IN THE COURT OF APPEALS OF IOWA

No. 7-169 / 96-1192

IN RE THE MARRIAGE OF ALAN J. BOHR AND JULIE A. BOHR

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Upon the Petition of ALAN J. BOHR,

Petitioner-Appellant/Cross-Appellee,

And Concerning JULIE A. BOHR,

Respondent-Appellee/Cross-Appellant.

FILED
MAY 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Chickasaw County, George L. Stigler, Judge.

Petitioner appeals, and respondent cross-appeals, from the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED.**

Judith O'Donohoe of Eggert, Erb, O'Donohoe, Frye & Von Ah, P.L.C., Charles City, for appellant.

Gary J. Boveia of Boveia Law Firm, Waverly, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

SACKETT, P.J.

Petitioner Alan J. Bohr appeals from the child custody provision and respondent Julie A. Bohr cross-appeals from the economic provisions of the September 5, 1995 decree dissolving their marriage. Alan contends the district court should have awarded him physical care of the parties' two children, and if he is not awarded physical care, he should have them at least during the summer months. Julie on cross-appeal contends (1) the district court failed to accurately value and equitably divide the parties' farming interests; and (2) the district court should have ordered Alan to pay her trial and appellate attorney fees. We affirm.

A dissolution action is tried in equity and reviewed de novo on appeal. *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa App. 1993); *In re Marriage of Whelchel*, 476 N.W.2d 104, 106 (Iowa App. 1991).

Alan and Julie were married on August 24, 1985. Their son Timothy was born in September 1986 and their daughter Kayla was born in April 1990. Alan was thirty-seven years of age at the time of trial and Julie was thirty-three. Both are high school graduates and are in good health.

At the time of marriage, Alan was a partner in a farming operation with his father and brother. He owned farm land that had come to him by way of inheritance and gifts. The farm economy was not good at the time and the amount of equity Alan had in the farming operation is not clear. Julie was employed at Beatrice Cheese in

Fredericksburg. Julie later quit that job and worked with Alan in the family dairy operation. At the time of hearing, Julie had returned to the job market.

The trial court found both Julie and Alan good caretakers. It found Julie had been more involved in the daily care of the children and Alan's primary function had been to farm while Julie worked outside the home and cared for the children. The court found the children's long-range interest best served in Julie's care and provided for joint custody with Julie having physical care. The court enjoined Julie from moving away from New Hampton. Alan was given visitation, including alternate holidays and five weeks each summer.

We first address Alan's claim if he does not have physical care he should have the children in the summer months. Divided physical care is not favored. *See In re Marriage of McElroy*, 475 N.W.2d 221, 223 (Iowa 1991); *In re Marriage of Westcott*, 471 N.W.2d 73, 75 (Iowa 1991). There is nothing in this record that supports consideration of divided physical care.

We examine the record to determine if we agree with the trial court's decision on physical care. The parties love their children and both claim to have assumed the greater share of their care. Their children have been an important part of each of their lives. Yet, they each have frequently elevated their personal desires and animosity towards the other over the well-being of their children.

The parties separated in June 1993. In April 1994, the dissolution was not yet final and the children were still uncertain about their ultimate placement. A man

twelve years younger than Julie and a member of the farming community moved in with Julie. The trial court found Julie's housemate immature for his age. He does not intend to marry Julie, although it had been her intention following the dissolution to move some distance away and live with him. The trial court found the man had no feeling for the children and had acted irresponsibly with them. The restriction on Julie moving from the area was put into the decree according to the trial court's findings because of the trial court's concerns for the children if she did move. Then, in October 1993, Alan had a woman and her son move in with him.

Alan and Julie's decision to quickly step into new relationships have been difficult for the children. Tim particularly has exhibited signs of depression over his parents' break-up. Alan and Julie seem to have elevated their need for companionship over their children's welfare.

The record is replete with attempts by both Alan and Julie to degrade and undermine the other. Julie has complained to the children Alan is lazy and dirty and she has encouraged them to say hateful things to their father. Alan makes constant complaints about Julie's complaining and that she yells and screams at the children. The most serious of the exchanges is that Alan has not always exercised adequate safety precautions when the children are with him around farm machinery. Julie has on occasion elected to entrust the children to her housemate, who drives fast and exhibits irresponsible behavior in the children's presence. Both claim they offer the children superior qualities as the primary care giver in a single parent home.

The trial court premised its finding in large part on a finding Julie was the primary care parent during the marriage. Consideration is given to her position of primary caretaker. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). Though the fact a parent is primary caretaker does not assure he or she will be the custodial parent. *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa App. 1996).

It is disturbing that the trial court, while finding the children have the best long-range chance with Julie, shows such a lack of faith in Julie's judgment in so much that he has found her plan to move with her housemate unwise and has restricted this move and imposed strict geographical limitations on Julie's residence. Such very limited geographical restrictions are not favored. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985). Such restrictions only pave the way for additional modification actions bringing trauma to the children, giving them a lack of stability, and incurring expense to the parties.

We consider the trial court's conclusion as to Julie's ill-advised decision to move with a man, twelve years younger than she is and fourteen years older than her son who has exhibited few signs of maturity and concern for the children, in assessing Julie's maturity and good judgment.

The decisive question is which parent will provide the more nurturing and stable environment where the children's needs will be put in a primary position and the other parent's place in their lives will be recognized, respected, and encouraged,

and the children will be more likely to have a healthy physical, mental, and social environment. *See In re Marriage of Pothast*, 539 N.W.2d 199, 200 (Iowa App. 1995).

The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Past conduct is considered because it provides a window to predict future behavior. Past behavior and attributes are assessed to determine the better placement for the children and not to reward or punish either parent. Each case is judged on its own factors and no one behavior or attribute is elevated to where it becomes the sole dispositive factor or cleanses the other spouse of prior sins.

The trial court had the parties and witnesses before him, and we give this consideration. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). We affirm the trial court on this issue.

Julie challenges the property division. She challenges the valuation of the farm operation awarded to Alan and the ultimate distribution of the property. The trial court set aside to both Alan and Julie motor vehicles, their life insurance policies with no cash value, furniture and appliances not valued, and bank accounts. Julie received her pension account. This distribution resulted in Alan receiving $3200 in value and

Julie $5200 plus the value of her pension plan that had accrued for four years, for which no value was shown.

The trial court then allocated personal debt, primarily attorney fees of $5000 for Alan's attorney to him and $11,000 for Julie's attorney to her.

The trial court next valued the equity in the farming operation at $85,134 and gave Alan credit coming into the marriage with $35,000 in assets and ordered Alan pay Julie $25,000.

Julie contends the trial court should have valued the farm assets before debt at about $350,000, not $230,000. Julie contends the calculations resulted in Alan receiving $200,363 and she receiving $31,148. She contends her cash award should be $84,148.

Alan contends Julie's figures are inaccurate. He advances she values crops for their worth at harvest, she values livestock at a 1992 rather than current figure, and she omits a liability of $55,000 owed to Metropolitan.

Alan had farm assets and land at the time of the marriage received both through gift and inheritance. The farm economy was not good when they married in 1985. Julie's income was important to the family. There was restructuring of the farm debt in the mid-eighties. When the farm partnership was dissolved in 1989, forty acres of property Alan had inherited was deeded to him and Julie as joint tenants. This real estate has a current value of $2875 per acre.

In 1993, Julie's wages were $18,000 giving her an adjusted gross income of approximately that amount. In the same year, Alan reported adjusted gross income of about $13,000 and took advantage of a net operating loss carry forward of about $8500.

The property division should treat both parties equitably. *See In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). The equity of the division is considered by applying the facts of each case to the statutory criteria. *See In re Marriage of Robison*, 542 N.W.2d 4, 5-6 (Iowa App. 1995). We find no reason to disturb the valuations established by the trial court. *See In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa App. 1993).

The allocation of farm assets allows Alan to remain in farming and gives consideration to the property he acquired through gift and inheritance. We find there are a variety of factors a court must weigh to determine how inherited or gifted property should be treated. *See In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989). The division was equitable. We affirm the trial court on this issue.

Julie contends she should have been awarded attorney fees in the trial court. We review for an abuse of discretion. *In re Marriage of Flattery*, 537 N.W.2d 801, 804 (Iowa App. 1995); *In re Marriage of Erickson*, 491 N.W.2d 799, 804 (Iowa App. 1992).

Alan contends he should not pay her fees. He contends part of her large bill was the result of her changing her attorney during the proceedings. He further

advances she is getting substantial property and has earnings that are not dependent on a capital investment. He contends his maximum borrowing ability even through FmHA is only $45,000 and this money will be necessary to pay Julie, retain his business assets, and pay his own attorney. The trial court did not abuse its discretion on this issue.

Julie requests an award of appellate attorney fees. We consider her request looking at her needs, the ability of Alan to pay, and other factors. *In re Marriage of Mrkvicka*, 496 N.W.2d 259, 262 (Iowa App. 1992). We award her $500 in appellate attorney fees. Appellate costs are taxed to Alan.

AFFIRMED.