IN THE COURT OF APPEALS OF IOWA

No. 6-106 / 95-0998

FILED
APR 23 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF ROBERT A. GJERTSON AND CANDACE MARIA GJERTSON

Upon the Petition of
ROBERT A. GJERTSON,

Appellant.

And Concerning
CANDACE MARIA GJERTSON,

Appellee.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Roger Gjertson appeals various economic and child custody provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

William J. Schadle, West Des Moines, for appellant.

Roger J. Hudson and Stacey N. Bell of Smith, Schneider, Stiles, Hudson, Serangeli, Mallany, Shindler & Scalise, P.C., Des Moines, for appellee.

Heard by Habhab, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Robert and Candace Gjeertson were married on September 16, 1972, and their marriage was dissolved on March 27, 1995. Robert appeals the custody and economic provisions of the decree. Robert argues: 1) he should have been awarded the primary physical care of the minor children; 2) the trial court erred in awarding Candace alimony; 3) Candace should not have been awarded three-fourths of the proceeds from the sale of the family home; and 4) the trial court erred in awarding Candace $5,000 in trial attorney fees. Both Robert and Candace seeks an award of appellate attorney fees.

In this equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.* Upon our de novo review of the record, we affirm the decree of the trial court except as modified.

The parties have four children, three of whom are minors affected by this action, Kathryn born June 30, 1980, Anna born April 10, 1983, and Rebekah born July 2, 1987. The parties moved to Iowa in 1991 so Robert could attend medical school. A dissolution petition was filed February 25, 1994, and Robert was awarded the temporary physical care of the children on March 23, 1994. Robert and the

children moved from Iowa to Minnesota in August 1994 so Robert could continue clinical rotations required for his medical education.

For the majority of the marriage Candace was the primary caretaker of the children. Only when she moved out of the family home for four months in 1992, and after Robert was awarded temporary custody in March 1994, did Robert assume primary physical care for the children. It appears both parents love their children and could provide for their physical and emotional needs. At issue is which is the better parent to assume full physical care of the children.

In child custody cases, the best interests of the children are the first and governing consideration. *Brauer*, 511 N.W.2d at 647. The factors a court is to consider in awarding custody are enumerated in section 598.41 of the Iowa Code and in our case law. All the factors bear on what will be in the long-term best interests of the children. *Id.*

A custody study in this case recommended that Candace be awarded the physical care of the children. We agree for several reasons cited in the record and by the trial court. First, with limited exceptions, Candace was the primary caretaker of the children during most of the marriage. She demonstrated more patience and ability in dealing with the disciplinary needs of the children. Robert, on the other hand, is quick tempered as well as somewhat indulgent with the children. Candace is more likely to give the girls structure and consistency.

During the marriage each of the parties, at times, displayed lack of judgment and common courtesy towards the other. It is not necessary to relate all of the problems each experienced, but it is a fair reading of the record that Robert is more given to physically insulting conduct. This is a factor in custody determinations which adversely impacts on the fitness of that parent to be the caretaker. *In re Marriage of Urban*, 532 N.W.2d 493 (Iowa App. 1995); *In re Marriage of Brainard*, 523 N.W.2d 611 (Iowa App. 1994).

We do not find the issues of alleged and actual moral misconduct to be persuasive in this case. While we take seriously such allegations, this alone is not determinative. *In re Marriage of Hornung*, 480 N.W.2d 91 (Iowa App. 1991). We look at all factors in "determining the best interests of the child" insofar as physical placement is concerned. *In re Marriage of Riddle*, 500 N.W.2d 718 (Iowa 1993).

We also keep in mind that the denial by one parent of the opportunity for a child to have meaningful contact with the other parent is a significant factor in determining custody. *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). When he moved the children to Minnesota in August 1994, Robert did not provide Candace with their phone number or address. When interviewed for the custody study, Robert was asked what visitation the girls should have with their mother if he were awarded their physical care. His response indicated he favors fairly limited visitation. Given this response and his otherwise hostile feelings toward Candace, we

feel he is less likely than Candace to foster the relationship of the children with their noncustodial parent.

We are aware of the expressed preference of the oldest daughter to live with Robert and, while a preference of a minor child cannot be ignored, it is not controlling in a custody dispute. *In re Marriage of Sires*, 506 N.W.2d 813, 815 (Iowa App. 1993). Custody decisions of this kind are not easy, and we are keenly aware of the superior vantage point of the trial court due to its ability to consider firsthand the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The assessment by the trial court of the parties is particularly important in a close case such as this. We have reviewed the record and find placement of the children with Candace is in the long-term best interests of the children.

The trial court ordered Robert to pay Candace $200 a month in alimony until August 1996 and the award would then increase to $1,000 a month. The alimony would terminate upon the death of either party or until Candace remarried or cohabited. Robert argues the trial court erred in ordering him to pay alimony to Candace.

When determining the appropriateness of alimony we consider the earning capacity of each party, their standard of living, the ability to pay, and the needs of each party. *See In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa App.

1994). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *Id.*

This was a marriage of twenty-two years. For the majority of the marriage, Candace was the primary caretaker of the children. She supplemented their family income by providing child care in her home and working part-time.

Both parties completed their undergraduate educations during the marriage. Candace set aside her plans to obtain a graduate degree in order to allow Robert to quit his job and enter medical school in 1991. When they moved to Des Moines and Robert began medical school, Candace became the primary wage earner for the family. Robert had agreed that after he completed medical school Candace could commence work on her graduate degree.

Prior to the dissolution trial Candace had a job at Broadlawns Medical Center earning approximately $25,000 a year. This employment was terminated, however. At the time of the dissolution trial, Robert still had to complete a year of residency and he would commence practice as a podiatrist in 1996. Robert testified he would earn $9,500 to $20,000 in his residency. Information he had previously conveyed to his wife indicated he would earn approximately $125,000 a year provided he pass the state board examinations he is to take in 1996.

Candace enjoys reasonably good health and is relatively young. She has an excellent education earned during the marriage and is equipped to earn a living in

medical administrative duties. Robert has incurred a heavy debt while in training. We find it more equitable, given all the circumstances, to limit alimony to a rehabilitative role, rather than to continue it for an indefinite and possibly very long period into the future. We therefore conclude that monthly alimony as determined by the trial court shall continue for seven years. Such alimony shall be paid to Candace regardless of any remarraige or cohabitation on her part. Robert will also forthwith provide life insurance designed to pay such alimony for such period in the event of his death prior to the expiration of seven years. This will allow Candace to continue her education as the parties had agreed.

We note with approval the wise retention by the trial court of its jurisdiction over future child support payments and alimony. We confirm such continuing jurisdiction.

The parties had purchased a home in Minnesota in 1976 for approximately $24,000. In this acquisition, they were helped by Robert's family. Around 1980 the parents of Candace provided money, labor, and materials to build additions onto the home. The parties also obtained a home improvement loan. The value of improvements was estimated to be between $30-40,000. Candace and Robert sold the home for $90,000 when they moved to Des Moines in 1991 using their equity of $38,000 to purchase a home in Urbandale for $75,000. The present value of this home is about $83,500. It is subject to a mortgage balance of about $39,800.

Candace and her parents testified the assistance they provided in improving the Minnesota home was in the nature of a gift to Candace. The trial court ordered the Urbandale home be sold with Candace to receive three-fourths of the net proceeds and Robert to receive the rest. It made this division to account for the fact the large down payment made on the home had come from the enhanced sale value of the Minnesota home which had resulted from the purported gift to Candace only.

The distribution of property in a dissolution action should be equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Wertz*, 492 N.W.2d 711, 713 (Iowa App. 1992). What constitutes an equitable division of marital property must be determined under the specific facts of each case. *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa App. 1984).

Although Robert finds this disposition of the sales proceeds to be inequitable, we find that it is appropriate.

Laying aside the questions of gifting, we note that Robert withdrew a pension fund acquired by him during the marriage. The net proceeds, after taxes, was approximately $21,000. His testimony on the use of these funds was less than forthright, but it is apparent that he used some $3,000 to $4,000 of this sum for family purposes.

The distribution of any house sale proceeds of $43,000 on a 75-25 ratio gives Candace credit for one-half of the pension funds remaining after deduction for family usage. Absolute division is not required.

Robert liquidated a substantial family asset, and a source of retirement funds for Candace. Given these circumstances, we find the division of the homestead proceeds was equitable.

Robert appeals the order of the district court requiring him to pay Candace for $5,000 of her trial attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the award Robert must establish the trial court abused its discretion. *Id.* We find the award in this case was equitable and not an abuse of discretion.

Both parties have requested 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 678, 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 relative circumstances of the parties in this action, we find equity does not

warrant an award of appellate attorney fees to either party. Court costs are, however, assessed to the appellant.

AFFIRMED AS MODIFIED.