IN THE COURT OF APPEALS OF IOWA

No. 2-178 / 91-1231

FILED
JUN 25 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF VICKI LYNN OLMSTEAD AND LARRY DEAN OLMSTEAD

Upon the Petition of
VICKI LYNN OLMSTEAD,

Appellee,

And Concerning
LARRY DEAN OLMSTEAD,

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, Judge.

Larry Olmstead appeals a dissolution decree and a ruling on posttrial motions which awarded legal and physical custody of the parties' children to Vicki Olmstead and ordered Larry to pay alimony. **AFFIRMED.**

Robert L. Rausch and David A. Roth of Rausch Law Firm, Waterloo, for appellant.

Mark S. Rolinger and Robert J. Dieter of Redfern, Mason, Dieter, Larson & Moore, Cedar Falls, for appellee.

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

SCHLEGEL, J.

Larry and Vicki Olmstead were married on December 30, 1974. The parties have two children: Kenneth Olmstead, born July 20, 1980, and Sherry Olmstead, born May 20, 1982. Vicki had two children from a prior marriage, Darren and Diane Cook, who lived with the parties.

Larry was born August 5, 1950, and has a high school education. Larry has had further education as a semitruck driver. He has been employed since 1971 with the same employer as a janitor; he makes $13 per hour. Vicki was born July 9, 1947. She is a high school graduate with no further education except she enrolled in a home study course learning to be a secretary. Vicki worked for a short period in 1988 as a dishwasher and has unsuccessfully attempted home sales of Avon and Watkins products.

On February 14, 1986, Larry pleaded guilty to the crime of indecent contact with a child. The victim was his stepdaughter, Diane. The sexual abuse started when Diane was approximately six years old. The district court sentenced Larry to one year in jail. The sentence was later reduced. Larry returned to the family home in September 1987. On May 23, 1989, Larry was charged with assault-domestic abuse for striking Vicki, Darren, and Diane. Larry pled guilty to this charge. On June 2, 1989, Vicki filed a petition for dissolution. On December 23, 1989, Larry was charged with operating a vehicle while intoxicated. Larry pleaded guilty to that charge.

On September 7, 1990, the district court entered a decree dissolving the parties' marriage. The court awarded legal and physical custody of Kenneth and Sherry to Vicki and ordered Larry to pay child support in the sum of $142 a week as long as the two children qualified for support and reduced the amount to $98 a week when only one child qualified for support. The court also awarded Vicki the family home in LaPorte City and rehabilitative alimony in the amount of $200 a month for three years. The court awarded Larry the rental property and ordered Larry to pay a portion of Vicki's attorney fees.

On September 17, 1990, Larry filed a motion to amend and modify the findings and conclusions under Iowa Rule of Civil Procedure 179(b). Larry also requested a new trial. Vicki filed a resistance to the new trial on September 20, 1990. On November 5, 1990, Vicki filed a resistance and motion regarding the rule 179(b) motion and requested an evidentiary hearing. Attached to Vicki's motion were exhibits describing Vicki's physical health and an affidavit of Diane attesting to the fact that Larry had withdrawn large amounts of cash from the parties' joint account. Vicki asserted Larry failed to fully disclose the assets of the parties. Larry filed a reply-resistance to Vicki's motion.

On July 9, 1991, the district court filed a ruling on the motions. The court amended its decree to provide additional alimony to Vicki. The court ordered alimony

should increase to $300 a month on October 1, 1993, increase to $400 a month on July 20, 1998, and remain at that level until May 20, 2000, when it will increase to $500 a month. The court ordered alimony should cease when Larry turns sixty-two or when Vicki remarries or cohabits.

On July 19, 1991, Larry filed another request for further review and for further amendments to enlarge and modify the court's ruling on the motions. Larry argued the court incorrectly accepted additional evidence at the 179(b) hearing. Vicki filed a resistance. On August 6, 1991, the court overruled Larry's motion. Larry appeals.

While Vicki argues the affidavits "merely explain and amplify evidence which had been submitted at the dissolution trial," we cannot totally agree. There is some support in the trial record for the notions brought forth in the exhibits, but the actual exhibits were not evidence in the original trial. We review this issue to determine if the trial court abused its discretion by considering additional evidence. See Appeal of Elliott, 319 N.W.2d 244, 247-48 (Iowa 1982).

We find the trial court did not abuse its discretion here. The court's consideration of additional evidence at the rule 179(b) hearing was in response to Vicki's specific request for an evidentiary hearing. Larry had notice of the exhibits when he received his copy of Vicki's 179(b) motion which specifically requested an evidentiary hearing. In addition, Larry demonstrated his advance

notice of Vicki's intent to introduce this supporting documentation in his resistance to Vicki's 179(b) motion to enlarge. We first find that procedurally the court acted properly in its amended findings.

We next address the court's substantive award of alimony and sole custody to Vicki. Our review of this issue 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).

We find both the court's award of alimony and sole custody to Vicki is proper. As the trial court noted, the parties were married for sixteen years, and during that time Larry was the principal worker outside the home. The court's ruling increasing Vicki's alimony stated: "upon careful reflection the Court feels it would be more in line with the guidelines of Chapter 598.22 of the Code to make better provisions for her support in the event her efforts at self-improvement do not meet with success." Vicki was enrolled in a home study course to become a secretary; at the time of the ruling she had completed only three of thirteen courses. The court also noted Vicki has health problems with her back. We affirm the court's amended alimony award.

In addition, we find the court properly granted sole custody of the parties' two children to Vicki. We find support for this decision in Larry's history of sexual, physical, and alcohol abuse. We conclude the children's best interests are better served by leaving the responsibility of parental decision making to Vicki. We affirm the court's award of sole custody to Vicki.

We have considered all arguments raised, and we affirm the trial court. The parties shall pay their own attorney fees.

AFFIRMED.