IN THE COURT OF APPEALS OF IOWA

No. 1-165 / 10-1405
Filed April 27, 2011

IN RE THE MARRIAGE OF JARED TSCHETTER AND KELLI TSCHETTER

Upon the Petition of

JARED TSCHETTER,
Petitioner-Appellant,

And Concerning

KELLI TSCHETTER,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, James Q. Blomgren, Judge.

Jared Tschetter appeals from the district court's order dissolving his marriage to Kelli Tschetter. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Cynthia D. Hucks of Box & Box Attorneys at Law, Ottumwa, for appellant.

Michael O. Carpenter of Gaumer, Emanuel, Carpenter and Goldsmith, P.C., Ottumwa, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Jared Tschetter appeals from the decree dissolving his 1998 marriage to Kelli. He contends he, not Kelli, should be the primary custodian of the parties' two children, the property division is not equitable, and he should not have been ordered to pay Kelli alimony. We affirm in part, reverse in part, and remand.

BACKGROUND AND PROCEEDINGS. Jared was born in 1972 and Kelli in 1976. Both parties are in good physical health. Kelli has emotional problems and has threatened suicide. She has limited or no hearing, but has been well educated and is able to function well in society with accommodations. The parties have two children: a daughter born in 2002, and a son born in 2006. Jared is employed as a database administrator at Buccaneer Systems in West Des Moines, Iowa. He also is a Sergeant First Class in the Army Reserve. His annual income from these two endeavors is $84,000. At the time of trial he lived in what had been the family home in Pella, Iowa.

Kelli was employed outside the home prior to their daughter's birth, but has not been since that time. Kelli receives social security disability of $882 a month. In addition, as a result of her disability, her children each receive $192 a month in benefits. At the time of trial, she and the children were living with her parents in Ottumwa, Iowa.

Testimony from both parties indicate the marriage was troubled from its inception. The parties met when they were both students in computer program analysis classes at Indian Hills Community College. The parties separated on October 7, 2008, after Kelli and her mother reported to the police that in the early

hours of October 6, 2008, Jared spanked their then two-year-old child hard enough to leave a mark on his buttock and hip. Kelli testified she left as a result of this incident though she had already decided to divorce Jared and planned to leave him on October 17, while he was in Texas on military duty. A report was also made to the Department of Human Services.[1] Jared disagreed with Kelli's report to the Department of Human Services, and questioned the timing of the report. He suggested his son could have been spanked by someone else and believed Kelli had the ability to do so. This is the only charge of poor parenting made against Jared. Following the incident, Kelli had care of the children and Jared had supervised visitation. The visitation supervisors were complimentary of Jared's parenting skills and his relationship with the children.[2]

Prior to trial the parties and the children were interviewed and evaluated by Keri Kinnaird, Ph.D., Psychology Supervisor at Orchard Place in Des Moines, Iowa. Kinnaird also had contact with the children's teachers and Kelli's therapist. Kinnaird filed a report and testified at trial. She was of the opinion that the children were fortunate in many respects and went on to say, "[t]hey are well-cared for and adored by their two families. They have close relationships with

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[1] The Department of Human Services found Jared physically abused his son. The department filed a child in need of assistance petition and Jared was originally placed on the abuse registry. By agreement between Jared and the State, the assessment was changed to confirmed, which apparently took Jared off the registry. The dissolution court found as to the matter, "[t]he evidence in this matter seems to suggest Petitioner [Jared] did in fact exercise on one occasion heavy-handed discipline upon [his son] which resulted in bruising in his hip and buttock area."

[2] A discussion here of all the claims the parties make against each other and the challenges they make to the other's credibility would serve no useful purpose. This was an extremely troublesome marriage. However the reports of experts involved with the family appear to support a finding that either parent is capable of caring for the children.

each of their parents within two supportive extended families." Kinnaird also determined the children were doing well in the current care plan,[3] but she said her recommendation was undetermined because,

> I believe that there is a possibility that written information attributed to Ms. Tschetter and presented in this matter was actually written by another person. This refers to documentation that I received from the father, as well as the emails I received ostensibly from the mother herself.

She then recommend to the district court if it determined another person was writing on Kelli's behalf, presenting information as coming from Kelli, that the matter be taken seriously for it would

> indicate an unhealthy degree of dependence and blurring of boundaries between the mother and the person assisting her in that way. It would strongly suggest that the person primarily responsible for parental decision-making is not the mother. It would suggest that this evaluation, as well as other assessments on behalf of these children were based in part on false pretense.

She went on to say if the court determined this had happened, she believed primary physical care should be placed with the father.[4]

The matter came on for trial. The district court opined the children are loved by both parents, cared for, and healthy. The court found Kelli had been the primary caretaker and the district court appears to have considered this a major factor in awarding Kelli physical care. The court noted the record had been reopened to address a visitation problem that occurred. The court found Kelli's testimony was not credible regarding the visitation incident and that she refused

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[3] She appears to refer to the fact the children have been in Kelli's primary care with Jared having visitation.

[4] The district court did not address the question of whether someone other than Kelli presented the information.

to answer questions by providing information unrelated to the question asked and her answers were not consistent.

In granting Kelli primary care, the district court expressed a significant concern about the role Kelli's mother assumed in raising the children. The court found the animosity she had against Jared inappropriate. The court said it expected Kelli's mother to support and encourage Jared's relationship with the children, noting, "[i]f she fails to do so and if Respondent is not capable of supporting Petitioner's relationship with the children, an action for modification may be appropriate."

Jared was order to pay $1233.78 in monthly child support and $400 as monthly spousal support for Kelli. The spousal support was ordered to be paid for five years or until the remarriage or death of Kelli, whichever event occurred sooner.

The court also made a property division, which resulted in the court dividing an obligation the parties had to Ford Motor Company and ordering Jared to pay an equalization payment of $33,964.69. Jared was to pay it by first paying Ford Motor $6857.46 and then paying the balance to Kelli.

SCOPE OF REVIEW. We review de novo. Iowa R. App. P. 6.907; *In re Marriage of McCurnin,* 681 N.W.2d 322, 327 (Iowa 2004). 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).

CHILD CUSTODY. Jared contends he should be the primary custodian. 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).

We give weight to the fact that Kelli assumed a substantial portion of the children's care during the marriage. The role of the primary caretaker is critical in children's development, and we give careful consideration in custody disputes to allowing children to remain with the primary caretaker. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). However, 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 the mother's primary care for most of its life to the father).

Kelli has suffered and continues to suffer a number of emotional problems. She has threatened suicide and has threatened to harm the parties' daughter. The district court and Kinnard had concerns, as do we, that the children's maternal grandmother dominates Kelli and the grandmother's attitude toward Jared will make it difficult for Jared to maintain a strong relationship with his children. Neither Kelli nor her mother feel it is their responsibility to facilitate Jared's visitation and Kelli was found in contempt for failure to provide court ordered visitation. Both parents have had a substantial presence in their children's lives. Jared has provided the parties' financial support, but has also spent considerable time with the children and has been involved with their care. He has also been supportive of Kelli's relationship with the children.

We affirm the award of joint legal custody. We modify to grant Jared physical care. He appears to be the more stable parent and more likely to support Kelli's relationship with the children than she is to support his relationship. We remand to the district court to fix Kelli's child support[5] and her visitation.

PROPERTY DIVISION. Jared challenges the property division contending that the Ford Credit debt should totally be Kelli's responsibility. She apparently took the Lincoln car that was subject to the encumbrance, failed to make the payments despite her agreement to do so, and ignored Jared's offer to assist. This resulted in the car being repossessed and a judgment entered against both parties making it difficult for either to get credit.

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[5] The district court shall consider the fact that the children receive social security payments as a result of Kelli's disability in fixing child support. She is entitled to a credit or off set against her child support for the social security benefits paid to the children.

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). We cannot say an equal division of property is not equitable in this case. Additionally, we believe the district court gave Jared some protection in providing the equalization payment he was ordered to pay Kelli could first go to Ford Credit. We affirm on this issue.

ALIMONY. Jared contends he should not have been required to pay Kelli alimony. He contends she has the ability to be gainfully employed and receives disability. We look to the provision of Iowa Code section 598.21A(1) to assess the alimony award. This was a ten-year marriage. Kelli left the job market to care for the parties' children during which time Jared was able to advance in his career. We affirm the alimony award.

ATTORNEY FEES. Kelli requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Kelli has not been successful on appeal. She is receiving a property settlement. We award no appellate attorney fees. Costs on appeal shall be paid one-half by each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.