IN THE COURT OF APPEALS OF IOWA

No. 9-417 / 08-0817
Filed July 2, 2009

IN RE THE MARRIAGE OF DANIELLE M. KURTZ AND BRANDON J. KURTZ

Upon the Petition of
DANIELLE M. KURTZ,
Petitioner-Appellee,

And Concerning
BRANDON J. KURTZ,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

The respondent appeals from the physical care and property settlement provisions of the district court's order dissolving his marriage to the petitioner. **AFFIRMED.**

Douglas Wolfe of Wolfe Law Offices, Mount Vernon, for appellant.

Stephen Jackson, Cedar Rapids, for appellee.

Jennifer Schulz, Cedar Rapids, for minor child.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Brandon J. Kurtz appeals the physical care and property settlement provisions of the parties' decree of dissolution. We affirm.

I. Facts and Procedural Background

Brandon and Danielle were married in 1995. They had two children, a daughter born in 1997 and a son born in 2000. In December 2004, Danielle petitioned for dissolution of marriage. On March 22, 2005, the court entered a temporary order providing that the parties would have joint legal custody of the children, with Danielle being granted physical care. Subsequently, as part of an order of protection, the parties agreed and the court ordered on June 21, 2005, that Brandon would receive visitation on alternating weekends, Wednesday overnight visitation each week, and summer visitation.

For a number of reasons, this case was not tried until December 2007. On March 18, 2008, the district court entered a decree of dissolution that awarded Danielle physical care of the children, while providing that Brandon would receive visitation on alternating weekends, plus Wednesday and Thursday overnight visitation each week, plus summer visitation. (In other words, this resulted in Brandon having the children for six overnights every two weeks.) The district court also awarded each party his or her own vehicles, bank accounts, life insurance policies, and retirement accounts.

Brandon appeals. He contends the district court should have ordered that he have physical care of the children. He also contends the district court erred in its property settlement. Specifically, he argues that the court should have divided

each party's 401(k) account, noting that Danielle's 401(k) account was by a large margin the most significant asset possessed by either party.

II. Analysis

We review dissolution of marriage proceedings de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

In reviewing this case, we are guided by the supreme court's opinion in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007). Like *Hansen*, this case involves a trial record that is "unattractive" in several respects, but two parents who clearly love their children. *Hansen*, 733 N.W.2d at 687.

Under our de novo review, we conclude the district court made a proper decision regarding physical care. Since the parties separated in November 2004 when Brandon moved out, the children have been primarily residing in their mother's household. The record also shows that the children are well-adjusted and doing well. If a change were made in physical care, the children would have to change schools. The children's counselor, who testified at trial, recommended that the children spend more time with their father (which will occur under the final decree), but she did not make a recommendation that Brandon be given physical care.

Although each party sees much to criticize in the other, we think the children's best interests do not require us to sift through all these criticisms. *See*

Iowa R. App. P. 6.14(6)(*o*) (stating our overriding consideration is the best interests of the children). We believe the district court's decree achieves the goals of stability, continuity, approximation, and the best interests of the children. *See Hansen*, 733 N.W.2d at 699-701. The children have done well under Danielle's physical care. Brandon has made a convincing case that he has an important role to play in the lives of the children, and the district court's award of liberal visitation will give him that opportunity.

Brandon's second argument on appeal relates to the court's division of property. Brandon points out that Danielle's 401(k) account had a balance of $45,216.54, whereas his 401(k) account had a balance of only $8070.40, yet the court did not divide the two accounts but instead ordered each party to retain his or her own account. Both accounts were subject to certain borrowings, but only an outstanding $8000 loan against Danielle's account appears to have benefited the marriage. Thus, in effect, under the court's order, Brandon would receive approximately $8070.40 of retirement account value, whereas Danielle would receive approximately $37,216.54 of retirement account value. The court declined to divide the retirement accounts because, as it explained: (1) Brandon was receiving more valuable property, including certain unencumbered used vehicles, a Bobcat, and equipment, (2) the parties' lengthy separation meant that neither had made a tangible contribution to the other's 401(k) account for at least three years, and (3) Brandon has a history of making additional income outside his regular employment, although such income was not taken into account for child support purposes. Upon our review, we believe the district court made a

just and equitable distribution of property and that no modification thereof is necessary in order to "do equity."

Danielle has requested an award of appellate attorney fees. 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 Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). In our discretion, we decline the request. Costs on appeal are assessed to Brandon.

AFFIRMED.