IN THE COURT OF APPEALS OF IOWA

No. 8-836 / 08-0292
Filed December 17, 2008

IN RE THE MARRIAGE OF PENNY J. WOSEPKA AND MARK A. WOSEPKA

Upon the Petition of
PENNY J. WOSEPKA
Petitioner-Appellant,

And Concerning
MARK A. WOSEPKA
Respondent-Appellee.

Appeal from the Iowa District Court for Butler County, John S. Mackey, Judge.

Petitioner appeals the physical care, property division, and attorney fee provisions of the decree dissolving the parties' marriage. **AFFIRMED IN PART AND REMANDED IN PART.**

Gary Boveia of Boveia Law Firm, Waverly, for appellant.

Teresa Rastrede and Curtis Klatt of Dunakey & Klatt, P.C., Waterloo, for appellee.

Heard by Vogel, P.J., and Miller, J. and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

MILLER, J.

I. Background Facts & Proceedings

Mark and Penny Wosepka were married in 1997. They have two children, Karlie, born in 1998, and Kelsie, born in 2002. On September 26, 2006, Penny filed a petition for dissolution of marriage.[1]

At the time of the dissolution hearing, in September 2007, Penny was forty-two years old. Penny was formerly married to Daniel Cox, and has a son, Khyle, with him. At the time of the marriage Penny was working at a bank as an assistant to a mortgage loan officer. In 1999 she began working for CUNA Mutual Life Insurance Company, and is now a transfer analyst. Her annual gross income from CUNA is $35,582. Penny has also been a licensed real estate agent. She has some residual health problems due to a previous personal injury accident in 2004.

Mark was also forty-two years old. Mark has a degree from a community college. In 1997, he began working for Deere & Company as a machinist. During the marriage he worked the third shift, from 11:00 p.m. until 7:00 a.m. He stated that due to his seniority he believed he could change to the first shift, from 7:00 a.m. until 3:00 p.m. Mark's gross annual income from John Deere is $59,647. Mark has no health problems.

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[1] We note that the notice of appeal in this case was captioned *Wosepka v. Wosepka*. Iowa Code section 598.4 (2005) specifically sets forth the format for the caption in dissolution of marriage cases, and we have put the correct caption on this case. We believe the provisions of section 598.4 should be followed in an appeal of a dissolution action, so the caption clearly shows the action is a dissolution proceeding.

In 2002, Mark inherited from his grandfather a four-plex apartment worth $50,000; lots worth $76,800; 2.25 acres worth $15,750; farm equipment worth $3500; and two trailers worth $2000. In addition, Mark purchased thirty acres from his sister which was worth $66,000. In 2006, he purchased a 200-acre farm from his mother, Barbara, for $200,000. Mark created Crown Point Investments, L.L.C., to hold his inherited property, and he is the sole member-manager. Mark earns $26,900 per year in income from his property.

The district court entered a dissolution decree for the parties on November 8, 2007. The court granted the parties joint legal custody of the children, with Mark having physical care. Penny was granted visitation, and ordered to pay child support of $571.38 per month. The court set aside to Mark $348,050 in inherited property and gifts. This amount included a gift of $150,000 from Barbara based on a finding that she sold him the 200 acre farm for $150,000 less than the actual value of the property. The court divided the remaining marital property to award Penny a net amount of $234,164 (which included the marital residence), and Mark a net amount of $193,769. The court did not award any attorney fees. The court entered a no-contact ordered between Penny's ex-husband, Daniel, and the children.

Penny filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court reiterated that the purchase of 200 acres from Barbara included a gift of $150,000. The court concluded Penny's personal injury proceeds had been counted twice, and adjusted the net amount of property awarded to her to $214,306. The court increased Penny's visitation with the children. Penny then

filed a second motion pursuant to rule 1.904(2), stating that because her visitation time had increased her child support obligation should be decreased. The court agreed and decreased her child support obligation to $457.10 per month. Penny now appeals.

II. Standard of Review

Our review in this equitable action is de novo. Iowa R. App. P. 6.4. When considering the credibility of witnesses, we give weight to the factual findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Physical Care

Penny contends the district court should have granted her physical care of the parties' two children. She asserts she was the children's primary caretaker during the marriage. She claims Mark was not as involved with the children, and he undermined her attempts to discipline the children. She states Mark did not support her decision to have Karlie meet with Stephanie Schwinn, a clinical social worker, to address discipline problems. She points out that her employer permits a flexible work schedule so she is able to meet the children's needs. Additionally, Penny claims the court placed too much emphasis on her relationship with her ex-husband and the fact he was facing sexual abuse charges.

The primary consideration in a physical care determination is the best interests of the children. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 1999). We consider the factors found in Iowa Code section 598.41(3) (Supp. 2005). We consider which parent will be more likely to

bring the children to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

We first note that the district court specifically found Mark was more credible than Penny. Mark testified he and Penny shared in child-care duties. He testified he often stayed home with the children while Penny engaged in social activities outside the home. Penny also testified Mark "enjoyed staying home doing nothing." She testified Mark had a very strong bond with the children. There was evidence that Penny often had discipline problems with Karlie, but Karlie was more compliant when interacting with Mark.

Furthermore, there was evidence Penny did not always include Mark in her decisions regarding the children. Penny placed Karlie in counseling with Schwinn without informing Mark. Regarding Penny's previous relationship with Daniel, Penny's sister testified Penny did not always tell Daniel about Khyle's activities.

At the time of the dissolution hearing, Daniel was facing sexual abuse charges in two separate counties.[2] Mark's sister testified that in 1999 or 2000 Daniel got into an argument with Penny and pushed her down to the ground, and then threatened to kill Karlie. Penny testified she had telephone contact with Daniel about four or five times a week and these contacts were about Khyle, who was then living with Daniel. Penny stated Khyle told her the charges against Daniel were false. Penny stated she believed her son and thought Daniel was "no threat at all in regards to what's being said." Penny believed the children

[2] Prior to Penny's first post-trial motion Daniel was acquitted of the charges against him in Jasper County. He was still facing charges in Bremer County.

could attend Khyle's wrestling meets, even though she knew Daniel would be present. She agreed, however, to the order keeping Daniel from having contact with Karlie and Kelsie.

On the issue of physical care, the district court determined:

> The court further concludes that Mark is better able to minister to the long-range best interests of the children as reflected by his credible testimony in contrast to that of Penny. Penny's minimization of her continuing contact with Mr. Cox is of grave concern to the court given his prior physical abuse of Penny and his threatening to kill Karlie in addition to the present criminal charges he now faces.

We agree with the court's conclusions on this issue. We find both Penny and Mark provided care for the children during the marriage. Penny's past conduct raises concerns about whether she would include Mark in decisions regarding the children. Penny's testimony showed she did not consider Daniel a threat. In addition, the evidence shows Mark is more prepared to devote himself to the care of the children. Considering all of these factors, we affirm the district court's decision placing the children in the physical care of Mark.

IV. Gift of $150,000

Penny claims the evidence does not support a finding that Barbara made a gift of $150,000 to Mark by selling the 200 acre farm to him for $200,000 in 2006. She states there is no evidence of the value of the farm in 2006. She points out Barbara did not file a gift tax return. She also points out that in answering interrogatories Mark did not mention the $150,000 gift.

Section 598.21(6) provides:

> Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of

> that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Barbara testified that at the time of the sale of the farm she was aware that the fair market value of the farm was more than the sale price. She stated the farm had been in her family since 1884. Barbara stated she had inherited the farm from her parents, and her father had wanted Mark to have the farm. She noted Mark had farmed with her father, and he was the only one of her children who was interested in the farm. Barbara testified the difference in value between the sale price and the fair market value was about $150,000 to $160,000. Barbara considered the difference in price to be a gift to her son alone, and not to his family. Mark also testified that the difference between the fair market value of the farmland and the sale price was a gift from his mother.

The owner of property is competent to testify to the market value of the property. *Hansen*, 733 N.W.2d at 703. Thus, Barbara's testimony about the market value of the property at the time of the sale was competent evidence to support the district court's valuation. The district court determined the value of the property at the time of the sale was $150,000 more than the sale price. "Although our review is de novo, we ordinarily defer to the trial court when valuations are accompanied by supporting credibility findings or corroborating evidence." *Id.* In this case the district court's valuation was accompanied by a credibility finding: "While Mark and his mother appear fairly quiet and reserved, the court finds their testimony to be more credible than that of Penny."

Therefore, we defer to the court's valuation of the 200 acres of farmland Mark purchased from his mother.

We affirm the district court's decision finding Barbara made a gift of $150,000 to Mark at the time of the sale of the farmland, and setting this amount aside to Mark as gifted property under section 598.21(6).

V. Real Estate Description

Penny was awarded the marital residence. The district court gave the legal description of the property as:

> A tract commencing at the Northwest Corner of Lot 2, Subdivision of the Southeast Quarter of the Northwest Quarter of Section 12, Township 91 North, Range 15 West of the 5th P.M., thence *west* 33 feet to point of beginning, thence south 323.4 feet, thence east 150 feet, thence north 323.4 feet, thence west 150 feet to beginning.

(Emphasis added).

Both parties agree this legal description is incorrect, and that the emphasized word should be "east" not "west." Penny further asserts that the legal description is incorrect because the property lines established by the legal description run through a garden shed located only a few feet from the home, cut off and exclude a portion of the fenced-in yard connected to the home, and exclude and deny access to the driveway by which leads to the home. She claims the legal description is thus inconsistent with the parties' use of the property. Penny also asserts the appraised value of the property, and the valuation set by the district court, do not comport with the legal description. Mark does not disagree with Penny's assertions concerning the garden shed, fenced-in yard, and driveway, but resists Penny's request that the issue be remanded to

the trial court "to conduct a survey . . ., generate an accurate legal description . . . represent[ing] the Wosepkas' prior use of the . . . property, and then re-award Penny the then appropriately described [property]."

We determine this issue must be remanded for the district court to conduct an evidentiary hearing on the issue of the extent of the property to be awarded to Penny as the marital residence, and for the court to then determine, based on the evidence presented at the original trial and any additional evidence presented following remand, the correct legal description of the property to be awarded to her. We do not retain jurisdiction.

VI. Attorney Fees

A. Penny asserts the district court abused its discretion by not awarding her trial attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We find no abuse of discretion in the district court's determination that each party should pay their own trial attorney fees.

B. Penny also seeks attorney fees for this appeal. An award of appellate attorney fees is not a matter of right, but rests within our 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 the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We determine each party should pay his or her own appellate attorney fees.

VII. Conclusion

We affirm the district court on all issues presented in this appeal, except that we remand to the district court for a determination of the extent of the property awarded to Penny as the marital residence, and the correct legal description of that property. Costs of this appeal are assessed three-fourths to Penny and one-fourth to Mark.

AFFIRMED IN PART AND REMANDED IN PART.