IN THE COURT OF APPEALS OF IOWA

No. 1-031 / 10-1059
Filed March 21, 2011

IN RE THE MARRIAGE OF MARIE ALANA MOSER AND STANLEY D. MOSER

Upon the Petition of
MARIE ALANA MOSER,
Petitioner-Appellee,

And Concerning
STANLEY D. MOSER,
Respondent-Appellant.

Appeal from the Iowa District Court for Warren County, Greg Hulse, Judge.

Stanley D. Moser appeals from the custodial, visitation and economic provisions of the decree dissolving his marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Michael Holzworth, Des Moines, for appellant.

Cami Eslick, Indianola, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Stanley D. Moser appeals challenging the custodial and economic provisions of the decree dissolving his marriage to Marie Alana Moser. We affirm as modified and remand for further proceedings.

SCOPE OF REVIEW. We review de novo. *See In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). Because the trial court was present to listen to and observe the witnesses, we give weight to its factual findings, but are not bound by them. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

BACKGROUND AND PROCEEDINGS. The parties met through EHarmony.com. They married in January of 2007. At the time of marriage Stanley was fifty and Marie was thirty-six. Stanley had two adult daughters from a prior marriage. Marie had an eleven-year-old son from a prior marriage. A daughter was born to the marriage in October of 2007.

Prior to marriage the parties executed an extensive prenuptial agreement that established, among other things, property rights and made provision for each party's rights should the marriage be dissolved. They disclosed their assets and liabilities. Marie represented she had a net worth of $160,000 and her net income in 2005 was $30,000. Stanley represented his net worth to be $1,881,500 and his net income in 2005 was $33,000. Both parties had their own attorney involved in the negotiations.

Marie filed a petition for dissolution on April 13, 2009, and the couple separated. At that time they had been married for just over two years. During the separation period they shared care of their daughter.

The matter came on for hearing on January 27, 2010. On March 4, 2010, the district court filed the decision from which this appeal is taken. The parties had agreed to joint custody and the district court granted physical care of their daughter to Marie. The court ordered Stanley to pay child support and established his visitation. The court considered the prenuptial agreement and divided assets and liabilities, and determined Stanley should pay Maria $166,589. He was given the option to pay it in installments of not less than $16,558 a year plus interest at the statutory rate.

CHILD CUSTODY. Stanley contends he should have been awarded physical care of his daughter. In resolving an issue of custody, we look to the interest of the child or children as the overriding consideration. *See In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). We are guided by the factors set forth in Iowa Code section 598.41(3) (2009). We give weight to the findings of the trial court, but are not bound by them. *See In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one parent as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody

proceeding. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985).

After sharing physical care of their daughter between the time of separation and trial, both parties recognized it would not work well, and neither asked for it rather they each sought primary physical care. The district court in awarding Marie primary physical care found she held that position prior to the parties' separation. The court found Stanley controlling, but also the more stable parent noting,

> It cannot be disputed Respondent [Stanley] was more stable considering Petitioner's [Marie's] numerous changes in residences and her numerous relationships with different men. However there is no showing that her instability had any negative impact on her older child or that she is not a good mother.

Marie owns three rental properties in Minnesota. Stanley was concerned she would move to Minnesota after the divorce and felt this was not in their child's best interest. The district court appeared to feel Stanley's claim for physical care was driven by this fear. Marie testified she had a one-year lease on a home in the Indianola area and other than that had no definite plans. The court noted Marie testified she had no plan to move to Minnesota at that time, but the court found such a move would not be surprising given that she has real estate in Austin, Minnesota, and has spent considerable time there.

The district court also considered the history of mutual physical contact in finding the couple has not been able to effectively communicate or cooperate with each other. The court indicated it was concerned about Stanley's desire to control Marie. While the court was also concerned about Marie being inflexible

about visitation and her admission she has engaged in throwing things, mutual physical contact, and name calling in front of the child, the court found this was likely the result of the stress related to the breakup of the marriage.

Stanley contends he, not Marie, should have physical care. He contends he can provide a more stable environment for his daughter. He contends he should stand on equal footing with Marie noting while Marie may initially have been the primary care parent, after the parties separated in April of 2009, they shared care.

Stanley believes he is the more stable parent having lived in the same place for thirty years, having a stable income, and having helped raise two daughters—one who has graduated from medical school, and a second who has a career in business. He contrasts this to Marie's life, noting that since her son was born in 1995 she was involved in relationships with six different men some of whom she and her son lived with. Stanley also points to Maria's decision to reconnect with former boyfriends on Facebook while she was still living with him. Stanley contends it was only after this happened that he became aware of the extent of her prior relationships. Stanley advances that he is concerned about his daughter growing up in a home where her custodial parent frequently moves in and out of romantic relationships. Stanley points out Marie admitted she has a temper and has responded in rage by throwing things. She admitted she threw a television down the stairs. Stanley also contends Marie will not support his relationship with their daughter as demonstrated by the fact she has not allowed

deviation from court ordered physical care and testified she believes only in visitation every other weekend.

Stanley believes the district court incorrectly determined he sought to control Marie and there was no evidence to support such a finding other than Marie's testimony. He believes the evidence shows she intends to move to Minnesota.

He contends we should give little credence to her testimony because she was coached by her attorney during the trial and was evasive in testifying. He correctly points out the district court noted during trial Marie looked constantly to her attorney for an answer to a question and evaded answering or giving direct answers which delayed the hearing.

Marie contends the custodial award should be affirmed. She argues this is supported by the fact that prior to the parties' separation she was the primary care parent, a factor Stanley does not deny. She advances Stanley was emotionally abusive and after the separation they were not able to make shared care work. She does not deny that she has been in a number of different relationships, but claims her son has done well. However, other than her testimony, there is little to nothing to support this argument.

She refutes Stanley's charge she was not a credible witness. She points to her attorney's statement to the district court that Marie was intimidated and she nodded to Marie to reassure her and to encourage her to answer questions.[1]

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[1] At oral argument Marie's attorney defined herself as one who nods.

Marie argues her exhibits support her testimony, but she fails to provide specific references to how or where the support appears in the record.

Marie admitted she has been in a number of relationships since her son's birth. They seem to last for a year or two and then she moves on to someone else. Her pattern continued with this marriage. She was the one who wanted out after two years, and she has taken up with former boyfriends since the parties' separation.

Both parties are college graduates. Stanley is from the Warren county area. He graduated from Iowa State University in farm operations and returned to his home area to farm, which he has done for thirty years. He raised, with his former wife, two daughters who are in their twenties and appear to have done well with their lives to this point. One of Stanley's daughters has a son about the age of the child at issue here. Marie was unhappy when Stanley gave gifts to the girls.

Stanley dated several women during the years after his first marriage was dissolved. Marie was somewhat evasive about her educational and employment background, but admitted to being in a number of relationships after her marriage to her son's father was dissolved.

As Stanley argues, the district court had problems with the manner in which Marie testified, as she appeared to seek approval from her attorney before answering questions. We have reviewed her testimony and agree that she was evasive. Marie did admit she has mood swings and at times was taking medication for depression.

The record focused primarily on the difficulties the parties had sharing care of their daughter after the parties separated and Marie's past relationships. Marie has been the primary-care parent, and we give this weight. The fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa Ct. App. 1996); *see also In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991) (affirming physical care with father despite mother's role as primary caretaker); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27-28 (Iowa Ct. App. 1988) (awarding custody of a child who had been in mother's primary care for most of its life to the father).

We as did the trial court find Stanley has stability in his life and Marie has had little. In the past she has seemed to be unconcerned about moving a series of men into her life and at times in her home without recognizing this can have a negative impact on her son. Where a parent seeks to establish a home with another adult, we have said the adult's background and his or her relationship with the child or children becomes a significant factor in a custody dispute. *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). We believe the type of relationship the parent has sought to establish and the manner he or she has established it is an indication of where that parent's priority for his or her children is in his or her life. *Id*. Marie does not appear to have given sufficient consideration to the effect of the relationships on her son's life and we have concern that her pattern of short-term relationships will continue.

Stanley was involved in the raising of his two older daughters and they are doing well. We are concerned, as was the district court, about the instability in Marie's life. The record reflects Stanley is the parent more likely to raise the child in a stable consistent environment. He also appears to be the parent most likely to support the noncustodial parent's relationship with the child. We modify the decree to provide Stanley be named primary custodian.

We remand to the district court to establish Marie's visitation and child support obligation as well as the parties' respective obligations for medical support and the division of the federal and state income tax exemptions.

PROPERTY DIVISION. The parties stipulated there would be no alimony. They agreed they would each keep their own personal property, they each would pay their own attorneys, and the court costs would be split evenly.

The district court noted the prenuptial agreement gave Marie, in the event of a divorce, one-half of their home including ten acres. The court valued this property and its contents at $269,500. The court then gave Stanley credit for $7600 which represented one-half the value of the property Marie took from the home. The court also noted that the prenuptial agreement gave Marie, in the event there was a dissolution of the marriage, one percent of Stanley's net worth for each year the parties were married. The court considered Stanley's net worth to be $1,481,000 and one percent a year for three years would be $44,430[2]. The result was that Stanley should pay Maria a total of $166,589 and he was given

[2] $1,481,000 X 1% =14,810 X 3 = $44,430.

the option of paying it in amounts not less than $16,558 per year plus interest at the statutory rate.

Stanley contents the amount he owes Maria should be reduced by the money used to remodel their house, as this was the intent of the prenuptial agreement. He contends $63,000 was spent; Marie in her testimony suggested $80,000 was spent. As to the home and ten acres the prenuptial agreement provides:

> Second Party [Stanley] currently owns a home with ten (10) acres (including vineyard) . . . and the same is to be continued to be owned by the Second Party and to be used as the marital home of both parties after their marriage.
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> . . . .
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> 10. In the event of dissolution or divorce:
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> A. The First Party shall be entitled to one-half (1/2) the value of the home with ten (10) acres (including vineyard) and its contents less one-half (1/2) of the joint mortgage debt incurred on the home during the proposed marriage.

The district court denied Stanley's claim that under this paragraph the value of the home, contents, and the ten acres should be reduced by $63,000 before Marie receives her one-half. Money was spent on remodeling the home, but apparently Marie would not agree to sign a note and mortgage on the home for the cost of the repairs. Stanley put them on a credit card and/or paid them from his income. The district court denied Stanley's claim finding only a "joint mortgage" reduced the value of the property.

Adjudicating property rights in a dissolution action inextricably involves a division between the parties of both their marital assets and liabilities. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). In making the division we consider the factors in Iowa Code section 598.21(1). Here we must look to

section 598.21(1)(*l*) which provides that in the division of property we consider "The provision of an antenuptial agreement." The division made by the district court was in accordance with the parties' agreement. We find no reason to reverse on this issue.

FEES AND COSTS. We award no attorney fees. Costs on appeal are charged one half to each party.

AFFIRMED AS MODIFIED AND REMANDED.