dissolving the parties' common law marriage, awarding physical care of the parties' two children to William and distributing the parties' property. **AFFIRMED AS MODIFIED.**

Mark J. McCool of McCool & McCool, Cedar Rapids, for appellant.

Benjamin W. Blackstock and Jon C. Tack of Blackstock Law Offices, Cedar Rapids, for appellee.

Considered by Cady, P.J., Huitink, and Streit, JJ.

CADY, P.J.

Teresa Augustine appeals the child custody and economic provisions of a dissolution decree. On our review, we affirm with modification to the property division.

William Griffith (Bill) and Teresa Augustine (Terri) began living together in 1984. Their relationship developed into a common law marriage. They had two children; Nathan, born on May 8, 1985, and Shane, born on March 28, 1986. Terri also had physical care of Steve Augustine, born on April 3, 1982, a son from a prior marriage.

Bill is self-employed as the owner and operator of Shagbark Stained Glass Studio located in Cedar Rapids, Iowa. Bill's mother and step-father started the business in 1986. In 1989 they transferred their entire interest in Shagbark to Bill. Bill's mother continued to work at the business, but did not receive a wage. Since 1989, Bill's mother and step-father have invested approximately $15,000 into the business.

Terri worked as a manager of a Pizza Hut until 1989 when she began working at Shagbark. She waited on customers, designed glass projects, worked on stained glass projects, and assisted Bill in teaching stained glass classes. Terri stopped working at Shagbark after the parties separated in 1994. She did not receive wages while working at the business.

The dissolution decree awarded Shagbark Stained Glass Studio to Bill. The district court found the fair market value of the inventory, equipment and fixtures was $18,000. It also found the total value of the gifts from Bill's mother and stepfather to the business exclusive of their donated labor, exceeded the fair market value of Shagbark. There was no evidence Bill's mother and stepfather intended Terri to be a recipient of their gifts. The court equally divided the remainder of the parties' property.

During the trial, Terri asserted she should be given primary physical care of Nathan and Shane because she has been their primary care giver since their births. She also asserted the boys should not be separated from Steve, their halfbrother. She further alleged Bill abused alcohol and drugs. Steve, on the other hand, claimed he should have physical care of the boys primarily because of the unhealthy environment created by Terri's sexual relationship with Chris Franck, a minor. The relationship began in 1994 when Franck was fourteen years of age.

The trial court concluded the best interests of Nathan and Shane would be met by placing their primary physical care with Bill, subject to liberal visitation with Terri. It found Terri was primarily responsible for the household duties during the time the parties were together, but both parents took an active role in raising the boys. Bill was particularly active in their education. It was common for Nathan, Shane and Steve to go to Shagbark immediately after school where Bill would assist and supervise their homework. Bill did not prohibit or discourage Steve from coming to

the studio after the dissolution of marriage action was filed, and hopes to maintain visitation with him.

The district court entered a temporary order after the dissolution petition was filed prohibiting Chris Franck from entering the marital home. Terri repeatedly violated the order prior to vacating the home on April 30, 1995. Terri's relationship with Franck was continuing at the time of trial. The trial court found the relationship set a very poor example for Nathan and Shane, and has caused them emotional injury. Franck is also prone to display violent behavior toward Terri and the boys.

Although Bill used marijuana in the past, there was no credible evidence he has used it since August 1994. Terri has not been supportive of the boys' relationship with Bill and has interfered with his visitation during the pendency of this action.

Terri appeals. She contends primary care of the boys should have been awarded to her. She also contends the court erred in not awarding her part of the value of Shagbark. Both Teresa and Bill seek an award of appellate attorney fees.

I. Scope of Review

Our review of custody and economic provisions of a dissolution decree 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. *Id.*

II. Primary Care

In child custody cases, our first and governing consideration is the best interests of the child. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). The factors courts consider in awarding custody are found in our statutes, as well as prior cases. *See* Iowa Code § 598.41(3); *In re Marriage of Weidner*, 338 N.W.2d at 355-56; *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). These factors essentially bear on what will be in the long-term best interests of the child. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Gender is irrelevant in the determination. *Id.* Neither party should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *Id.*

The role of primary care taker of the children during the marriage does not ensure the court will designate that parent as the primary caretaker at the time of the divorce. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). The role of primary caretaker is, however, critical in the development of children. Careful consideration is given in custody disputes to allowing the children to remain with the parent who has been the primary caretaker to add needed continuity to the lives of children during a time which can be a difficult and confusing for them. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992).

We find Bill and Terri divided child care responsibilities as described by the trial court. Terri was the primary care giver, but Bill actively participated and assisted in raising the boys. Nevertheless, the benefits of continuing Terri's role as primary

care giver are severely hampered by her continued sexual relationship with Chris Franck.

Moral misconduct is a factor to be accorded weight in a child custody determination. *Burkel,* 525 N.W.2d at 441. It has been weighed most heavily only 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 App. 1983). In this case Terri began her relationship with Franck, who is still a minor, when he was fourteen. Both Nathan and Shane have indicated they recognize the relationship between Franck and Terri as one of "boyfriend" and "girlfriend". We agree with the trial court this relationship adversely impacts Nathan and Shane. There is also evidence Franck tends to display violent behavior towards Terri and the boys. Moreover, Terri placed her interests before her children when she repeatedly ignored the court order to stop seeing Franck in the marital home.

We are not swayed by Terri's argument she should be given primary care of Nathan and Shane because they should not be separated from their halfbrother. There is a presumption siblings should not be separated. *In re Marriage of Will,* 489 N.W.2d 394, 398 (Iowa 1992). The separation of siblings is disfavored because it deprives children of the benefit of constant association with one another. *Id.* There is a strong interest in keeping children of broken homes together. *Yarolem v. Ledford,* 529 N.W.2d 297, 298 (Iowa App. 1994). Courts may depart from the rule, however, if the circumstances demonstrate separation may better promote the long-term interest

of the children. *Id.* These same principles apply when half siblings are involved. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986).

The circumstances in this case demonstrate separation is necessary for the best interests of Nathan and Shane. Although Nathan and Shane have lived with Steve their entire life, their emotional and physical well-being is jeopardized by Terri's relationship with Franck. Nathan and Shane's long-term best interests are more wholly served by limiting their exposure to Franck and his interaction with Terri. Moreover, Bill is willing to foster a continuing relationship between Steve and his two brothers.

III. Property Division

Terri alleges the trial court erred in failing to equally divide the stained glass business. The trial court awarded Bill the Shagbark stained glass inventory, equipment, fixture and all other tangible personal property connected the with business, together with the right to do business as Shagbark Stained Glass Studio, as well as the encumbrance. Bill contends the trial court correctly awarded him Shagbark because his parents gifted the business to him and have continued to invest money and free labor into the business.

The partners in a marriage are entitled to a just an equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Peterson*, 491 N.W.2d 535, 537 (Iowa

App. 1992). The determining factor is what is fair and equitable in each particular circumstance after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund,* 344 N.W.2d 276, 280 (Iowa App. 1983).

Iowa Code section 598.21(1) (1991) provides "the court shall divide all property *except* inherited property or gifts received by one party, equitably between the parties. (emphasis added). The only exception to this rule must be based "upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." The intent of the donor and the circumstances of the gift or inheritance control whether the gift or inheritance is to be set off in the dissolution. *In re Marriage of Hoffman,* 493 N.W.2d 84, 89 (Iowa App. 1992).

The trial court found the fair market value of the inventory, equipment and fixtures of Shagbark to be $18,000. It found "there is no goodwill that can be valued for the reason that there are numerous competitors and the art of stained glass design and making is so unique and personal to the person doing the work that it would be in appropriate to assign a value to good will." Further, the court found the total value of the gifts made by Bill's mother and stepfather to Bill in connection with Shagbark, exceeded the fair market value of the business.

Terri does not challenge the valuation of the business, but contends her uncompensated labor also contributed to its value. The trial court attributed the entire value of Shagbark to gifts received from Bill's mother and stepfather. We disagree with the trial court's finding on this issue.

The evidence justifies a finding that the contributions by Bill's mother and stepfather were intended as a gift to Bill and not Terry. We agree the total value of these gifts at the time of the divorce exceeded the fair market value of Shagbark. This does not mean, however, the entire value of the business can be attributed to gifts from Bill's mother and stepfather. A portion of the parents' gifts of money and labor was an investment in the development of Bill's skill in the trade and knowledge of the business which is not reflected in the value placed on the inventory, equipment and fixtures.

Likewise, Terri contributed to the continuation and growth of Shagbark once Bill became the owner of the business. For the first year Bill owned the business, Terri contributed her income to the family through her work as a manager at Pizza Hut. After Terri stopped working for Pizza Hut she worked at Shagbark on a full-time basis. She not only made substantial contributions to the operation of the business, but continued her role as housekeeper. Terri's contributions assisted the growth of Shagbark and Bill's increased skill and knowledge of the trade.

We adjust the property division to reflect Terri's contributions to the business by awarding Terri a property settlement of $3000. This amount shall be paid by Bill within 90 days of the issuance of the procedendo. The remainder of the marital property and debt was divided equally.

IV. Attorney fees

Terri seeks attorney fees for this appeal. Bill also seeks an award of attorney fees. An award of attorney fees is not a matter of right, but rests with the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We 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). Under the circumstances of this case, we order each party to pay his or her own attorney fees for this appeal. The costs of this appeal are taxed one-half to Terri and one-half to Bill.

AFFIRMED AS MODIFIED.