IN THE COURT OF APPEALS OF IOWA

No. 6-552 / 96-0426

IN RE THE MARRIAGE OF CATHY ANNA BULLOCK-McCALLEY AND JAMES D. McCALLEY

Upon the Petition of
CATHY ANNA BULLOCK-McCALLEY,

Petitioner-Appellant,

And Concerning
JAMES D. McCALLEY,

Respondent-Appellee.

FILED
NOV 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Cathy Bullock-McCalley appeals the district court's decree of dissolution of the parties' marriage. **AFFIRMED.**

Thomas J. Levis and Mark R. Schuling of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

Thomas J. Cahill of Cahill Law Offices, Nevada, for appellee.

Heard by Sackett, C.J., and Habhab and Vogel, JJ.

HABHAB, J.

Cathy and Jim McCalley were married in April 1991. They have one child from the marriage, Zachary, born October 3, 1991. The family moved from Georgia to Ames, Iowa in 1992. Cathy filed a petition for dissolution of marriage in June 1995.

In its findings of fact, the district court noted Cathy had obtained a bachelor's degree in psychology and a master's degree in special education from Georgia schools. She earns a gross annual income of $36,000 working with the Ames Public Schools; however, she has been unable to obtain employment in her field of training because of different certification requirements in Iowa. Jim received his doctorate degree in electrical engineering in 1992 and was hired as an assistant professor at Iowa State University where he earns a gross annual income of $70,015.

The court found Cathy had been Zachary's primary caretaker while the family lived in Georgia and through the balance of 1993 and 1994. It noted, however, in the summer of 1994 Jim became substantially more involved in the day-to-day care of Zachary. A child custody evaluator appointed by the court described both Cathy and Jim as excellent parents; however, she recommended Cathy be awarded primary physical care of Zachary.

The court awarded primary physical care of Zachary to Jim. The court noted it "had an opportunity, not only to examine the testimony of the parties, but also to observe the parties and their demeanor in the courtroom." It found Jim has "more

stability in his life and a stronger extended family. He appears to be more at peace with himself and his surrounding society."

The court found Cathy would require some additional education to become certified in her field in Iowa. It therefore awarded her alimony in the amount of $250 per month for a period of thirty-six months beginning on March 1, 1996. Jim was awarded the parties' marital residence.

Cathy appeals. She argues the court erred in finding it was in Zachary's best interests to award Jim primary physical care. Cathy requests she be awarded the marital residence if the appellate court awards her primary physical care. Cathy further argues the district court's award of alimony is insufficient and requests appellate attorney fees.

I. Primary Physical Care. In reviewing the terms of an original decree, our review is de novo. Iowa R. App. P. 4. Cathy asserts, as she provided the majority of Zachary's care during the marriage, it is in Zachary's best interest that primary physical care be awarded to her. Cathy points out she stayed home with Zachary after his birth in October 1991 until July 1994. She maintains during that time she served almost exclusively as Zachary's caretaker as Jim was working long hours to obtain his doctorate degree. She asserts Jim only began to take a more active role in Zachary's care in July 1994 when it became evident the parties would be divorcing. Cathy argues Jim is more strict in disciplining Zachary and more inflexible. She also

points out the court-appointed custody evaluator determined Zachary's best interests would be met by awarding primary physical care to her.

In awarding primary physical care of Zachary to Jim, the trial court stated:

> Both parents are described as excellent parents. Each have substantial positive attributes to contribute to the child. Both are nurturers.
>
> There is little controversy that the Petitioner was the primary caretaker of the child for the first few years of his life and the Respondent was basically preoccupied with his education and work. She complains that the active participation of the Respondent with his son within the last two years is motivated by the initiation of these proceedings and a desire to "win" custody. The court does not attribute that type of sinister motive to the Respondent. It may be that the lawsuit shocked the Respondent into a realization that he needed to become more involved with his son, but it is apparent from the evidence that his activities with the child are sincere and represent an appropriate parenting activity. . . .
>
> The Petitioner would provide a less structured environment than the Respondent. The Respondent would likely encourage the intellectual pursuits of the child more than the Petitioner.
>
> The court has had an opportunity, not only to examine the testimony of the parties, but also to observe the parties and their demeanor in the courtroom. The Respondent has more stability in his life and a stronger and extended family. He appears to be more at peace with himself and his surrounding society.

From our de novo review of the record, we find that while the evidence indicates both Jim and Cathy appear to be excellent and loving parents to Zachary, the trial court properly awarded primary physical care of Zachary to Jim. In close cases such as this, we believe it is especially important to give deference to the findings of the district court. "[T]he district court had the parties before it and was

able to observe and evaluate the parties as custodians." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). "One who personally observes holds a clear advantage over us who learn the case from a cold record. The first-hand observer can translate that advantage into a more just disposition." *In re Marriage of Wegner*, 434 N.W.2d 397, 400 (Iowa 1988) (Harris, J., dissenting). We affirm the trial court's award of primary physical care of Zachary to Jim.

Cathy has also requested we award her the martial home. As we have affirmed the trial court's determination with regard to primary physical care of Zachary, we also affirm the award of the martial residence to Jim.

II. Alimony. The trial court awarded Cathy $250 per month in alimony for thirty-six months. Cathy contends the additional schooling she will need to become certified in this state and the sacrifices she made in her career which required her to stay home with Zachary and enabled Jim to obtain his doctorate degree warrants a higher award.

In fixing the amount of alimony, the trial court acknowledged Cathy's need to obtain additional education to become certified in her field. The record reflects Cathy has an annual income of $36,000 per year and is employed by the Ames Public School System and she has obtained bachelor's and master's degrees from the State of Georgia. Jim earns $70,015 per year as an assistant professor in electrical engineering at Iowa State University.

Alimony is not an absolute right; an award depends upon the circumstance of each particular case. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). "The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3)." *State v. Khalsa*, 542 N.W.2d 263 (Iowa App. 1995); *see In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). The ability of one spouse to pay alimony must be balanced against the needs of the other spouse. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995).

In our de novo review of the record and after considering the factors listed in Iowa Code section 598.21(3), we find the trial court's award of alimony to be equitable.

III. Appellate Attorney Fees. Cathy requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 679, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Cathy.

AFFIRMED.