IN THE COURT OF APPEALS OF IOWA

No. 0-304 / 99-0465
Filed June 28, 2000

IN RE THE MARRIAGE OF MELINDA J. VANDER ECKEN AND RICHARD L. VANDER ECKEN

Upon the Petition of
MELINDA J. VANDER ECKEN,
Petitioner-Appellant/Cross-Appellee,

And Concerning
RICHARD L. VANDER ECKEN,
Respondent-Appellee/Cross-Appellant.

FILED
JUN 2 8 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marion County, Richard D. Morr Judge.

Petitioner appeals, and respondent cross-appeals, provisions of their dissolution decree regarding child custody and support. **AFFIRMED AS MODIFIED; REMANDED.**

James H. Waters, Des Moines, for appellant.

Lorraine J. May and Marci B. H. Tooman of Hopkins & Huebner, P.C., Des Moines, for appellee.

Heard by Mahan, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Melinda Vander Ecken appeals, and Richard Vander Ecken cross-appeals, provisions of their dissolution decree regarding child custody and support. We affirm as modified and remand.

Melinda and Richard married in May of 1988. They had three children during their marriage: Jacob, born in October 1988; Jessica, born in February 1990; and Jeremy, born in September 1992. At the time of trial, Melinda was thirty-two years old and Richard was thirty-eight. For the past four and a half years, Melinda has worked at 3M on the midnight to 8:00 a.m. shift. She has logged significant overtime, particularly on weekends. Richard has worked for the Veterans Administration for eighteen years. His shift is 7:00 a.m. to 3:30 p.m. on weekdays. The family lived in Melcher, Iowa during the marriage.

In October of 1998, Melinda petitioned for dissolution of the marriage. Shortly thereafter, Melinda moved with the children to Knoxville into a three-bedroom apartment upstairs from her parents' residence. Trial was held on January 13 and 14, 1999. The trial court ruled from the bench and made its findings of fact and conclusions of law. The court subsequently reduced the decree to writing on February 10, 1999. The court awarded primary physical care of the three children to Richard. The court ordered Melinda to pay child support but did not include Melinda's overtime in her income for purposes of calculating child support.

Melinda appeals. She contends it was error to award Richard primary physical care. Richard cross-appeals, disputing the trial court's exclusion of

Melinda's overtime from the child support calculation.

I. Scope of Review. We review dissolution decrees de novo. *See In re Marriage of Knickerbocker,* 601 N.W.2d 48, 50-51 (Iowa 1999) (citations omitted). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *Id.* (citation omitted). In doing so, we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* (citations omitted).

II. Primary Physical Care. In any custody determination, the primary consideration is the best interests of the children. Iowa R. App. P. 14(f)(15); *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999) (citation omitted). The court's objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy,* 592 N.W.2d at 683. We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *See* Iowa Code § 598.41(3); *In re Marriage of Daniels,* 568 N.W.2d 51, 54 (Iowa App. 1997) (citations omitted). These include the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the children. *Id.* A history of domestic abuse by one parent is also factor. *Id.*; *see also* Iowa Code § 598.41(3)(j). Melinda contends the district court failed to consider her significant involvement in caring for the children and ignored evidence of domestic abuse by Richard.

We find no evidence from which we can afford Melinda the statutory presumption regarding domestic abuse. In assessing what is sufficient to

constitute a 'history' of domestic abuse, we weigh the evidence of abuse, its nature, severity, repetition, and to whom directed, not just count the number of incidents. *Forbes*, 570 N.W.2d at 760. We do not minimize the seriousness of domestic violence and the negative impact it has on children. However, we note the allegations of abuse surfaced for the first time during the dissolution proceedings. Only one incident was ever reported to the police and Melinda never sought a protective order. Richard was not arrested as a result of that reported incident, which he claims Melinda initiated by striking *him* with a broom handle. A 'history' of abuse is not established by a single, documented incident. *In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). Melinda provided the testimony of no one who witnessed any other incidents of alleged abuse. After considering the evidence, the trial court found "absolutely no proof that Mr. Vander Ecken ever committed domestic abuse" or that he was an abusive person.

In reaching our conclusion regarding domestic abuse, we do not ignore two incidents that Richard admitted. One concerned his breaking of an outdoor light with a shovel two years prior to trial and the other involved his throwing a hammer through a door inside the house. While these acts demonstrate he has a temper, we note the destruction was not directed at a person. He admitted these acts at trial and was able to express regret. Melinda's counsel conceded at oral argument that she had presented no other evidence of domestic abuse trial, except the two incidents of property destruction and the one incident wh

police were called but no arrest was made. Accordingly, we give little weight to this factor in determining custody.

We conclude it is in the children's best interests to have their father as the primary physical caretaker. The evidence regarding the characteristics of the parents, as well as each one's capacity and desire to provide for the needs of the children, weighs in Richard's favor. Richard seems to be more committed to the children's needs and is the more stable parent. Richard would also seem to be more supportive of Melinda's relationship with the children—the trial court found Melinda had a propensity to manipulate the children to try to hurt Richard. Careful consideration is also given in custody disputes to allowing children to remain with the parent who has been the primary caregiver. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa App. 1995). The evidence at trial was disputed concerning who was the primary caregiver during the marriage. Richard testified he had spent most of his free time with the children. He stated he did nearly all of the cooking and cleaning. He claimed he transported the children to and from daycare, got them up and ready for school, took them to their sporting and school events, and attended and participated in their extracurricular activities. Melinda also claimed she did her share of cooking and cleaning and other household chores.

The trial court believed Richard's version of events and we do not disturb this assessment on appeal. Whom to believe is a credibility call left to the trial court. The children's daycare provider testified that most of her interaction has been with Richard, not Melinda. The record indicated Melinda would get off of

work at around 8:00 a.m. and sometimes not get home until 10:00 a.m. She would then sleep most of the rest of the day, often leaving the children in day care even after school got out in the afternoon. We recognize Melinda had a difficult working schedule. However, even when she had free time, she often spent it away from the children bowling or pursuing other recreation. Melinda worked quite a bit of overtime on weekends as well. She indicated in the record that she intends to continue her employment with 3M, therefore, the children would be with Melinda's mother a good part of the time if Melinda were given custody. While there is no indication the grandmother is unfit to care for the children, it is in their best interests to be with a *parent* who is equally capable of caring for them. We affirm the district court's award of primary physical care to Richard.

III. Melinda's Overtime. The trial court found Melinda's gross annual income for 1997 was $40,512. Approximately thirty percent of this income was attributable to overtime. The trial court deducted thirty percent and used $30,000 as Melinda's income figure for purposes of calculating child support. Richard contends Melinda's overtime income should have been included in the calculation.

We agree. Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. *In re Marriage of Brown,* 487 N.W.2d 331, 333 (Iowa 1992) (reversing lower court's failure to include overtime wages in child support calculation where overtime was not speculative). Only when such overtime is speculative or uncertain, or where

a parent is forced to work overtime to meet a burdensome child support obligation, may overtime pay be excluded from the guideline calculation. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993).

Melinda's overtime was not speculative. Overtime was available to her almost every weekend for her entire tenure at 3M. In 1998, she worked approximately 600 hours of overtime. Melinda's supervisor testified that a great deal of overtime was always available to 3M employees. He indicated he had also worked around 600 hours of overtime in 1998. The supervisor also stated that to a certain extent, overtime at 3M was not voluntary; each employee was expected to work his or her fair share in order to keep the job. Nothing in the record shows this overtime will decline in the near future. In similar circumstances, the Iowa Supreme Court has found overtime was not speculative and should be included in the calculation. *See Brown*, 487 N.W.2d at 333-34. In *Brown*, the father's overtime had been continuous for the previous year and a half, some overtime was mandatory and expected of an employee at the father's workplace, and there was no indication that overtime would be unavailable in the future. *See id.* at 333; *see also Geil*, 509 N.W.2d at 742; *In re Marriage of Elbert*, 492 N.W.2d 733, 735 (Iowa App. 1992). We conclude the trial court erred in omitting Melinda's overtime from the child support calculation. We remand for the limited purpose of recalculating child support. Costs are taxed to Melinda.

AFFIRMED AS MODIFIED; REMANDED.