IN THE COURT OF APPEALS OF IOWA

No. 9-109 / 98-0623
Filed March 31, 1999

IN RE THE MARRIAGE OF SUAD GHARIB AND JOHN GHARIB

Upon the Petition of SUAD GHARIB,

Appellant,

And Concerning JOHN GHARIB,

Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Suad Gharib appeals the child custody and various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Benjamin W. Blackstock of Blackstock Law Offices, Cedar Rapids, for appellant.

Carolyn J. Beyer of White & Johnson, P.C., Cedar Rapids, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Suad (Sue) Gharib appeals the child custody and various economic provisions of the parties' dissolution decree. We affirm.

Background facts. John and Sue Gharib are first cousins and natives of Lebanon. John came to the United States in 1976 and settled in Cedar Rapids. In 1977 John married Ruthann Gharib. They had one son, Justin, and divorced in 1981. John and Sue married in Lebanon in 1983, and Sue moved to the United States in 1984. Two children were born to the marriage, Suzanne in 1985 and Jamie in 1986. Sue comprehends English fairly well, but does not express herself well in English. John has a better command of English, but is not fully fluent. Both parties required an interpreter for the dissolution proceedings.

Sue filed a petition for dissolution of marriage in May of 1997. Trial was held in February of 1998. On March 13, 1998, the court entered its decree, dissolving the parties' marriage and dividing their property. The court granted the parties joint custody of the children and named John as the primary care parent. Sue was ordered to pay child support and John was ordered to pay alimony. Sue now appeals.

Scope of review. Our review of this equitable proceeding 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 Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). We give weight to the fact findings of the district court, especially

in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Primary physical care. In assessing an issue of child custody, the controlling consideration is the interest of the children. *In re Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995). The court determines placement according to which parent can minister more effectively to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *Courtade*, 560 N.W.2d at 38.

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted); *see* Iowa Code § 598.41 (1997). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See Daniels*, 568 N.W.2d at 54; *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Sue first contends that primary physical care of the girls should have been granted to her because of John's history of domestic abuse. Domestic abuse is, in

every respect, dramatically opposed to a child's best interests, and is given considerable weight in determining who should receive primary care. *See Daniels*, 568 N.W.2d at 55. John did enter a plea of guilty to one incident of domestic abuse in the past, received a deferred judgment and completed a batterers' education program. However, John contends that he didn't understand at the time that he was admitting the abuse and just did what he had to do to resolve the matter. Sue voluntarily dismissed a second domestic abuse action, and another application for relief was dismissed. Sue argues that because there existed this one unrebutted history of domestic abuse, that factor alone should have outweighed all other factors in determining the issue of primary care. Pursuant to Iowa Code section 598.41(1)(b) and (2)(c), a history of domestic abuse does create a rebuttable presumption against the award of joint custody. *See Marriage of Forbes*, 563 N.W.2d 269, 632 (Iowa 1997). However, once the presumption is rebutted, both parents are considered in determining who should be primary care parent. *See Id.*

We also note that the testimony revealed Sue to be the more volatile of the two. Unfortunately, both Sue and John were quite combative in their relationship with each other. We recognize that some relationships are mutually aggressive; in those cases a claim of domestic violence must not be used by either party to gain an advantage in a custody dispute. *See In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa App. 1998). Several credible witnesses testified that Sue was overly aggressive in her

discipline of the children, and had seen her hit and slap them. There was no evidence that John exhibited any of his aggressive behavior toward the children.

The trial court found, and we agree, that neither party should benefit or be penalized by the presumption created in 598.41:

> The Court finds that yelling and screaming was an unfortunately common occurrence throughout this marriage. However, the Court does not find that the incidents between the parties that rose to physical altercations were of sufficient frequency or seriousness for the Court to find the kind of history of domestic abuse which would require the Court to place that as a consideration above all others in determining what placement is in the best interests of the children.

Sue also contends that she should be awarded primary care because John shut off the utilities to the marital home, failed to pay temporary support, and was found guilty of contempt. We note there were numerous filings and temporary matters which arose during the pendency of this action and consider them within the context in which they arose. While these and other actions by John during this litigation are of concern, we find they were adequately explained at trial and rectified.

Neither party was shown to be the children's primary caregiver. Sue and John owned a successful tailor shop where they both worked together, and brought the girls to work with them when they were young. John was the one who took the girls to school, doctors' appointments, and many activities. John attended the children's school conferences and actively supported their socialization with friends. Sue has a less open attitude toward outsiders and lives in relative isolation within the Lebanese community. We share the trial court's concern that the children would be

forced to share in Sue's isolation if she were granted primary care. We also note the very real threat, as supported by the testimony, that Sue would move back to Lebanon with the children should she be granted primary physical care. In addition, we are concerned about Sue's ability to facilitate the children's relationship with John after the dissolution given her contemptuous attitude toward John's son and ex-wife. Finally, we note that while John attended the court-ordered parenting class, Sue did not. The trial court's thorough examination of this difficult custody issue is reflected in the extensive fact and credibility findings. We defer heavily to those findings and affirm the primary physical care of the children with John.

II. Property division. Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). Assets and debts should be equitably, but not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1). *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa App. 1997). Although our review is de novo, we will defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, ___ N.W.2d ___ (Iowa App. 1999); *see also In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

The parties' primary assets included their homestead and three rental properties. The trial court awarded Sue the homestead and John the rental property he was living in at the time of trial. The court ordered that the remaining properties

be sold with the first (approximately) $18,000 of the net proceeds to be used to pay off the homestead mortgage, and the remainder to be split equally between the parties. The court further ordered John to pay Sue $9,000 to equalize the property distribution and assigned John all of the marital debt. As a result, the parties received a nearly equal net distribution.

Sue now complains that she should receive the homestead free and clear of any debt, pursuant to an order entered by the court in October of 1997 approving the sale of one of the rental properties. However, we find no conflict between that order and the decree. Sue also argues that all three rental properties should have been sold and the proceeds split; however, this would not achieve an equitable distribution and would also leave John and the children without a home. We find the trial court's distribution to be supported by the record and defer to its fair and equitable division of the parties' assets and debts.

III. Alimony. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996). Alimony may be used to remedy inequities in a marriage and compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). We consider alimony and property distribution together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage*

of McLaughlin, 526 N.W.2d 342, 345 (Iowa App. 1994). Before awarding alimony, the district court must consider the factors listed in Iowa Code section 598.21(3).

Taking into consideration all relevant factors, the trial court awarded Sue $100 per month in alimony to end upon her death or remarriage. The parties' tailoring shop had been sold during the dissolution, so both parties were unemployed at the time of trial, but John was hoping to rebuild the business. As Sue had contributed to its former success, the trial court noted that she should share in the anticipated reestablishment.

Sue contends that John made false and misleading claims as to his true income and should be required to pay $500 per month in alimony until she dies or remarries. However, the trial court realized neither party was in a very stable economic situation at the time of the decree, and awarded minimal alimony while noting the availability of modification should John's business prove to be successful. We will not disturb this on appeal.

IV. Attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989). The test is whether the fee is reasonable and based on the parties' respective abilities to pay. *See In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997).

The trial court ordered that approximately $5,000 in an escrow account left over from the sale of the parties' tailor shop be applied to Sue's attorney fees.

Beyond that, the trial court ordered that each party would be responsible for their own attorney fees. We decline Sue's request that an additional $20,000 from John's share of property sale proceeds be applied to her trial attorney fees. We find no abuse of discretion in the trial court's determination of this issue.

Both John and Sue request that they be awarded appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *Benson*, 545 N.W.2d at 258. 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 Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). After considering these factors, we decline to make an award appellate attorney fees to either party. Costs of this appeal are assessed to Sue.

AFFIRMED.