FILED
NOV 29 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-228 / 89-1054

IN RE THE MARRIAGE OF PEGGY J. CASWELL AND TIMOTHY J. CASWELL

Upon the Petition of

36

PEGGY J. CASWELL,

Appellee,

And Concerning

TIMOTHY J. CASWELL,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, William Klotzbach, Judge.

Rehearing of respondent's appeal from various provisions of the dissolution decree. **AFFIRMED AS MODIFIED.**

Gary J. Boveia, Waverly, for the appellant.

Terry Diane Parsons, of Olson, Parsons & Ament, Cedar Falls, for the appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

We granted Timothy Caswell's petition for rehearing of the appeal of his dissolution decree because we had inadvertently failed to address the issue of which of the parties is to be responsible for the house payment, taxes, repairs, insurance, and upkeep of the residence located at 4223 Cearview Drive while Peggy Caswell has the right to live there with the parties' children. We have now considered the petition and response and have addressed the issue in division III of this opinion. We affirm the district court as modified.

The parties, Peggy and Timothy Caswell, were married in 1979. They have two children, Brad, born in 1981, and Luke, born in 1982. In addition, Peggy has an older son, Brian, born in 1970, who Tim adopted shortly after the marriage. Brian has lived with the parties throughout the marriage.

Both parties are employees of the John Deere Tractor Works. Their incomes vary somewhat due to overtime and incentive pay. Tim's base pay rate is $13.54 per hour, but he can earn up to $19.66 per hour with incentive pay. In 1988, his gross earnings exceeded $47,000, but he testified he expects less income in the future due to reduced overtime and reduced incentive pay. During the trial Tim's most recent paycheck showed a gross of $641 per week. Peggy's base pay rate is $12.01 per hour, but she can earn up to $18.01 per hour. Recently, her gross earnings have been about $720 per week.

The dissolution decree placed the two children who are still minors in joint legal custody and in Peggy's physical care. The decree specified minimum visitation rights for Tim; this visitation includes alternate weekends, three weeks in the summer, and several listed holidays and birthdays.

The decree directed Tim to pay Peggy child support of $124 per week as long as all three children are eligible for support. (The oldest child is still eligible because he is a college student.) When only two children remain eligible for support, the amount drops to $105 per week, and when only one is eligible, the amount drops to $75 per week.

Peggy was awarded the marital residence, which was valued at $47,000, but was subject to a debt of about $22,000. Tim was awarded rental property which he owned together with his mother; this property was valued at $45,000, but was subject to a debt of $17,000. Each party was awarded a vehicle and various personal effects. There were no substantial bank accounts or financial assets to be divided.

Tim has appealed from the dissolution decree. He asks that his minimum visitation rights with the two younger children be expanded to include one week night each week, more holiday time, and at least six weeks in the summer.

Tim also requests certain changes in the child support provisions. He does not challenge the amount of child

support. However, he asks that his child support obligation be suspended during his summer visitation and for Peggy to be directed to pay him child support during the summer visitation. He also asks that his support payments for the adult child, Brian Caswell, be made directly to the child rather than to Peggy. This request is largely due to the alienation that has occurred between Brian and Tim. Following the parties' separation, Peggy told Brian that Tim in fact was only his adoptive father and revealed to him the identity of his biological father. This was done without the consent or knowledge of Tim. Tim believes the animosity his son feels towards him is a direct result of Peggy's actions. In addition to the changes in child support, Tim asks the court to determine which party will receive the income tax dependency exemptions for the calendar year 1988.

Finally, Tim challenges the division of property. He argues he should be awarded the marital residence as well as the rental property, subject to Peggy's right to occupy the marital residence until the children are grown. In support of this request, he argues that he owned both properties before the marriage and that he brought substantially more assets into the marriage than Peggy did. He also requests that certain specified items of personal property be awarded to him.

Peggy requests attorney's fees on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Visitation Rights.** After examining the first issue of visitation rights, we feel Tim's request is not an unreasonable one. The trial court specified that Tim should have liberal visitation rights, however the proposed guidelines do not insure the maximum continuing physical and emotional contact that he is entitled to. Iowa Code § 598.41(1). Tim's visitation time is expanded to six weeks during the summer. As the original decree states, the summer weeks need not be consecutive, and by May 1 of each year the parties must decide when Tim will exercise his visitation. If the parties fail to agree upon a visitation period, Tim's visitation will commence one week after the children's summer recess. In addition, Tim will be allowed visitation rights for one-half of his Christmas holiday vacation period, provided that it coincides with the children's vacation period. The remainder of the visitation periods will stand as set forth in the original decree.

This court cautions the parties to put aside their differences when organizing the visitation schedule. As the children grow older and become involved with extracurricular activities, a rigidly-applied visitation schedule may become disruptive. Parental expectations and the visitation schedule will have to be adjusted to accommodate those changes. Parental cooperation now will not only benefit the children, but will also make it easier to accommodate future events which may affect the visitation schedule.

II. **Child Support.** This court has rarely considered requests to make support payments directly to the adult child. However, this is an unusual case. In view of Brian's new found knowledge of his true biological father, and the circumstances that surround this acquired knowledge, Tim's request to make payments directly to Brian through the Clerk of Court of Black Hawk County is granted. Iowa Code § 598.22. Peggy's conduct in this case has alienated Brian from Tim. Brian's testimony indicates he believes only his mother is providing him with financial support. The payment of support directly to Brian will make it clear that his adoptive father is assisting him financially, and it may enable father and son to mend their relationship. From the support payments Tim makes to the clerk of court, one-third will go directly to Brian, and the remainder to Peggy.

Tim's request to waive child support payments for Brad and Luke during their summer visitation is denied. Even though the children will be staying with their father, Peggy will still have the expense of maintaining the children's home. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Tim's request for Peggy to make child support payments during visitation periods is also denied. Accordingly, Tim will continue to make child support payments during his visitation periods with the children.

After reviewing the financial support Tim provided to Peggy during the year of 1988, it is this court's judgment that he should be allowed to claim two children as dependents for tax purposes for that year. Peggy is hereby ordered to execute any federal and/or state documents necessary to facilitate this order.

III. Division of Property. Tim contends the trial court erred in its allocation and division of property. We agree.

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 Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Tim claims the trial

court erred in awarding the residence to Peggy since he owned that property prior to their marriage and he was the one largely responsible for its financial support. We are persuaded awarding the residence to Peggy is inequitable. Tim is awarded the residence subject to Peggy's right to live in the family home with Brad and Luke until Tim's child support obligations cease.

For the period of time Peggy resides in the family home, Peggy will pay rent of $300 per month to Tim. She will also be responsible for the cost of routine maintenance of the residence and utility payments. Tim will be responsible for any and all loan payments on the house, taxes, insurance, and the costs of repairs. As a consequence of this modification, and as reimbursement to Peggy, Tim shall repay Peggy $230 ($300 house payment + $200 taxes + $30 insurance - $300 rent) for each month since the filing of the dissolution decree (April 20, 1989) until this decision is filed.

We remind the parties that this living arrangement is meant to provide the children with the stability and comfort of remaining in their family home. We hope the parties can set aside their differences and refrain from petty disagreements that might jeopardize their children's well-being.

Tim also requests certain items of personalty should be placed in his possession. Peggy contends this request is not properly preserved on appeal. However, after reviewing

the record we believe Tim sufficiently raised this issue during the trial. Therefore, Tim may take possession of his wedding ring, the crystal bowl, the weights and weight lifting bench, certain tools which are specifically requested, the J.D. picnic cooler, the five gallon cream can, the aluminum scoop, and his softball glove.

Peggy seeks appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and depends upon the parties' respective abilities to pay. See In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Guided by these general principles, Peggy's request for attorney fees is denied.

For the foregoing reasons, the decision of the district court is affirmed as modified. The costs of this action are to be divided equally by the parties.

AFFIRMED AS MODIFIED.