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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF SHIRLEY A. LAHM AND STEVEN D. LAHM

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Upon the Petition of)
SHIRLEY A. LAHM,)
Petitioner-Appellee,)
And Concerning)
STEVEN D. LAHM,)
Respondent-Appellant.)

Filed May 28, 1987

7-31
85-1572

Appeal from the Iowa District Court for Polk County (47-27714), Gene L Needles, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage. **AFFIRMED.**

Ray Sullins, Des Moines, for appellant.

James R. Cook of Cook & Waters, Des Moines, for appellee.

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

HAYDEN, J.

Respondent-husband, Steven D. Lahm, appeals from the district court decree dissolving the parties' marriage. On appeal he questions the court's determinations regarding custody, visitation, and property division. Respondent and petitioner-wife, Shirley A. Lahm, both request attorney fees on appeal.

The parties were married on June 19, 1971. Sheri, the only child of this marriage, was born on December 5, 1972. The parties met while petitioner was attending college at Iowa State University in Ames, Iowa. She eventually received a bachelor of Science and a certificate to teach from the university. Respondent graduated from high school and attended trade school; he never graduated from college. Shortly after her graduation from college petitioner began working as a service representative for Northwestern Bell at approximately $12,000 per year. At the time of trial she had worked continuously for Bell, had advanced to the position of engineer, and raised her salary to over $30,000. Respondent initially worked for a swimming pool construction company for approximately $16,000 per year. He left this to work as a journeyman carpenter. Beginning approximately four years prior to the trial he formed his own construction company, Lahm Construction Company. This was based in the marital home and never produced the same amount of income as had his previous employments. In fact, when he became self-employed his contribution to the family income dropped significantly.

During the marriage the parties accrued several substantial assets. These included: the homestead, two rental income properties, the construction company checking account, a college savings account for Sheri, petitioner's annuity with Northwestern Bell, and various checking and savings accounts. Both parties contributed to the collection of these assets.

Shirley Lahm filed her petition for dissolution of marriage on August 13, 1984. On the next day the court awarded petitioner temporary custody of the child. Subsequently, she moved herself and Sheri from the family residence to a nearby duplex. In an order filed October 17, 1984, and after full hearing, the district court modified its earlier order and awarded joint legal custody of Sheri, with primary physical care with the petitioner. The dissolution trial began on April 30, 1985, and continued several days. On June 11, 1985, respondent was found in contempt of court for disobeying the court's order concerning visitation. This contempt citation was stayed by the Iowa Supreme Court and later dismissed upon mutual agreement of the parties. On September 23, 1985, the trial court filed its findings of fact and conclusions of law.

The trial court gave petitioner sole custody of Sheri and allowed respondent liberal visitation of every other weekend, alternate holidays, and four weeks during summer vacation. Respondent was ordered to pay $50 per week child support. The trial court awarded respondent the parties' rental properties, the rental bank accounts, $3,000 in cash, his construction company bank accounts and tools, and the $247.96 he took from petitioner's credit union account. The trial court awarded petitioner the remainder of the parties' property, including their homestead, a car, a boat and trailer, household goods, her Northwestern bell benefits, and her bank and credit union accounts. The court directed respondent to pay $6,000 toward petitioner's attorney fees. From this decision respondent has appealed.

Respondent contends: (1) the trial court should not have given petitioner sole custody of the parties' child; (2) his visitation is inadequate; and (3) the property division is inequitable. Each party requests attorney fees on appeal. Petitioner's motion to impose sanctions for failing to meet appellate procedure deadlines was ordered submitted with the appeal.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Deck, 342 N.W.2d 892, 894 (Iowa App. 1983). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

I.

Respondent contends the trial court erred in: placing custody of Sheri with petitioner, in not granting him joint legal custody, and in not allowing him sufficient visitation. We disagree.

Pursuant to section 598.41 (1985), the court is directed to provide ample visitation with both parents and, upon request of one parent, to consider joint custody subject to the best interests of the child and reasonableness of the proposal. In re Marriage of Miller, 390 N.W.2d 596, 598 (Iowa 1986). In enacting section 598.41, the legislature did not use the word presumption when referring to joint custody; however, the statutes do express a preference for joint custody over other custodial arrangements. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Regarding joint custody section 598.41 provides:

> If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and parent should be severed.

Respondent contends the trial court should have granted either joint custody or sole custody in him.

The trial court based its decision awarding sole custody to petitioner upon Iowa Code section 598.41(3)(b), (c), (e) and (g), which provides the factors

to consider when determining which custodial arrangement is in the child's best interest, these factors are as follows:

> b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
>
> c. Whether the parents can communicate with each other regarding the child's needs.
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> * * *
>
> e. Whether each parent can support the other parent's relationship with the child.
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> * * *
>
> g. Whether one or both the parents agree or are opposed to joint custody.

The trial court also found respondent: attempted to control petitioner and Sheri by inappropriate means; undermined petitioner's attempt to discipline Sheri; ignored court orders by harassing petitioner at her work place and residence, because of this harassment petitioner was twice forced to call the police; and discussed the dissolution case with Sheri. Further, the trial court specifically found: respondent cannot communicate with petitioner regarding Sheri's needs; he cannot support Sheri's relationship with petitioner; and petitioner opposes joint custody of Sheri.

In resolving issues concerning child custody, the primary and governing consideration is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). The factors considered in awarding custody are delineated in section 598.41(3) of the Iowa Code and in In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). The pivotal issue in ascertaining the child's best interest involves a determination of which parent is capable of administering more effectively to the long-range best interests of the child. In re Marriage of Welbes, 327 N.W.2d 756, 758

(Iowa 1982). Iowa Code section 598.41 (1985) provides in pertinent part as follows:

> Custody of children.
>
> 1. The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure a minor child frequent and continuing contact with both parents. . . .

This statutory language encourages courts to consider and grant liberal visitation rights when permitted in the circumstances. See In re Marriage of Weidner, 338 N.W.2d at 356-59. We fully recognize the trial court's superior position in determining when, and the conditions under which, visitation is proper. Lamansky v. Lamansky, 207 N.W.2d 768, 771 (Iowa 1973).

After a careful review of the record presented on appeal, we affirm the trial court's award of sole custody to the petitioner. Not only do we affirm the court's award, but we affirm its findings in regard to the award. We find that: petitioner was the primary caretaker for Sheri; although respondent did contribute significantly to her rearing; during these proceedings respondent has acted immaturely and maliciously in his refusal to cooperate or communicate with the petitioner; that respondent has repeatedly tried to poison the child's feelings towards the mother; and because of his behavior petitioner requests sole custody remain with her. We also find Sheri's best interest will be served through continued sole custody with her mother.

Under these circumstances we find the trial court's award of visitation both liberal and reasonable. We note that respondent's abuse of visitation has forced petitioner to file contempt proceedings three separate times. (One was dismissed mutually by the parties and another was found to be meritless.) Respondent must abide by the trial court's decision regarding custody and visitation.

II.

Respondent contends the trial court's distribution of assets was inequitable. He questions the trial court's: valuation of his tools; credit to him for money from the rental properties; and the lack of evidence in the record to support the trial court's distribution.

Pursuant to Iowa Code section 598.21(1) (1985), the trial court shall divide the property of the parties "except inherited property or gifts received by one party, equitably between the parties." A justified property division is one that is equitable under the circumstances. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976); In re Marriage of Stewart, 356 N.W.2d 611, 612 (Iowa App. 1984). We reject any rule based on a specific percentage division of the assets, and recognize that we must determine what is equitable under the facts of each case. In re Marriage of Callenius, 309 N.W.2d 510, 514 (Iowa 1981).

The testimony at trial presents conflicting evidence as to the worth of the assets accumulated by the parties. However, certain factors ring clear. After petitioner filed for divorce, respondent raided the parties' checking and savings accounts, including Sheri's college fund. As a result of this action, petitioner lost control of these funds, respondent was able to draw any money he needed from them, and the trial court's determination of the amount in these accounts was made very difficult. Confusion also existed regarding the determination of rental income collected on the rental properties. We determine the trial court's distribution was equitable.

Regarding respondent's complaint about the trial court's method of valuation of his tools and truck, we note when the trial court's valuation is well within the permissible range of evidence, we are generally not inclined to

disturb it. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). We find the court's methods of valuations were reasonable.

Finally, respondent contends the trial court erred in awarding attorney fees. Both parties request attorney fees on appeal. Petitioner filed a motion for sanctions against respondent for failing to meet appellate procedure deadlines and the supreme court ordered this submitted with the appeal.

Trial courts have considerable discretion in granting attorneys' fees in dissolution cases. In re Marriage of Lochmiller, 229 N.W.2d 228, 229 (Iowa 1975). The allowance of attorneys' fees incurred on appeal is generally based upon the parties' respective financial resources. In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984). We also consider whether the party making the request for fees 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).

We affirm the trial court's award of $6,000 attorney fees to petitioner. Respondent's request for attorney fees on appeal is denied, but petitioner is granted $750 on appeal. Petitioner's request for sanctions on appeal is denied.

AFFIRMED.