IN THE COURT OF APPEALS OF IOWA

No. 0-597 / 90-641

FILED
DEC 27 1990
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARGARET BORMANN AND CARL RAY BORMANN

Upon the Petition of

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MARGARET BORMANN,

Appellant,

And Concerning

CARL RAY BORMANN,

Appellee.

Appeal from the Iowa District Court for Kossuth County, W. B. MacDonald, District Associate Judge.

Mother appeals the economic and custody provisions of the parties' dissolution decree. **AFFIRMED.**

T. J. Braunschweig, Algona, for appellant.

William McNertney, Algona, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

PER CURIAM

Margaret and Carl Bormann were married in 1977. Four children were born of the marriage: Jeffrey, born 11-25-77; Anna, born 8-29-80; Lorena, born 1-19-83; and Andrew, born 3-10-84. Margaret did not work outside the home during the marriage. She assisted on the farm and took care of the children. Margaret currently works at a Western Store in Forest City earning $136.73 per week. Carl is a farmer.

The dissolution decree placed the four children in joint legal custody and in Carl's primary physical care. The decree awarded Margaret forty percent of the net business asset value. The decree did not order permanent alimony or child support. Each party was responsible for his or her own attorney fees.

Margaret appeals the decree. She contends that she should have primary physical care of the four children. She claims that in awarding custody the district court erred by: 1) considering the fact that she filed the petition for dissolution; 2) concluding that Margaret abused alcohol in the past and placing the burden upon her to prove she did not abuse alcohol; and 3) placing unreasonable emphasis on religion. If she is awarded primary care of the children, Margaret wants child support of $1,000 per month.

Margaret next argues that the economic provisions of the decree are inequitable. She claims that Carl

misrepresented his assets on his financial statement. Margaret claims the district court erred by improperly considering interrogatories answered by Carl. She requests an equal portion of the assets. She further asserts that she be awarded alimony. She requests her attorney fees.

I. Margaret first claims the trial court erred in awarding physical custody of the four children to Carl. Our review in this matter is de novo. Iowa R. App. P. 4. 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 enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of 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).

Our review of the record convinces us that the children's best interest will be served by placing their physical custody with Carl. There is certainly no

guaranteed "best" solution to the problem of physical care; and regardless of the final decision, this family has and will continue to experience a great deal of stress.

Throughout the trial, evidence was introduced with regard to Margaret's extramarital relationship with Craig. The evidence suggests Margaret became involved with Craig prior to her separation from Carl. While evidence of moral conduct cannot be the only factor to be weighed when determining custody, it may be a factor to be considered along with other circumstances in custody determinations. In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

We believe Margaret's conduct casts doubt on her maturity and ability to minister to the best interests of the minor children. While Margaret makes certain complaints regarding Carl's behavior, not one suggests Carl is a poor parent. To the contrary, there is substantial evidence supporting Carl's strong parenting skills.

By awarding the physical custody of the children to Carl, they will have the benefit of residing at the farm where Carl has the support of his family. In addition, we believe this arrangement reflects a greater degree of permanency than that of the children being required to travel back and forth to Margaret's employment where the only place for them is the efficiency apartment in the back of the store.

Although it appears from the record that Carl on occasions responded to Margaret in a hostile manner, it was the opinion of the trial court and is the opinion of this court that this hostility arose from his attempt to keep his family together during the time his wife was involved in her extramarital affair. Under the circumstances presented in the record, it is understandable that Carl would experience some stress.

II. Margaret contends the trial court erred in concluding she abused alcohol and further erred in placing the burden on her to prove she did not abuse alcohol. After carefully reading the record, we conclude that while the judge did take note of evidence which indicated Margaret had a drinking problem, he did not give this weight in his determination as to custody. Margaret also contends the trial court erred in placing too much emphasis on religion. From our de novo review of the record, we disagree.

We adhere to the principle that courts should not consider the religious views of either parent in deciding custody issues. Further, as it relates to permanent custody, that decision should be made independent from any temporary custody decisions. Based upon the past behavior of both parents, we caution Carl and Margaret and encourage both parties to cooperate with each other for the sake of the four children.

As it relates to the appellant's claim that the trial

court abused its discretion in failing to award attorney fees, our supreme court has determined that an award of attorney fees is not a matter of right, but "rest[s] with the court's discretion and depends upon one spouse's financial needs and the other spouse's ability to satisfy them." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa 1983); In re Marriage of Vrban, 359 N.W.2d 120 (Iowa 1984). From our de novo review of the record, we are unable to find that the trial court abused its discretion.

We next turn to the appellant's assertion that the court improperly considered interrogatories answered by the respondent. The appellant asserts that the court, in making its property distribution, placed great reliance on the information contained in the interrogatories. Because our review is de novo, we need not address this assignment of error for from our review of the record we find that the distribution of the assets made by the trial court is equitable and just.

Finally, we consider the appellant's assertion that the trial court improperly denied Margaret Bormann alimony. We held in In re Marriage of Williams, 449 N.W.2d 878, 883 (Iowa App. 1989):

> When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each partner, and (2) their present standards of living and ability to pay balanced against their relative needs. [citations omitted]
>
> Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that spouse. [citation omitted]

We have reviewed the trial court's analysis in its consideration of alimony. When we review the entire record, we agree with the trial court that an award of permanent alimony would be inequitable.

Finally, we find the distribution of the assets to be equitable and see no reason to disturb this distribution on appeal.

Costs on appeal are assessed to the appellant.

AFFIRMED.