IN THE COURT OF APPEALS OF IOWA

No. 3-372 / 92-1610

FILED
MAY 26 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF DAVID P. BARRATA AND CYNTHIA M. BARRATA

Upon the Petition of
DAVID P. BARRATA,

Appellant,

And Concerning
CYNTHIA M. BARRATA,

Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

The husband appeals the property portion of the decree of the district court dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Jeanne K. Johnson and James Scheetz, Des Moines, for appellant.

Brian Dowd, Des Moines, for appellee.

Considered by Donielson, C.J., and Hayden and Habhab, JJ.

PER CURIAM

David and Cynthia Barrata were married on November 17, 1980, in Manila, Philippines. The parties have two children: Darren, born on December 22, 1981, and Anna, born on May 12, 1983. During the marriage the parties lived in Des Moines, Iowa.

David was fifty-five years old at the time of the hearing. He was previously employed by Monarch Cement Company. He was injured in 1987 and now is employed as a convenience store clerk. David has income of about $11,557 from his employment, and he has net monthly income of $699.70. He also receives a monthly pension of $210. David brought a home which he purchased in 1970 into the marriage, and this was the parties' marital residence.

At the time of the hearing Cynthia was thirty-four years old. She is a native of the Philippines. Cynthia is employed as an administrative assistant with Communication Data Services. Her income is $17,014, and she has net monthly income of $921.27. She brought few assets into the marriage.

The parties purchased a home in the Philippines in 1988, which they had intended to use upon their retirement. The home is in Cynthia's mother's name because a person who is not a resident of the Philippines may not own real property there. Cynthia's parents occupy the property.

David filed a petition for dissolution of the parties' marriage. The district court awarded the parties joint legal custody of the children, with Cynthia having primary physical care. The court applied the child support guidelines and ordered David to pay child support of $143 per month per child.

The court determined Cynthia could remain in the marital residence until May 11, 2001, when the youngest child reaches the age of eighteen. During this period, Cynthia is responsible for property taxes and mortgage payments of $84.68 per month. David is responsible for all other debts which may appear as liens against the property. On May 11, 2001, the property will revert to David, and Cynthia will have no claim against the property. The court ordered the parties to sell the house in the Philippines, with the proceeds to be divided equally between the parties. The court divided the parties' other property and debts.

David filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). For the first time he asked to be granted the tax exemptions for the two children. The court denied the motion. David now appeals.

I. 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. David first contends the district court should have awarded him the dependent tax exemptions for the parties' two minor children. He points out the district court did not address this issue and claims under the case of In re Marriage of Wilhelm, 491 N.W.2d 171, 173 (Iowa App. 1992), we should remand this issue to the district court.

Our review of Wilhelm shows it was not remanded because the district court failed to address the issue of the parties' tax exemptions but was remanded with specific instructions to award the exemptions to the noncustodial parent because we disagreed with the district court's conclusion the custodial parent should be entitled to the exemptions. Id. Our decision in Wilhelm was based on the financial conditions of the parties. Id.

Generally, the parent having custody of a child for the greater part of the year will be treated as having provided more than one-half of a child's support and will be entitled to the dependency exemption. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1992). Here, Cynthia has physical care of the parties' children. In examining the parties' financial circumstances, we determine she should have the dependent tax exemptions for the minor children.

III. David contends the district court should have awarded the Philippine property to Cynthia and ordered her to pay him $7,500, the amount of his one-half equitable

interest in the property. He questions the enforceability of the court's order. He also states Cynthia, with her ties to the Philippines, may be better able to manage the property.

We specially note in the district court's decree the parties are ordered to sell the real estate, with the proceeds to be divided between them equally. Most judgments operate in personam, and their effectiveness flows from the fact they provide for a final determination of the rights and obligations of people rather than property. In re Estate of Mack, 373 N.W.2d 97, 99 (Iowa 1985). Thus, a court in one state, by a decree in personam, may indirectly affect interests in land in another state by ordering a conveyance and enforcing the order in personam. 24 Am. Jur. 2d Divorce and Separation § 951 (1983). Here, the district court had in personam jurisdiction over the parties and we conclude the court's order is enforceable as an in personam judgment against them. We affirm the district court decision on this issue.

IV. David contends the district court should have instituted certain conditions to protect his interest in the marital residence while Cynthia occupies the property. He is concerned Cynthia will incur debt which will appear as a lien against the property. He also asks she be required to vacate the property if he assumes physical care of the children or if she cohabits with an adult male.

Additionally, David asks Cynthia only be given the right to live in the marital residence until May 1997 instead of May 2001. He states this should be a sufficient period of time to recognize her contributions to the marriage.

The parties 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). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

We determine the district court's distribution of the property to be equitable under the circumstances. The dissolution decree recognizes David brought the marital residence to the marriage, and after May 2001, he is awarded this asset free of any claims by Cynthia. In the meantime, Cynthia and the children need a place to live while the children are minors.

Cynthia's ability to live in the marital residence represents her share in the parties' largest asset. Because this represents a large portion of the property distributed to her, we agree with the district court she should not be required to vacate if indeed, she cohabits or David assumes physical care of the children. Additionally, we admonish Cynthia not to encumber the property nor give cause for any liens to be placed against it. The decree is modified accordingly.

V. Cynthia asks for attorney fees for this 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). David shall pay $500 to apply upon Cythina's appellate attorney fees. Costs of appeal are taxed to David.

After considering all issues raised in this appeal, we affirm the decision of the district court as modified.

AFFIRMED AS MODIFIED.