IN THE COURT OF APPEALS OF IOWA

No. 3-204 / 92-1599

FILED
JUN 29 1993
CLERK SUPREME COURT

IN RE THE MARRIAGE OF STEPHEN F. DELLA VEDOVA AND GLENDA J. DELLA VEDOVA

Upon the Petition of
STEPHEN F. DELLA VEDOVA,
Petitioner-Appellant/Cross-Appellee,

And Concerning
GLENDA J. DELLA VEDOVA,
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Monroe County, James D. Jenkins, Judge.

The husband appeals and the wife cross-appeals the economic and custodial provisions of the district court's decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Sidney E. Drake of Drake, Wilson & Jay, Centerville, for appellant.

J. Terrence Denefe of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

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KEEFE, S.J.

Stephen and Glenda Della Vedova were married on August 27, 1971. The parties have six children. The two oldest children are adults. Molly, born in 1973, is attending cosmetology school in Ohio. Carey, born in 1974, is attending Des Moines Area Community College. The four minor children are: Kate, born on January 22, 1978; Tyson, born on March 2, 1982; Emily, born on June 11, 1983; and Samuel, born on August 31, 1984. The children all have a learning disability.

Stephen was born on June 26, 1949. He is self-employed as a truck driver. Stephen owns his own tractor and trailer. Prior to 1992, he worked as an over-the-road trucker, which caused him to be away from home for extended periods. Stephen is in good physical health. In early 1992, he suffered a mental breakdown and was voluntarily hospitalized. Following the breakdown, Stephen began working as a short-haul driver. This has resulted in a reduction of his income. The district court found his net monthly income was $2,000.

Glenda was born on November 3, 1949. She did not work outside the home during most of the marriage. Glenda had finished two years of college prior to the parties' marriage. She completed her college degree in secondary education during the marriage. Glenda has been unable to find a teaching position. She is currently employed at Heartland ResCare in Ottumwa where she earns approximately

$16,500 per year. She has net monthly income of about $1,100. Glenda is in good physical health, although she suffers from depression.

Stephen filed this petition for dissolution of the parties' marriage in March 1992. He had primary responsibility for the children while the action was pending.

Following a hearing, the district court entered a decree on September 25, 1992, dissolving the parties' marriage. The district court found that the best interests of the children would be served by an award of their joint custody to both parents, with physical care awarded to Glenda. The district court noted that Glenda had been the primary care-giver to the children during the marriage and declined to change this arrangement.

The court applied the child support guidelines and ordered Stephen to pay child support of $800 per month. Stephen was also ordered to pay one-half of the posthigh school expenses of Molly and Carey. The court divided the parties' property. Stephen was awarded property with a net value of $44,964, which included the truck and trailer. Glenda was awarded property with a net value of $44,360, which included the marital residence. The court concluded certain payments received from Stephen's father, Aldo Della Vedova, were not a marital debt.

Stephen appealed and Glenda cross-appealed certain provisions of the dissolution decree.

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I. Scope of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Custody.

Stephen contends he should have been awarded physical care of the parties' minor children. He admits that Glenda provided the majority of the care for the children prior to March 1992. However, after that time he provided most of the care for the children. Stephen believes that Glenda has recently changed, and now puts her own needs before those of the children. He also believes Glenda may move the children to Ohio, where her mother lives.

In child custody cases, the best interests of the child is the first and governing consideration. In re Marriage of Rodgers, 470 N.W.2d 43, 44 (Iowa App. 1991). 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 dissolution proceedings. In re Marriage of McElroy, 475 N.W.2d 221, 223 (Iowa App. 1991).

We agree with the district court decision that, considering the best interests of the children, they should

be placed in the physical care of Glenda. The parties agreed that Glenda was the primary person to care for the children for most of their lives. We find no evidence to show Glenda has changed or that she is no longer a proper person to care for the children. We find the evidence shows Glenda has been better able to put aside her feelings about the divorce and has realized that the children need a relationship with both parents. We affirm the district court decision placing physical care of the minor children with Glenda.

III. Child Support.

Stephen contends the district court erred in calculating his child support obligation. He states that his income tax returns show average annual income for the past three years of $2,307. He states his average net monthly income is $163.

The court must determine the parent's current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parent's income. Id. Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over a reasonable period when determining the current monthly income. Id.

Stephen admits he had gross income of $65,105 in 1989, $91,869 in 1990, and $66,586 in 1991. However, his business expenses for income tax purposes nearly met his

income in each year. The district court found some of these expenses were discretionary. The court did not consider these expenses in determining Stephen's net monthly income.

At the trial Stephen testified that he could earn $240 per day at trucking, and his expenses would be about $120 per day. Using these figures, Stephen could earn $2,600 per month before taxes. We determine Stephen has net monthly income of $1,820. Under the child support guidelines, we find Stephen's child support obligation for the four minor children should be $728 per month. We modify the dissolution decree to make this change.

IV. Property Division.

A. Stephen also contends the division of property is inequitable to him. He claims that his father loaned the parties a total of $122,800 during the course of the marriage. The district court found this amount was not actually a loan, but was a gift to the family. Stephen states the amount should be treated as a debt of the parties. He believes that he should be allocated this debt, but also be given a corresponding amount of the assets.

We agree with the district court's conclusion this amount should not be treated as a loan. Even Stephen admits he was only required to repay the amount if he could. The intent of the donor and the circumstances of the gift control whether the gift is to be set off in the

dissolution. In re Marriage of Hoffman, 493 N.W.2d 84, 89 (Iowa App. 1992). We conclude this gift from Stephen's father, Aldo, should not be set off to Stephen because it was a gift to the family. While some gifts were in the form of cash, Aldo also purchased appliances and furniture for the family. Furthermore, he used the family construction business to remodel the parties' home. We conclude these gifts were made to the entire family.

B. In her cross-appeal, Glenda contends the district court should not have recognized a debt owed by the parties to Stephen's uncle, Rino Della Vedova. Rino lent the parties $17,000 to help pay a debt of $57,000 they owed the bank for the purchase of the truck and trailer. Glenda contends this amount is actually a gift.

We agree with the district court's conclusion that the $17,000 should be considered a debt of the parties. Stephen had formerly worked for Rino in the construction business, and a business relationship existed between them.

C. Glenda contends the court erred in making an award of her wedding ring. The court found the ring had a value of $1,100 and included it in the assets awarded to Glenda. Glenda claims that she left the ring at the house when she moved out and no longer has possession of it. However, Stephen testified he does not have possession of the ring.

A party who has not been accountable with property under his or her control during the dissolution process must be charged accordingly. In re Marriage of Williams,

421 N.W.2d 160, 164 (Iowa App. 1988). In making a division of property, a court may consider property which was under the control of one party and which subsequently disappears. Id. at 167.

Here, Stephen had control of the wedding ring prior to the dissolution. We order Stephen to either give the ring to Glenda or, in the alternative, to pay her $1,100 to reimburse her for the loss of the ring.

D. Finally, Glenda claims she should be awarded one-half of Stephen's personal injury settlement. Stephen received $11,285 after he was in an accident with his truck. Stephen was unable to work for a period of time after the accident and the settlement represented lost income and damage to his truck. The settlement money was placed in a separate account.

After Stephen had a mental breakdown in March 1992, he again did not work for a period of time. He used the settlement money for living expenses during this time. At the time of the dissolution hearing there was $799 left in the settlement account. The district court considered this amount a marital asset and awarded it to Stephen.

Proceeds of a personal injury claim are marital assets to be divided according to the circumstances of each case. In re Marriage of McNerney, 417 N.W.2d 205, 208 (Iowa 1987). Settlement proceeds thus do not automatically belong to either party. Id.

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We agree with the district court that only the amount left at the time of the dissolution hearing, $799, should be considered a marital asset. We also agree that this asset should be awarded to Stephen.

E. Both parties contend the property division is inequitable. The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). We determine the property division as set forth by the district court in this case is equitable. We make this determination with the understanding, however, that Stephen will either turn the wedding ring over to Glenda or pay her $1,100. With this understanding, we affirm the division of property.

V. Summary.

We have affirmed the district court on all issues, except we have modified Stephen's child support obligation. Costs of this appeal should be assessed one-half to each party.

AFFIRMED AS MODIFIED.