FILED
OCT 24 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-414 / 89-481

IN RE THE MARRIAGE OF ALLISON LYN JAY AND LEON D. JAY, JR.

Upon the Petition of

264

ALLISON LYN JAY,

Petitioner-Appellant,

And Concerning

LEON D. JAY, JR.,

Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Leo Connolly, Judge.

Petitioner appeals her dissolution decree. **AFFIRMED AS MODIFIED.**

Robert V. Rodenburg of Lyle A. Rodenburg, P.C., Council Bluffs, for appellant.

G. Elizabeth Otte, Council Bluffs, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

This appeal challenges the custody award in a dissolution decree. We affirm.

Petitioner-appellant Allison Lyn Jay and respondent-appellee Leon D. Jay, Jr., were married June 7, 1980. They have two children, William, born March 5, 1985, and Michelle, born October 23, 1987. The trial court granted custody of the children to Leon and granted Allison reasonable visitation.

Allison's first challenge is to the procedural posture this case has followed. Initially Allison filed a petition and Leon filed an appearance.[1] No answer was filed. Allison moved for a default. The trial court denied the motion and assigned the case for trial. The matter proceeded to trial. No answer had yet been filed when the case was submitted to us. The trial court, following an unusual procedure, ultimately decided the case. Custody was awarded to Leon. Allison appeals.

Allison first contends because of Leon's failure to file an answer she was surprised by the custody dispute. She also contends the court should only have received evidence to substantiate her allegations. First, we do not find Allison was surprised by the custody dispute. The resistance to default made it abundantly clear that custody would be an issue and Leon would seek custody.

1. The attorney filing the answer did not represent Leon at the trial or on appeal.

We next address her claim because of Leon's failure to answer her petition the only evidence that should have been received was evidence to substantiate her petition. Allison has failed to preserve error on this issue. Allison made no motion at the trial court level to limit evidence based on the absence of the answer, and the matter was tried as though an answer had been filed. We will not consider the issue for the first time on appeal. See Davis v. State, 443 N.W.2d 707, 710 (Iowa 1989).

Allison next contends she should have been awarded custody of the children. Our concern is for the best interests of the children. We determine which parent can minister more effectively to the long-range best interests of the children. In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 (Iowa App. 1985); In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa App. 1981). Allison was the children's first and primary caretaker. She continued to assume this position until the marital problems began. At that time, according to the testimony of Leon and other reliable witnesses, she nearly abandoned her family responsibilities.

When Allison no longer assumed these family responsibilities, Leon took them on. In the nine months prior to trial, Leon assumed nearly all the family and household responsibilities. He has developed a strong relationship with the children. Additionally, during that period Allison has not shown financial responsibilities.

She has withdrawn large sums of money from investments, and is unable to explain the disposition of the money. We find Leon to be the more responsible parent and the one with whom the children will have the more secure home.

We affirm the trial court in all respects, except we find the order should be modified to award both parties joint custody with Leon receiving physical care. Court costs are taxed to Allison.

AFFIRMED AS MODIFIED.

Habhab, J. concurs; Schlegel, P.J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

The parties to a dissolution action are entitled to an orderly procedure under the rules of civil procedure. In this case, although the petitioner filed the proper petition, respondent did nothing but appear. The rules of civil procedure were simply disregarded in the disposition of this matter. The trial of the case was ordered at a time when no answer or other motion to the petition was on file, and at a time when the petitioner could really only guess what the position of the respondent would be. This is the kind of thing that the rules are designed to avoid. It is under this kind of proceeding that a party can be blind-sided when the rules provide for avoidance of such a result.

The court, at the conclusion of the evidence, did not propose to determine the issues presented to it excepting the custody issue, and required the parties to settle the division of property.

I believe the petitioner was prejudiced in this proceeding. I would remand for a new trial, after appropriate pleadings and discovery were assured.