

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 28 1982

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DEBRA MARIE EBAUGH AND JACK ~~LeROY EBAUGH~~

209

Upon the Petition of)

DEBRA MARIE EBAUGH,)

Filed October 28, 1982

Petitioner-Appellant,)

and Concerning)

JACK LeROY EBAUGH,)

2-285

65958

Respondent-Appellee.)

Appeal from Black Hawk District Court - Charles W. Antes and Thomas Nelson, Judges.

Petitioner-wife appeals from a dissolution decree which awarded custody of the parties' minor child to respondent-husband. Respondent-husband appeals from the trial court's order on limited remand which awarded custody to petitioner-wife. Each party asserts that he or she should have been awarded custody. Petitioner-wife also asserts that respondent-husband should have been directed to pay her attorney's fees in the trial court and should be directed to pay attorney fees on appeal. ORDER ON LIMITED REMAND AFFIRMED.

Richard A. Knock of Merson, Snow & Knock, Cedar Falls, Iowa, for petitioner-appellant.

Gary J. Boveia, Waverly, Iowa, for respondent-appellee.

Considered en banc.

PER CURIAM

Petitioner-wife, Debra Marie Ebaugh, appeals from a dissolution decree which awarded custody of the parties' minor child to respondent-husband, Jack LeRoy Ebaugh. Respondent-husband appeals from the trial court's order on limited remand which awarded custody to petitioner-wife. Each party asserts on appeal that he or she should have been awarded custody. Petitioner-wife also asserts that respondent-husband should have been directed to pay her attorneys fees in the trial court and should be directed to pay attorney fees on appeal. We affirm the trial court's order on limited remand.

Petitioner and respondent were married in 1979. No children were born of the marriage, but petitioner had one illegitimate child, Ryan, whom respondent adopted, and one child, Dana, from a previous marriage.

The record reflects that, prior to trial, the petitioner and respondent, through their attorneys, reached agreement that custody of Ryan should be with petitioner. The attorney for the child also concurred to this agreement. On that same date Judge Nelson was advised that the issue of the custody was settled and that the issues to be resolved at trial included respondent's child support obligation, visitation and property division. Trial was held on November 3, 1980, and Judge Nelson awarded custody of Ryan to respondent. Petitioner and the child's attorney both filed a motion for a new trial which was overruled by the court. Petitioner filed her notice of appeal on December 2, 1980.

On December 12, 1980, petitioner filed an application for an order staying all orders and rulings of the trial court. The supreme court subsequently entered a stay order. On January 2, 1981, an order was entered remanding the matter to Black Hawk County District Court for a supplemental hearing regarding the custody issue. The agreement and understanding of counsel prior to trial was ordered to be made a part of the record. The district court was authorized but was not required to make any modification in its decree warranted by the

evidence. The trial court entered its supplemental decree on May 22, 1981, awarding custody of the child to petitioner. Respondent appeals from that order.

I. Scope of Review. Our review of dissolution proceedings is *de novo*. Iowa R. App. P. 4. We review the facts as well as the law and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to the trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Custody. Respondent claims that the trial court erred in placing custody of Ryan, the minor child, with petitioner. Each party argues that the best interests of the child necessitates the placement of custody with him or her. The central question in governing consideration of the courts in any proceeding which concerns the custody of a minor child is what is in the best interests of that child. See, e.g., Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). The numerous factors we must consider in deciding custody issues are set out in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Petitioner and respondent were married on September 15, 1979. On April 28, 1980, petitioner filed a petition for the dissolution of marriage. Ryan is the natural son of the petitioner and was adopted by the respondent on December 11, 1979. The testimony at trial seemed to indicate that Debra was in the process of pursuing a third party in a paternity action sometime in the fall of 1978 while at the same time the respondent and the petitioner's current husband were attempting to persuade her to drop the paternity action and allow the respondent to adopt Ryan. Petitioner acquiesced in the adoption by respondent.

The trial court found that respondent first came in contact with Ryan in June of 1979 when Ryan was approximate eight months old. Respondent and petitioner shared the same household for approximately seven months before they were separated. Trial court also found that in the year prior to trial the total number of hours the respondent and the child had spent together would not add up to a week's time.

There is testimony in the record that respondent was an extremely meticulous housekeeper and that the habits of the small child interfered with his expectations, often leading to angry outbursts. The petitioner's performance did not live up to the high standards established by respondent. This led to constant conflict which contributed to the downfall of their marriage.

Ryan currently is in a home with his natural mother and her new husband, both of whom have professed a great deal of love and respect for each other. Additionally, this provides a setting in which the minor child can maintain sibling contact. The trial court found that disrupting this relationship by forcing Ryan to move a fifth time in his life might be harmful to his emotional stability and we agree.

On the record before us, the parents' abilities to care for the need of the minor child, Ryan, are close, although there appears to be a stronger bond between the child and petitioner. However, where there are two competent, loving parents, and where the operative facts under the Winter criteria are equal, the scales are tipped in the petitioner's favor by the rule that we give weight to the findings of the trial court. See In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). Accordingly, we affirm the award of custody of the minor child, Ryan, to petitioner.

III. Attorneys Fees. Petitioner asserts that trial court erred in not awarding attorneys fees at the trial level. Attorneys fees are not recoverable as a matter of right. See In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). "Trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution cases." In re Marriage of Moorhead, 224 N.W.2d 242, 245 (Iowa 1974).

The record shows that the petitioner sought attorneys fees in the amount of \$5,150, for which petitioner had already advanced the sum of \$1,692, leaving a balance owing her attorney of \$3,458. Petitioner's counsel supplied no itemization

of these particular charges. Based on this record, we cannot say that trial court abused its discretion in not awarding attorney fees at the trial level.

Once an appeal is taken, the trial court loses jurisdiction to make an award of attorney fees. This court may make an award of attorney fees on appeal. In re Marriage of Seidenfeld, 241 N.W.2d 881, 884 (Iowa 1976). Since June 4, 1981, petitioner allegedly has incurred further expenses in prosecuting this appeal, including attorney fees in the amount of \$4,633.50 of which she has paid \$543. Considering the parties' relative financial resources, In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981), and without attempting to fix the total value of the services of petitioner's counsel, we find that respondent should contribute \$1,500 towards petitioner's attorneys fees on appeal. Costs are assessed against respondent.

ORDER ON LIMITED REMAND IS AFFIRMED.