FILED
AUG 25 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BETSEY RUTH HOWE,

Petitioner-Appellee-Cross-Appellant,

vs.

GARRY ANDREW HOWE,

Respondent-Appellant-Cross-Appellee.

Filed August 25, 1981

1-255
65843

Appeal from Warren District Court - Anthony M. Critelli, Judge.

Respondent-husband appeals and petitioner-wife cross-appeals from the decree dissolving their marriage. Respondent asserts 1) that custody of the parties' two minor children should have been awarded to him rather than to petitioner or, in the alternative, the parties should have joint custody, 2) that the property award to petitioner is excessive, 3) that his child support obligations are excessive, and 4) that trial court's award for petitioner's attorney fees at trial are excessive. AFFIRMED.

Kristine M. Fasano, Des Moines, Iowa, for respondent-appellant-cross-appellee.

Mason J. Ouderkirk, Indianola, Iowa, for petitioner-appellee-cross-appellant.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent-husband, Garry Andrew Howe, appeals, and petitioner-wife, Betsey Ruth Howe, cross-appeals, from the decree dissolving their marriage. Respondent asserts 1) that custody of the parties' two minor children should have been awarded to him rather than to petitioner or, in the alternative, the parties should have joint custody, 2) that the property award to petitioner is excessive, 3) that his child support obligations are excessive, and 4) that trial court's award for petitioner's attorney fees at trial are excessive. On cross-appeal, petitioner challenges a $17,000 lien in favor of respondent which trial court placed against the residence awarded to her. She also seeks attorney fees on appeal. We affirm trial court's judgment and, in so doing, deny respondent's application for stay order filed July 13, 1981.

The parties' six year marriage was dissolved by decree filed September 15, 1980. At the time of the hearing, petitioner, age 25, was employed as a sales person for a local clothing shop, earning approximately $536 net per month. Respondent, age 26, was a union drywaller, earning approximately $27,000 per year. By the terms of the dissolution decree, petitioner was awarded custody of the parties' two minor children, Jason, born December 31, 1974, and Jeremy, born December 21, 1976. Respondent was granted specified liberal visitation rights, together with any other reasonable visitation upon which the parties could agree. Respondent was ordered to pay $250 per month per child as child support, to maintain health and accident insurance coverage for the children, and to pay one-half of any medical or dental expenses not covered by insurance. He also is required to maintain a $15,000 life insurance policy with the children named as beneficiaries. Petitioner received most of the parties' household goods and the parties' residence, valued by trial court at $61,000, subject to all existing encumbrances and a $17,000 lien bearing interest at eight percent in favor of respondent. Respondent was ordered to pay other debts of approximately $3,200 and $1,200 toward petitioner's attorney fees at trial.

I. Custody. Respondent contends that trial court erred in awarding custody of the parties' two minor children to petitioner. He argues that their best interests would be served by placing custody with him or, in the alternative, by granting joint custody to the parties. We disagree.

In assessing child custody provisions, the best interests of the minor children are our first and governing concern. Iowa R. App. P. 14(f)(15). Neither party is given initial preference in our determination. In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa

1978). We base our conclusion on the factors set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Trial court considered respondent's evidence that petitioner had physical limitations caused by epilepsy and that she had become highly emotional and short-tempered. The court also was aware of respondent's significant contributions to the care of the children, even though he had a full time job, and his obvious love and concern for the boys. Our review of the record convinces us that the children's best interests would be served by an award of custody to either parent. Under such circumstances, we apply the rule articulated in In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976), and defer to trial court's superior position in observing both parties and evaluating the evidence. See also In re Marriage of Steenhoek, 305 N.W.2d 448, 454 (Iowa 1981); In re Marriage of Snyder, 241 N.W.2d 733, 734 (Iowa 1976).

We also reject respondent's contention that the parties should have joint custody in light of petitioner's objection and the recent history of tension and dispute between the parties. In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979). As a result, we do not disturb trial court's provisions for custody.

II. Division of Property. Respondent argues that, considering the parties' earning capacities, the division of debts, and the large equity in the home, the home should be sold. Petitioner argues that trial court failed to give proper consideration to her inheritance of $5,500 and the $4,200 worth of assets she brought into the marriage. Considering the criteria set forth in section 598.21, The Code 1981, we cannot agree with either party's position. The record shows that similar rental housing would be more expensive, in addition to uprooting the children from their present environment. Also, respondent will receive interest on his $17,000, thereby giving him some benefit for his delayed enjoyment of that asset. The record further reflects that petitioner's inherited funds were used for living expenses, indebtedness incurred by the parties, and tax liabilities. Under these facts, we do not believe petitioner is entitled to a specific set-off of that amount in calculating respondent's share of the home equity. We further believe that trial court's award is equitable considering all factors, including the assets brought to the marriage.

III. Child Support. Respondent also argues that the amount of his court-ordered child support obligations is excessive. As indicated above, respondent is required to pay $500 per month total child support. Considering his annual gross income of nearly $27,000 (argued by respondent in brief to be $1,300 net per month), petitioner's

limited earning capacity, her documented expenses, and the children's increasing needs, we conclude this amount is equitable under section 598.21(4), The Code 1981.

IV. Attorney Fees. Respondent also alleges that trial court erred in awarding excessive attorney fees to respondent. We disagree. Attorney fees are not recoverable as a matter of right, but depend on one party's financial needs and the other party's ability to pay. Burham, 283 N.W.2d at 278. Trial court has considerable discretion in awarding such fees. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Given the disputed matters in this case, respondent's income, and petitioner's lack of liquid assets, we find no abuse of discretion in trial court's award.

Petitioner also requests an award of attorney fees for this appeal. The primary consideration in this regard is the parties' resources. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). After reviewing the entire financial situation of both parties, we find an award of attorney fees is warranted. We conclude, without setting the amount petitioner's attorney may charge, that respondent should pay $750 of those fees.

Based on the foregoing, we affirm trial court's judgment. Costs of this appeal are assessed against respondent.

AFFIRMED.