IN THE COURT OF APPEALS OF IOWA

No. 5-300 / 94-1882

IN RE THE MARRIAGE OF LINDA MARIE COLLINS AND BEN ARNOLD COLLINS, JR.

Upon the Petition of

LINDA MARIE COLLINS,

Petitioner-Appellee,

And Concerning

BEN ARNOLD COLLINS, JR.,

Respondent-Appellant.

FILED
AUG 17 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Warren County, Jerrold W. Jordan, Judge.

Ben Collins appeals from various provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Tom Hyland of Hyland, Laden & Pearson, P.C., Des Moines, for appellant.

Greg S. Noble of Murray, Jankins & Stennes, Des Moines, for appellee.

Heard by Hayden, P.J., and Habhab and Cady, JJ.

HABHAB, J.

Linda and Ben Collins were married on November 1, 1981. In 1990, Ben obtained a medical degree (D.O.) from the college of Osteopathic Medicine and Surgery. Linda attended school part-time during the early years of the marriage. She worked at least part-time outside of the home until 1991, when she became a full-time homemaker. The parties have two children, Jonathan, born December 26, 1984, and Brittany, born October 1, 1990.

Ben completed his residency in 1993 and joined the Associated Internists of Central Iowa. He also works for Des Moines General Hospital. His net monthly income, excluding money received moonlighting at an emergency room, is $6069.

Ben and Linda purchased a home in Indianola in September 1993. In October 1993, Ben moved out of the family home. On November 3, 1993, Linda filed a petition for separate maintenance. Ben filed an answer alleging a breakdown of the marital relationship and asking that Linda be awarded primary physical care of the children. In February 1994, Ben filed an amended answer seeking physical care of the children.

Following a hearing, the district court entered a decree dissolving the marriage. The district court found both parties had suffered periods of depression, both had engaged in childish and manipulative behavior, but both also were loving and caring parents. Linda was awarded physical care of the children. The award was contrary

to the recommendation of a child custody investigator and to Jonathan's expressed wishes.

The court found Linda was entitled to $168,000 in reimbursement alimony due to her sacrifices while Ben received his medical decree. In the ruling on post-trial motions, Ben was ordered to pay the alimony in monthly installments of $833.33. Ben was also ordered to pay child support of thirty percent of his net monthly income of $6069, or $1820 per month.

Linda was awarded the family residence valued at $105,000. She was to be solely responsible for all mortgage payments, taxes, insurance, and utilities. The court ordered her to assume an additional $997 in indebtedness. She was also awarded the personal property in her possession and a 1990 Chevrolet valued at $5000 which carried an indebtedness of $7500. Ben was awarded the personal property in his possession and a 1994 Mitsubishi valued at $11,000. He was to assume debts in the amount of about $224,000.

Ben appeals.

I. ***Scope of Review.*** In this equity action, our review 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 Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. ***Physical Care.*** Ben contends the district court erred in placing primary physical care of the children with Linda. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are found in our statutes, as well as in prior cases. *See* Iowa Code § 598.41(3) (1993); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983). These factors bear on what will be in the long-term best interests of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). 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 in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

Dr. Garfield, a custody investigator, stated Linda showed significant levels of paranoia during the divorce. He also stated Ben's repetition of the threat that he was going to take the children away from Linda and take the house from her would contribute to her paranoid feelings.

Dr. Garfield was most concerned with an allegation made by Jonathan that Linda hit him in the stomach. The district court had the parties before it and was in the best position to determine credibility. The district court concluded Jonathan is manipulative and the incident did not occur as Jonathan reported to Dr. Garfield. Further, Dr. Garfield chose not to discuss the incident with Linda to get her version of what happened. Dr. Garfield testified the outcome of his report, that Ben should

be granted custody of the children, may have been different if it were not for Jonathan's allegations.

Dr. Garfield noted a primary concern for the children if Ben were to receive custody would be Ben's demanding work schedule and the resulting lack of time spent with the children. Linda, on the other hand, has been the historical primary caretaker of the children. Consideration should be given to allow the children to remain with the primary historical caregiver to foster continuity in the child's life. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). We affirm the district court on this issue.

III. ***Alimony***. Ben contends the district court erred in its reimbursement alimony award. Ben's contention is not that alimony should not have been granted; rather, he argues the district court used improper calculations in determining the amount of alimony.

Ben's argument is the district court erroneously accepted an expert witness's opinion on an assumed projection of pay increases. Dr. Mattila, the expert witness,[1] testified a 4.5% annual rate of pay increase should be used. Dr. Mattila based this assumption on overall increases in pay to the population as a whole, not to physicians specifically. Ben contends a 2.8% rate of increase should be used. Ben bases this percentage on the rate of increase for internal medical practitioners in 1992.

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[1] Dr. Mattila is a professor of economics at Iowa State University. He specializes in labor economics.

Ben also argues Dr. Mattila erroneously assumed an average federal income tax rate of 21.2% and an average state rate of 7% by using average rates from the Internal Revenue Service statistics. Ben contends these are unrealistic considering Ben's current income level.

Regarding Ben's first contention, we believe the district court properly adopted Dr. Mattila's pay increase rate of 4.5%. Dr. Mattila provided very reasonable testimony as to why his long-term average of 4.5% should be used rather than Ben's one-year average of 2.7%.

> First of all, we never rely on just one year's change because we're projecting many years in the future, and one year in the past means nothing.
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> Second, the data you just showed me shows that in that particular year internists went up a little slower, but some other specialities went up more rapidly. I wouldn't be at all surprised if one looked at a different year, internists would go up faster and other specialties might go up slower. Over a long-term average, I'd be very surprised if internists differed substantially from the rate of increase of other specialties, surgeons or OBY or OBG or whatever specialty we're talking about.
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> Third, in that particular year 1992, the data actually used, if we picked out that one year, the actual U.S. increase was about the same. It was about 2.7 percent. In that sense I am assuming the same rate. I am projecting many years in the future, I would never use 2.7 percent which was the U.S. average. I would use a long-term average of 4.5 percent. That's what I did do so I would argue that your approach is totally incorrect.

We find the district court had good reason to adopt Dr. Mattila's rate of pay increase percentage in figuring the reimbursement alimony.

Regarding the income tax rates Dr. Mattila suggested in his testimony, he once again provided a reasonable explanation for the rates he chose to use. Dr. Mattila explained how his figures included inflation projections, peak earning potentials, and average tax rates over time. We find the district court had a reasonable basis for adopting Dr. Mattila's projected tax rates in figuring the reimbursement alimony. We affirm the district court regarding the amount of alimony awarded.

IV. ***Child Support.*** Ben's final contention is the district court erred in calculating his child support obligation. Ben argues the reimbursement alimony should be deducted from his net monthly income and added to Linda's net monthly income. Ben's argument stems from his interpretation of *In re Marriage of Lalone*, 469 N.W.2d 695 (Iowa 1991).

In *Lalone*, our supreme court specifically stated "a noncustodial parent's income may be reduced for ' [p]rior oligation[s] of child support and spouse support actually paid pursuant to court or administrative order,' Child Support Guideline (9) (emphasis added), but they do not provide for deduction of alimony under the present decree." *Lalone*, 469 N.W.2d at 697. The court did, however, end up affirming the district court's decision to subtract alimony payments from the noncustodial parent's net monthly income and add it to the custodial parent's net monthly income. *Id.* The court found it was necessary to do so under the discretionary portion of the guidelines which allows for adjustments "upward or downward . . . if the court finds the needs

of the children and to do justice between the parties under the special circumstances of the case." *Id.*

The supreme court has indicated an adjustment "upward or downward" should only be done in cases involving special circumstances. The child support guidelines are to be followed unless doing so would lead to an unjust or inappropriate result. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). There is a rebuttable presumption the child support obligation calculated under the guidelines is the correct amount of child support to be awarded. *Reaves*, 514 N.W.2d at 104; *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993); *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). After determining the correct amount of child support under the guidelines, the court is to consider whether the prescribed amount would result in substantial injustice to the parties. *Reaves*, 514 N.W.2d at 105. If there is substantial injustice, then the child support obligation may be adjusted upward or downward. *Id.*

We find there are no special circumstances in this case which warrant a departure from the child support guidelines. Since, however, Ben has appealed the amount of child support to be paid, we must recalculate his child support obligation pursuant to the guidelines which became effective July 1, 1995.[2] We find no reason

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The new child support guidelines "shall apply to cases pending on the effective date." We interpret this language by the supreme court to mean the guidelines are to be applied to all cases pending on July 1, 1995, which includes those on appeal.

to deviate from the 27.4% set out in the guidelines as the percentage for Linda's net monthly income of $1001 and Ben's net monthly income of $6069. Under the new guidelines, using the net monthly income figures used by the district court, Ben's monthly child support obligation is $1663. We modify the district court's decree accordingly.

V. ***Attorney Fees***. Linda requests attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We award Linda $500 in appellate attorney fees.

We have considered all issues raised by the parties and order the district court's decree to be modified in accordance with this opinion.

AFFIRMED AS MODIFIED.