IN THE COURT OF APPEALS OF IOWA

No. 0-258 / 09-1578
Filed May 26, 2010

IN RE THE MARRIAGE OF RAQUEL LYNN CHIPOKAS AND MARK LEWIS CHIPOKAS

Upon the Petition of

RAQUEL LYNN CHIPOKAS,
Petitioner-Appellant,

And Concerning

MARK LEWIS CHIPOKAS,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Raquel Chipokas appeals from the custodial and alimony provisions of the decree dissolving her marriage to Mark Chipokas. **AFFIRMED.**

Timothy S. White and Laura A. Kamienski of White Law Firm, P.L.C., Cedar Rapids, for appellant.

Allison M. Heffern and Kerry A. Finley of Simmons Perrine Moyer Bergman P.L.C., Coralville, for appellee.

Heard by Vaitheswaran, P.J., Doyle, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SCHECHTMAN, S.J.

Raquel "Rocky" Chipokas appeals from the custodial and alimony provisions of the decree dissolving her marriage to Mark Chipokas. She contends the court erred in granting them shared care of their children and not awarding her their physical care. Rocky further asserts error for the court's refusal to award her spousal support. Both parties request an award of their appellate attorney fees. We affirm.

I. Background Facts and Proceedings. Rocky and Mark were married in their hometown, Cedar Rapids, in the summer of 1994. They are the parents of two daughters: Courtney, now thirteen and in seventh grade, and Ashley, a fourth grader and now ten years old. Rocky is currently forty years of age and Mark is forty-six.

Rocky earned a bachelor's degree in communications, with a minor in psychology, from the University of Iowa. She has been gainfully employed since her graduation in 1992. Her ultimate goal was to be a sales representative for a pharmaceutical manufacturer, which she achieved in 1998. She left that firm after five years for a similar position with Bristol-Myers Squibb. Rocky serves an eastern Iowa territory, logging about one thousand miles of travel weekly. She principally calls on psychiatrists and some primary care physicians, promoting an anti-psychotic drug. She earns approximately $118,000 per year, which includes family medical/dental insurance and retirement benefits. She is also provided with a vehicle that is driven for personal use for a small monthly stipend. Rocky has suffered from marital stress in the past, diagnosed as an adjustment disorder

with depressed mood and anxiety. An anti-depressant medication has given relief. Otherwise, she enjoys good health.

Mark is a 1989 graduate of the University of Iowa law school and has been a sole practitioner in Cedar Rapids since 1993, focusing on workers' compensation and personal injury, with a dusting of criminal defense. His net income for the last five years has averaged $140,000 per year. Mark and his brother jointly own three real estate holding companies with a combined equitable value of about $100,000 for Mark's share.

The parties constructed a large new home in 2003, which added some stress in Rocky's life. Rocky filed a petition for dissolution in July 2008. Separation ensued, followed by some attempts at reconciliation, with Mark finally leaving the residence in April 2009.

In response to a motion for temporary orders, the district court (not the trial court) established "shared physical care" on a temporary basis in late June, 2009. It then amended that temporary order without an evidentiary hearing, to award physical care temporarily to Rocky after school began, with routine visitation to Mark. This latter order was in place only three weeks until trial started in mid-September.[1] The dissolution decree followed on September 29, 2009, which awarded joint legal custody, then granted joint physical physical care of the two children, alternating their care weekly. The court declined to award spousal support or attorney fees to either party.

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[1] Rocky asked for primary physical care at trial, while Mark requested shared physical care.

II. Scope and Standard of Review. Our review of dissolution of marriage controversies is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). "Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses." *Id.* (citations omitted). Because our determination depends on the facts of a particular case, precedent is of little value. *Id.*

III. Child Custody. In child custody cases the first and governing consideration is the best interests of the children. Iowa Code § 598.41(1)(a) (2009). The court's objective is to place the children in the environment most likely to bring them to health, both physically and mentally, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 1999). "Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*." *Id.* (emphasis added). Under a *custody* umbrella, our legislature has set forth ten non-exclusive considerations in Iowa Code section 598.41(3) (parental suitability; whether developmental needs of the child will suffer from lack of contact with both parents; communication with each other; history of caregiving; ability to support the other's parental relationship; child's wishes or opposition; agreement of the parents; geographic proximity; child's safety; history of domestic abuse). Though these considerations technically apply to *joint legal custody* decisions, rather than *physical care* determinations, they, as well as other facts and circumstances, are relevant to decide whether joint physical care is in the children's best interests. *Id.* (citing *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974)).

Hansen recited four factors to consider where there are two suitable parents and whether to implement a joint physical care arrangement: (1) the stability and continuity of caregiving, as supplemented by the approximation principle; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and, (4) "the degree to which the parents are in general agreement about their approach to daily matters." *Id.* at 696-99.

Rocky contends the dissolution court failed to render findings addressing the above-specified four factors. More specifically, Rocky asserts she has historically been the children's primary caretaker,[2] a high degree of conflict exists between the parties, and their ability to communicate has ebbed with the attendant loss of respect. We will address each of these factors, as well as some selected trial court's factual conclusions thereon.

In its findings, the district court noted, "Both parents have had a strong physical, emotional, and intellectual impact on their daughters' development." The court further found, "Both have historically provided day-to-day care for their daughters and have been intimately involved in their education, health, and activities." Our de novo review of the record supports these findings.

The parties have jointly shared the parental roles in caring for their daughters. Each prepared meals, though they frequently opted to dine out as a family unit because each was employed full-time. Rocky did most of the laundry

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[2] This allegation is substantially mitigated by evidence that during the pendency of the temporary orders, the child care expense for the girls skyrocketed, demonstrating Mark's prior, active involvement in their care.

and housekeeping, offset by Mark tending to the yard and outside maintenance. Due to Rocky's need to travel out of the city, Mark covered any number of daytime tasks, which his law practice as a sole practitioner allowed. While Rocky did assume the bulk of the attention to the girls' competitive dance practices and performances, Mark was the coach of their basketball and soccer teams. Each devoted time to their homework, awakened them, and escorted them to school. Each attended their school teacher conferences, school events, and medical appointments. Mark took them camping, swimming, fishing, skiing, and assorted leisure activities. He planned and accompanied them on a number of spring breaks and vacations, without Rocky. It is never possible (nor plausible) to accurately measure the time and effort that each parent contributes to the care and attention of their child(ren), then place it on a balance sheet and declare one or the other as superior. The quality of that time varies as well as a host of other variables, like conflicts with work or other family tasks. Suffice it to say, the parental responsibilities were reasonably shared by the pair as each of their other familial roles permitted.

With regard to the second factor, our court has stated "when a marriage is being dissolved we would find excellent communication and cooperation to be the exception and certain failures in cooperation and communication not to be surprising." *In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005) *overruled on other grounds by Hansen*, 733 N.W.2d at 692. The district court did conclude, "Rocky and Mark can communicate with each other and show mutual respect." Prior to the litigation, even though they were each employed, there

were few instances when problems arose even though both girls were active in a host of activities. Their communication skills were honed for the mutual welfare of their children. Rocky respected Mark's ability to parent by entrusting him with the girls for extended periods. She respected his judgment by referring some of her clients to him for legal services. They planned a huge residence together, which in itself requires communication and respect for the other's views.

If any one factor militates against a grant of joint physical care, it is the degree of conflict between the parents. As is the case in many marriages that eventually end, acrimonious conduct has occurred. This discord was exacerbated by an extramarital affair between Mark and one of Rocky's best friends. This affair led to some bizarre conduct on Rocky's part, mostly vindictive and retaliatory. Mark made a couple responses that were unlike him, though perhaps better explained. But Rocky acknowledges that Mark "loves the girls first and foremost" and wants Mark, as their father, to "be a part of the girls' lives . . . . I'll always try to facilitate it because I was very blessed to have a great relationship with mine." The district court found the "upset and bitterness" the affair caused "resulted in the parties conducting themselves in ways that are anomalous to their general personalities and lifestyles," leading the parties to be "antagonistic toward the other." Though this occurrence is not condoned, the age of fault has passed. Nor can Rocky invoke the conflict factor as a reason to negate a shared care award when the conflict, in many instances, has been aroused by her in extraordinary retaliation to Mark's conduct. *See Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994). The trial court determined

the children's best interest would be served by being with both parents "to the fullest extent possible," finding the bitterness over the affair should not deprive the children of the benefits of being with both parents. We find that any acrimony is not a deterrent to joint physical care, each acknowledging their eagerness to shape their daughters' lives to be as fulfilling as any of their peers, which presumes an active role by the other.

Another plus for joint physical care is that Rocky and Mark live but a mile or so apart in the same school district and city. Iowa Code § 598.41(3)(h). The four grandparents live very close, as well as an uncle with whom they have been particularly bonded. They agree on their extracurricular activities and daily routines. They agree on their religious instruction and attendance, though they are of different faiths. They agree on their enrollment in the public schools. They agreed, by stipulation, on the division of college expenses, acquisition of health insurance, payment of uninsured medical expenses, and joint legal custody. Though the past years were somewhat turbulent, the important fourth factor is positive as they are in general agreement about their approach to daily matters for Courtney and Ashley.

Rocky did allege some varied incidents of domestic abuse, which Mark adamantly dismisses, explains, and denies. The district court did "not find any incidence of domestic abuse," nor were any proved. The court stated, "Claims by both parties have been exaggerated in order to obtain primary care." We agree that the instances did not constitute assaultive conduct. We defer to the court's

findings that the parties lack credibility in regard to this issue. *See Brown*, 776 N.W.2d at 647.

An added embellishment to shared care is the daughters are each in gifted and talented programs and are advanced for their years. This makes custodial transitions more tolerable.

In considering the four factors set forth in *Hansen*, and the best interests of the children, we conclude joint physical care is most appropriate. The children have enjoyed a quality relationship with both parents during their lives to date. There does not appear to be any conflict between Rocky and Mark with respect to the manner their daughters are raised to adulthood. In spite of incidents of spirited bitterness between the parties, this appears to be waning. The children have adapted and continue to excel at school and extracurricular activities. They are bright, well-rounded, and socially adept. They deserve and are entitled to quality time with each of their parents. The proximity of their residences complements a joint physical care custodial arrangement.

Because the children's best interests are served by placing them in their parents' joint physical care, we affirm the portion of the decree relating to child custody.

IV. Spousal Support. The payment of spousal support is not an absolute right; rather, whether a court awards spousal support depends on the particular circumstances of each case. *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008). The factors to be considered in determining an award of spousal support include the length of the marriage, the age and health of the parties, the

property distribution, the parties' educational level, and the parties' earning capacities. *See* Iowa Code § 598.21A(1).

Rocky contends the court erred in failing to award her spousal support. She argues Mark earns more income, which in part is attributable to contributions she made during the marriage. She also asserts the stability of her job is questionable, and that a nominal award of alimony (one dollar per year) would leave the door open for a modification, should she lose her employment in the future and become underemployed.[3]

In considering the factors set forth in section 598.21A(1), we conclude an award of spousal support is not warranted. Both parties earn a significant income. Although Mark's salary, as averaged, is slightly more than Rocky's, she receives insurance and vehicular benefits with her current position, while Mark does not. The parties are exiting the marriage with a fairly equal property division; Rocky was awarded approximately $250,000 in assets with minimal debts. Although she argues the future of her job is uncertain, the district court gave little credence to her claims, commenting:

> Although Rocky asserts her job may not be secure, in part due to the stress and anxiety she has experienced during the dissolution proceedings, she is a talented and award winning employee who should be able to continue to earn income at her current level.

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[3] While leaving the alimony issue open by awarding some modest sum sounds equitable at first glance, why is this situation any different than a plethora of other dissolutions where alimony was denied in any sum? The vocational future of all domestic litigants is subject to a garden variety of unknowns, including the economy, the employer's trade, one's health, etc. Assorted good and bad scenarios can be envisioned in this and every divorce. Alimony can only be gauged by the facts before us. We perceive little to justify singling out this situation as one meriting a modifying option.

We do note section 598.21A(1)(e) refers to a party's "earning capacity" and not their current earnings. Even if Rocky were terminated by her present employer, her capacity to earn would likely be relatively unchanged due to her education, experience, vocational skills, and demonstrated sales acumen.

We affirm the portion of the decree denying Rocky an award of spousal support.

V. Attorney Fees. Both parties request an award of their appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We are to 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 Okland,* 699 N.W. 2d 260, 270 (Iowa 2005). We decline to award either party their appellate attorney fees. Costs of the appeal are assessed three-quarters to Rocky and one-quarter to Mark.

AFFIRMED.