IN THE COURT OF APPEALS OF IOWA

No. 0-184 / 99-1231
Filed July 12, 2000

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF MICHAEL R. SCHULT AND DARLENE C. SCHULT

Upon the Petition of
MICHAEL R. SCHULT,
Petitioner-Appellee/Cross-Appellant,

And Concerning
DARLENE C. SCHULT,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Clinton County, David H. Sivright, Judge.

The respondent appeals, and petitioner cross-appeals, from the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED.**

Steven H. Jacobs and Jean Dickson Feeney of Betty, Neuman & McMahon, L.L.P., Davenport, for appellant.

Richard W. Farwell and Christopher L. Farwell of Farwell & Bruhn, Clinton, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

Darlene Schult appeals from the child custody and economic provisions of the parties' dissolution decree She argues the district court erred by: (1) awarding primary physical care of their minor child to Michael; (2) determining the value of Schult Engineering stock at $122,040; and (3) denying her request for a specific minimum visitation schedule. She also requests an award of appellate attorney fees. On cross-appeal, Michael contends the district court erred by: (1) awarding Darlene rehabilitative alimony; and (2) awarding her excessive trial attorney fees. We affirm.

I. Factual Background and Proceedings. Michael and Darlene were married on April 24, 1982. This was the second marriage for both parties. Darlene has one child, Tracy, from her prior marriage, who was twenty-seven years old at the time of trial. A decree filed April 2, 1982, awarded custody of Tracy to her father, Gary Fox. In September of 1986, however, Darlene filed a petition to modify the custodial terms of the decree. Shortly thereafter, Mr. Fox stipulated to an "indefinite continuance" resulting in a de facto change of physical care. The modification claim was never adjudicated and Tracy began living with Darlene and Michael in October of 1986. The evidence suggests Michael treated Tracy as his own child and a good relationship formed between them.

At the time of trial, Michael was forty-two years of age. He is a high school graduate who took an apprenticeship to become a pattern maker and started a company known as D & M Machine and Welding in 1982. The company was unsuccessful and was subsequently dissolved. Michael and his

father later formed Schult Engineering & Pattern Company in Michael's garage and later moved the business into new quarters owned by their partnership known as Schult Enterprises. The company currently has approximately forty employees and generated an adjusted gross income of $159,764 in 1998. Approximately one-third of the company's revenues come directly from John Deere; and an additional ten percent comes indirectly from John Deere as well.

Darlene, a high school graduate, was forty-eight at the time of trial. During the early years of the marriage, she managed a women's clothing store. Darlene eventually quit that job to perform certain bookkeeping and clerical duties for Schult Engineering. When the parties' adopted daughter, Erica, was born prematurely on April 17, 1989, Darlene quit work outside the home to become a full-time mother. The evidence suggests Darlene was Erica's primary physical caretaker during the marriage, but Michael has become more involved in recent years, especially in support of Erica's extracurricular activities. Erica has a very close and positive relationship with both parents, and with her stepsister, Tracy.

II. Issues on Appeal. In its decree filed May 10, 1999, the district court awarded the parties joint legal custody, but granted primary physical care of Erica to Michael. The decree allowed Darlene "liberal visitation." Darlene claims on appeal she should be awarded primary physical care; and in the alternative, the decree should be modified to establish a specific minimum visitation schedule.

To value the parties' ownership interest in Schult Engineering, the district court utilized the "asset approach" urged by Michael's expert, valued the

business at $122,040, and awarded the company stock to Michael. Darlene contends the district court should have utilized the "income approach" advocated by her expert to establish the value of the stock in excess of $700,000.

The district court awarded Darlene rehabilitative alimony in the amount of $2000 per month for sixty months and $10,000 in trial attorney fees. Michael argues on his cross-appeal both awards are excessive and inequitable. Darlene also requests this court to award her attorney fees on appeal.

III. Standard of Review. Our review is de novo. Iowa R. App. P. 4. In assessing a custody order, we give considerable weight to the judgment of the district court which has had the benefit of hearing and observing the parties first-hand. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). In close cases, we give weight to the findings of the trial court that had the parties before it and had the ability to observe their demeanor and evaluate them as custodians. *In re Marriage of Forest*, 201 N.W.2d 728, 730 (Iowa 1972); *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Economic provisions of a dissolution decree are also reviewed 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 are not bound by them. Iowa R. App. P. 14(f)(7).

IV. The Merits.

A. Custody and Visitation Issues. Darlene contends she has been Erica's primary caretaker during her lifetime. Careful consideration is given in custody disputes to allow 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).

However, the fact a parent has been primary caretaker of a minor child prior to divorce does not assure the parent will be awarded primary physical care. *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa App. 1996).[1] The pre-dissolution primary caretaker should be awarded physical care responsibilities only if there are no other significant reasons to change the physical care responsibilities. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). Although the record does substantiate Darlene's claim she was the primary caretaker, we agree with the district court's finding Michael should be responsible for Erica's physical care because he will more likely provide the stable environment needed to bring Erica to healthy physical, mental, and social maturity.

Each party offered testimony of the other parent's shortcomings, indiscretions, embarrassments, and unkind words and we will not catalogue them here. We agree with the district court's assessment the physical care issue presents a very close question. The scale is tipped in Michael's favor, however, by the factor of stability. Darlene's past history of alcohol abuse, concealment of credit card debt from Michael, and estrangement from her older daughter, Tracy, leads us to adopt the district court's finding Darlene has not shown the emotional

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[1] *See In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa App. 1996) (mother was primary caretaker, but had made false and manipulative allegations of physical abuse against the father who also had a substantial influence in the children's upbringing); *In re Marriage of Wessell*, 520 N.W.2d 308, 311 (Iowa App. 1994) (mother was primary caretaker, but was financially irresponsible, morally impaired, dishonest, not providing a safe environment and leaving the children home unattended); *In re Marriage of Wilhelm*, 491 N.W.2d 171, 172 (Iowa App. 1992) (mother, the primary caretaker, suffered from physical and mental disorders while father provided discipline, stability, involvement with the kids and was in better health); *In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa App.1991) (mother had emotional problems, but father was responsible, mature, and self-reliant and gave the children higher priority than the mother).

sophistication required to differentiate between her own needs and the best interests of Erica. Our decision is also influenced by the psychological evaluation of Dr. W. David McEchron. His opinion Darlene has mild emotional problems and inadequate insight is consistent with our assessment of her behavioral history.

To support her assertions, Darlene points out Erica expressed a preference to live with her. A minor child's preference with respect to which parent he or she wishes to live with, although not controlling, is relevant and cannot be ignored. *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa App. 1991). In determining the weight given to a child's preference, we consider the child's age, educational level, maturity, relationship with family members, and reasons given for her decision. *Id.* In her child custody study, Dr. Janet Drew observed:

> Initially, Erica indicated no strong preference for a home in which she would like to reside. However, during the last interview with her, she stated she would like the court to know that she would like to reside with her mother. She noted that her mother takes her shopping and does things with her. When asked what would happen if the court could not grant her this wish, she indicated that she would be okay and live with her dad.

Dr. Drew also opined Erica, who was nine years old at the time of the trial, is too young for her preference to be given much weight. After considering the relevant factors, we conclude Erica's preference to live with Darlene does not outweigh the other factors that support placement of primary physical care with Michael.

Our decision on primary physical care requires us to address the capacity of each parent to promote contact between Erica and the other parent. *See* Iowa

Code §§ 598.41(1)(a), (c); and 598.41(5); *In re Marriage of Shanklin*, 484 N.W.2d 618, 619 (Iowa App. 1992). We agree with the district court's finding Darlene's choices concerning Erica's activities and companions were at times influenced by whether the third parties showed loyalty and support to Darlene or Michael. Darlene's estrangement from Tracy appears to be related to Tracy's unwillingness to comply with Darlene's preference for dissociation from Michael. Evidence in the record tends to prove Michael has the capacity to promote the relationship between Darlene and Erica in the post-dissolution period. After considering all of the factors set forth in Iowa Code section 598.41(3), we find the district court correctly ordered joint legal custody and properly placed primary physical care with Michael.

Darlene posits the district court erred in failing to establish a specific visitation schedule. Her preference for a "strict" schedule was noted in the summer of 1998 when she began restricting Michael's access to Erica, insisting on careful adherence to the terms of the district court's temporary order. Although we do not criticize her for compliance with the temporary order on visitation, her tendency to view the temporary visitation schedule as a maximum, rather than minimum, level of contact between Michael and Erica is instructive with respect to her capacity to promote the relationship between Erica and her father. In its decision to grant Darlene "liberal visitation," the district court expressed implicit confidence in Michael's willingness to allow extensive contact between Erica and her mother. The law does not require the district court to establish a specific schedule of visitation, and we are not inclined to impose one

in this case. We trust the parties' love for Erica will cause them to cooperate in arranging visitation to promote her strong continuing relationship with Darlene. Accordingly, we affirm the district court's award of primary physical care to Michael and the award of liberal visitation to Darlene.

B. Valuation of Schult Engineering. Darlene claims the district court erred in its valuation of the closely held corporation. This issue presented a classic "battle of experts." Michael presented the testimony of Gary Foster, a certified public accountant who holds a Master's Degree in accounting from the University of Iowa. In his more than twenty-five years of professional experience, he has been called upon twenty-four times to give his opinion on the value of businesses. He has provided accounting services to Schult Engineering since it was incorporated. He opined the company has a before-tax value of $122,040. Foster favors the "asset value approach" because it is less subjective than the "income approach," and he was unable to find comparable sales needed to utilize the "market approach."

Darlene presented the testimony of Dennis Taylor on valuation of the company. Taylor is a CPA who holds a MBA degree with a concentration in finance from the University of Iowa. He holds the designation of Accredited Business Valuation from the American Institute of Certified Public Accountants. He opined Michael's interest in Schult Engineering has a value of $700,000. Taylor favored the "income approach" to valuation and relied upon an Internal Revenue Service ruling suggesting appraisers will accord primary consideration to earnings when valuing stocks of companies that sell products or services to

the public. Taylor characterized Schult Engineering as a stable company with a history of substantially increasing earnings.

The district court found Foster's valuation more credible. We agree for several reasons. Taylor's "income approach" does not adequately consider the company's dependence upon a single customer, John Deere. The record reflects the current downturn of the agricultural economy has a direct impact on the demand for agricultural implements and John Deere's resulting demand for services provided by Schult Engineering. The "income approach" does not adequately consider the company's economic vulnerability associated with such dependence. Furthermore, the company's obvious dependence upon two key men, one of whom is nearing retirement, and the natural limitations on marketability of a fifty percent interest in a closely held corporation lead us to conclude the district court correctly gave more weight to Foster's opinions. We affirm the district court's valuation of Schult Engineering at $122,040.

C. Alimony. Michael contends the district court erred by awarding Darlene $2000 per month for sixty months in rehabilitative alimony. He specifically argues rehabilitative alimony is inequitable because Darlene is in good health, has marketable skills and experience, and does not need five years to complete her education. Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining; its primary goal is self-sufficiency. *In re Marriage of Smith,* 573 N.W.2d 924, 926 (Iowa 1998); *In re Marriage of Ales,* 592 N.W.2d 698, 704 (Iowa App. 1999). Rehabilitative alimony has been found to be particularly appropriate

when the spouse has been out of the job market for a period of time. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). Darlene is forty-eight years old, has been out of the job market for eleven years, only has a high school education, and will need a period of retraining or reeducation in order to be employable. We believe rehabilitative alimony will give Darlene the ability to become self-supporting. Therefore, we affirm the district court's award of rehabilitative alimony.

D. Trial Attorney Fees. Michael also asserts the district court's award of $10,000 in trial attorney fees was excessive. The district court has considerable discretion in awarding attorney fees. *In re Marriage of Schettler,* 455 N.W.2d 686, 689 (Iowa App. 1990). We will not interfere unless there is a manifest abuse of discretion. *In re Marriage of O'Rourke,* 547 N.W.2d 864, 867 (Iowa App. 1996). Seeing no abuse of discretion in the district court's award given the length of the trial, the complexity of the issues, and Michael's much greater earning capacity, we affirm the award of trial attorney fees.

C. Appellate Attorney Fees. Darlene requests an award of attorney fees on appeal. In addressing a request for appellate attorney fees, we consider the requesting party's need, the ability of the adversary to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. An award of attorney fees rests within the discretion of the court. *In re Marriage of Benson,* 545 N.W.2d 252, 258 (Iowa 1996). We note the district court ordered Michael to pay $10,000 for Darlene's trial attorney fees, rehabilitative alimony, and property division payments totaling $150,000 on or before May 1, 2000.

Under the circumstances of this case, we conclude each party should pay their own attorney's fees on appeal.

AFFIRMED.