IN THE COURT OF APPEALS OF IOWA

FILED
MAY 30 1995
CLERK SUPREME COURT

No. 5-181 / 94-1286

IN RE THE MARRIAGE OF DEBRA M. JAEGLE AND EDWARD R. ROBBEARTS

Upon the Petition of
DEBRA M. JAEGLE,

Appellee,

And Concerning
EDWARD R. ROBBEARTS,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Edward Robbearts appeals certain provisions of the parties' dissolution decree.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED IN PART.

M. Kathryn Miller, Des Moines, for appellant.

James T. Carlin and Michael Motto of Carlin, Hellstrom & Bittner, Davenport, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Edward Robbearts appeals certain provisions of the parties' dissolution decree. We affirm in part, modify in part, and remand in part.

Debra Jaegle and Edward Robbearts were married in February 1987. At the time of trial Debra was thirty-four years of age and Ed was forty-four years of age. They have one child, Sarah, born in January 1988.

When the parties married Debra was completing her residency in internal medicine. She is a physician employed by Internal Medicine Associates, P.C., and is also an employee and shareholder of Renal Dialysis Associates. In 1992 she earned $50,807.63 from Internal Medicine Associates and $12,000 from Renal Dialysis Associates. She also received $15,700 in bonuses from Renal Dialysis Associates.

Ed does not have a college degree. During the marriage Ed was employed in the pest control industry. He earned approximately $26,009 in 1990 and $17,376 in 1991. He was terminated in November 1992 for poor work performance and remains unemployed. The evidence does not indicate how much he earned in 1992. Ed is a recovering alcohol and gambling addict.

The decree awarded Debra assets valued at $91,373 and liabilities of $65,150. The court valued her ownership interest in Renal Dialysis Associates at $697. Ed received assets valued at $2400 and liabilities of $4400. These amounts do not include

marriage. In order to achieve an equitable division of assets the court ordered Debra to pay Ed $12,500 in monthly installments with interest.

The court awarded Debra sole legal custody of Sarah. Ed received liberal visitation rights and was required to pay eighty-three dollars per month in child support.

Both parties filed Iowa Rule of Civil Procedure 179(b) motions. Ed also filed a motion for new trial. The court responded to Debra's rule 179(b) motion and clarified the visitation portion of the decree. Ed filed an application for order to show cause why Debra should not be held in contempt for failing to allow him visitation as ordered. The court dismissed the application and denied Ed's 179(b) motion and motion for new trial by separate orders.

Our review in equity cases is de novo. Iowa R. App. P. 4. 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. Iowa R. App. P. 14(f)(7).

Ed first challenges the district court's valuation and distribution of assets. He contends the court erred in (1) its valuation of the home furniture and appliances, (2) failing to include Debra's car as a marital asset, (3) failing to award him personal property in Debra's possession to him, and (4) its valuation of Debra's interests in Internal Medicine Associates and Renal Dialysis Associates.

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

The parties' joint statement of assets and liabilities included a valuation of $5445 for the furnishings and appliances. The district court valued the items at $4000. The court determined the car was not a marital asset based on Debra's testimony that her mother owned the car. No other evidence relating to the car's ownership was presented.

Because of the difficulty of the task of valuation, the law provides much leeway to the trial court, even permitting the trial court to devise its own scheme for valuation. *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa App. 1991). The trial court's valuations are a reflection of its assessment of witness credibility. The court's valuations of the home furnishings and its exclusion of the car from marital assets are supported by credible evidence, and we will not disturb them on appeal. *See In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

Ed requested certain personal property be awarded to him. This included copies of photos, portraits and videos of Sarah, his fishing equipment, tools, and three prints. Ed's personal items have little or no value to Debra, and it is reasonable to award them to Ed. It is also appropriate to allow Ed to have copies of Sarah's photos and videos. We therefore modify the decree and award Ed his fishing equipment, tools, and three

prints. In addition Debra shall turn over copies of Sarah's photos to Ed or make the originals available for him to copy.

Ed's final challenge to the property distribution stems from the court's valuation of Debra's interests in Internal Medicine Associates and Renal Dialysis Associates. Pursuant to a subpoena duces tecum, David Stokes, the certified public accountant from the firm maintaining the business records of the two corporations, was ordered to bring all financial records of Debra's interests. In reply Stokes brought one financial statement showing the retained earnings of Renal Dialysis Associates were $697 in 1992.

We are unable to fairly assess the value of Debra's corporate interests based on the scant financial information found in this record. For example, the nominal value placed on Debra's interest in Renal Dialysis Associates cannot be reconciled with the substantial earnings distributions she received in 1992 and 1993. Moreover, the district court did not, and we are unable to, value Debra's interest in Internal Medicine Associates. Any equitable division of property under these circumstances is impossible.

We therefore remand for further evidence on this specific portion of the property division to determine the specific value of Debra's corporate interests. Debra shall produce the necessary financial documents, including income tax returns, income statements, balance sheets, buy/sell agreements, and other corporate minutes necessary

to facilitate this determination. David Stokes' compliance with Ed's subpoena duces tecum shall be accomplished by appropriate order of the district court.

Next Ed contends the district court erred in awarding sole legal custody of Sarah to Debra. We agree.

In making custody determinations, our object is to assure the child maximum physical and emotional contact with both parents. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Joint custody is preferred whenever reasonable and in the best interests of the child. *Id.* An award of sole custody requires clear and convincing evidence that joint custody is not is the best interests of the child to the extent the legal relationship between the child and a parent should be severed. *Id.* (emphasis added).

The record reveals Sarah has very loving relationships with both parents. Ed often served as Sarah's primary caretaker during the period Debra was completing her residency. Although Debra attempts to portray Ed as an alcoholic and gambler who is unfit to have joint custody of Sarah, our review of the record reveals Ed is seeing a therapist and appears to have overcome any problems.

Despite the positive evaluation of Ed and his relationship with Sarah, the custody evaluator stated "it does not appear that joint custody would be workable at this point." The recommendation of an independent custodial investigator may be

considered in determining custody, but it is not controlling. *See In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993).

The record clearly indicates Debra has interfered with Ed's visitation and is often hostile to him in Sarah's presence. After our de novo review of the record, we determine it is in Sarah's best interests to award the parties joint legal custody. Debra shall retain primary physical care. The decree is modified accordingly.

The parties also have had conflicts as to the visitation schedule during the Christmas holidays. Since the parties no longer reside in the same city they spend a great deal of time transporting Sarah from one home to another to comply with the schedule. Ed's 179(b) motion presented a solution to the parties' problem, but the district court did not recognize this in its August 10, 1993, ruling on the motion.

We therefore modify the decree and provide that one party shall have care of Sarah from December 23 at 5 p.m. to December 28 at 9 a.m. The other party shall have care of Sarah from December 28 at 9 a.m. until January 1 at 8 p.m. Ed shall have the first schedule in all odd-numbered years and second schedule in all even-numbered years. The alteration of other scheduled holidays shall be determined by the alteration of the Christmas holiday.

We strongly encourage the parties to communicate with each other and to put their differences behind them. This is in Sarah's best interests.

Finally Ed argues the district court erred in failing to award him attorney fees. In addition he requests attorney fees on appeal.

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa App. 1991). To overturn an award the complaining party must show the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts and based on the parties' respective abilities to pay. *In re Marriage of Benson*, 495 N.W.2d 777, 783 (Iowa App. 1992). After considering the parties' financial positions, we modify the decree and order Debra to pay $1000 toward Ed's attorney fees.

Each party shall pay his or her own appellate attorney fees. Costs of this appeal are assessed one-half to each party.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. The district court order is therefore affirmed in part, modified in part, and remanded with directions.

AFFIRMED IN PART, MODIFIED IN PART AND REMANDED WITH DIRECTIONS.

Cady, J., concurs; Habhab, P.J., concurs in part and dissents in part.

HABHAB, J. (concurring in part; dissenting in part)

I respectfully dissent from the part of the majority opinion that remands the case for further evidence concerning Deborah's interest in Internal Medicine Associates and Renal Dialysis Associates. The valuations fixed by the trial court were well within the permissible range of evidence before it, and I see no need to remand. *See In re Marriage of Miller*, 524 N.W.2d 442, 444 (Iowa App. 1994); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984). Rather, I would affirm the trial court on this issue.

Except for the partial dissent set forth above, I concur with the remainder of the majority opinion.