IN THE COURT OF APPEALS OF IOWA

No. 5-191 / 94-1826

FILED
MAY 30 1995
CLERK SUPREME COURT

**IN RE THE MARRIAGE OF RICHARD O'TOOLE BURROUGHS, JR. AND APRIL TARA BURROUGHS**

Upon the Petition of
**RICHARD O'TOOLE BURROUGHS, JR.,**

Petitioner-Appellant,

And Concerning
**APRIL TARA BURROUGHS,**

Respondent-Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

Richard Burroughs appeals from the decree dissolving his marriage to April Burroughs. **AFFIRMED.**

Joseph D. Thornton of Smith Peterson Law Firm, Council Bluffs, for appellant.

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ.

**HABHAB, P.J.**

Richard and April Burroughs were married on June 20, 1992. April had one child, Michaella, age four, from a prior relationship. Michaella's custody is not at issue in this appeal. On April 15, 1994, Richard filed a petition for dissolution of marriage. The main dispute at the dissolution trial concerned primary physical care of the parties' son, Dillon, born February 13, 1993.

At trial, much of the evidence focused on April's mental health history. April admitted attempting suicide on two or three occasions, the latest being in May 1993. An October 26, 1993, report by Dr. Douglas Praus, however, indicated she had reported five suicide attempts in the previous six years. April also was hospitalized for drug and alcohol dependency in 1988. Several of her care giver reports suggested she was suffering from posttraumatic stress disorder stemming from sexual abuse as a child.

Richard testified he had been the primary caretaker for Michaella while April earned her associate degree in Science at Iowa Western Community College. His mother also cared for Michaella and Dillon at times.

April testified she suffered a cervical trauma after Richard shoved her head first into a couch. She later admitted she had struck Richard first. She also related Richard had once forced her and Michaella to enter a local shelter after having them removed from the marital home. April noted Richard had placed all of her personal goods on the front lawn and locked her out of the house after filing the dissolution decree.

The district court found, in its decree, that, except for some problems relating to the childhood sexual abuse, most of April's mental health troubles stemmed from the parties' relationship. The court awarded joint legal custody to both parties and gave primary physical care of Dillon to April. The court stressed its decision was

based mostly on its observation of the parties' demeanor and credibility. The court also decided the issues of child support and visitation which are not at issue on appeal. Richard appeals.

The sole issue on appeal is whether the district court erred in awarding April primary care of Dillon.

Our review of cases such as these 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). Deference is given to the district court regarding the credibility of witnesses because the court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992); *In re Marriage of Anderson*, 509 N.W.2d 138, 143 (Iowa App. 1993). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

We believe the deference to be given the district court on credibility issues is particularly important in this case. The district court specifically stated the credibility of the witnesses was a deciding factor in the case. The court stated:

> This is a case where the court's firsthand observation of the parties, their demeanor and that feeling one gets when watching and listening to a witness as to his or her credibility, sincerity, and motives becomes a substantial, if not the primary factor, in the decision. A reading of a cold transcript might produce a determination different than the one made by the court today.

The testimony reveals that both parents are capable of giving proper care. The only person who testified, other than the parties, was the children's day care provider, Deanna LaFluer. In her opinion, both Richard and April were capable of providing good care for the children. Her testimony does not show that either parent has an advantage in this respect. We recognize Ms. LaFluer had a limited basis upon which

to judge the parties' parental abilities, however, we find this testimony to be particularly useful given the credibility problems raised by the district court.

We find the district court's decision regarding the primary physical care of Dillon should be affirmed.

April requests appellate attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to 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 district court's decision on appeal. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We order Richard to pay $750 toward April's appellate attorney fees.

**AFFIRMED.**