IN THE COURT OF APPEALS OF IOWA

No. 8-382 / 98-0126

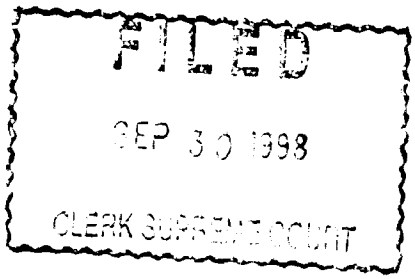
IN RE THE MARRIAGE OF THOMAS LEE REA AND SHELLY LYNN REA

Upon the Petition of THOMAS LEA REA,

Petitioner-Appellant,

And Concerning SHELLY LYNN REA,

Respondent-Appellee.



Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

Petitioner appeals the child custody and support provisions, property division, and award of attorney fees contained in the parties' dissolution decree. **AFFIRMED.**

Michael C. Vinyard of Vinyard & Curran, Ottumwa, for appellant.

Michelle Hoyt Swanstrom of Swanstrom & Krafka, Ottumwa, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

MAHAN, J.

Thomas Rea appeals from the provisions of the parties' dissolution decree. Thomas contends the district court erred when it: (1) awarded Shelly Rea primary physical care of the parties' two children; (2) calculated the amount of child support Thomas must pay; (3) ordered Thomas to pay $750 of Shelly's attorney fees; and (4) included $2000 for the value of a race car and parts in its assessment of Thomas's assets.

Thomas and Shelly married in August 1986. They have two children, Ashlee and Derran. Ashlee is eight years old and Derran is six. Both Thomas and Shelly have high school diplomas. Both parties worked during the course of the marriage. At the time of trial, Thomas worked at Barker Company as a lead man, a position similar to a foreman, and Shelly worked at Wal-Mart as department manager of the snack bar. Thomas earns $10.30 per hour; Shelly earns $7.35 per hour.

Shelly has suffered from a number of medical and psychological problems over the past several years. Diagnoses have included migraine syndrome, depression, anxiety, communication disorder, nervous breakdown, panic disorder, dependant personality, and urinary tract infection. Shelly does not consider herself mentally ill.

In December 1996, Shelly had an abortion when she was thirteen weeks pregnant. Shelly tried to keep the pregnancy and abortion a secret from Thomas. When Thomas found out about the pregnancy, Shelly engaged in an elaborate rouse to convince him she had a miscarriage. Shelly admitted to the abortion at her deposition and again at trial.

Shelly also became involved in an extramarital affair with Dan Terrell. Ashlee and Derran knew Terrell as the "road grader man." There was disagreement between Shelly and Thomas about whether the children ever saw Shelly and Terrell having sex. However, it was admitted by Shelly that she and Terrell did have sex in the parties' home. The record also discloses other admitted incidents involving the affair which are troubling and show a lack of judgment on the part of Shelly. There are founded reports of child abuse against Terrell involving one of his daughters.

After the parties separated, Shelly moved into a rental home owned by Terrell and continued seeing Terrell, who was also going through a divorce. Shelly and Terrell are together with Ashlee and Derran several hours each day.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. PRIMARY PHYSICAL CARE. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue in determining

the best interests of the children is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Thomas contends he is the better parent to have primary physical care of the children. Thomas argues he is a hard-working, honest, and God-fearing man whose family is supportive of him, while Shelly has suffered a laundry list of physical and emotional problems, aborted a child without telling her husband and then lied about it, had an affair, and continues to see a person who has admitted abusing his own child. Thomas also points out Shelly consistently refused to take the medications doctors prescribed for her. Shelly does not deny she did not take the prescriptions. She contends she does not need them because she has convinced herself she is a good person and does not need medication to control her life. Credible evidence was also presented that many pills were found loose between cushions of the couch and in the kitchen cupboards when the house was cleaned before sale.

In September 1997, Terrell struck his eleven-year-old daughter, Elizabeth, with a plastic wand used to open and close Venetian blinds. The incident left a bruise on Elizabeth's arm caused by Terrell's hand and a mark on her leg from the wand. Ashlee and Derran saw this incident. Terrell has also been involved in two other abusive incidents with Elizabeth, both times leaving bruises on her arm.

Nan Hyde, a child abuse investigator for the State of Iowa, testified Terrell admitted his actions and asked her for guidance on how to discipline Elizabeth. Shelly also consulted Hyde about whether it was safe for Terrell to be around her children. Hyde told Shelly she thought it was safe because Terrell was cooperating and understood what he had done and would not do it again. Hyde reiterated this sentiment at trial, though she stated there were no assurances another incident would not occur. Hyde did not advocate on behalf of either parent.

In making its decree, the district court stated:

> The parties' marriage was strained for some time before this action was commenced. In April of 1996 Shelly had a breakdown which she attributes to the stress of the marital relationship and the accumulation of responsibility for the parties' activities and household. In the months that followed, she was hospitalized repeatedly, diagnosed with depression, and under several doctors' care. She doggedly fought the prognosis, admittedly ignored some of her doctor's prescriptions for medication and follow-up care, and claims to have recovered fully. She professes and demonstrates self-esteem and control over the circumstances of her life. She appears genuinely happy and energetic. She has not been treated for any symptoms of depression for approximately one year, is functioning well at work, and amply attends to the day-to-day needs of the children.
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> . . . .
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> Dan testified forthrightly about all circumstances of his involvement in the child abuse incidents, the D.H.S. investigation of all three as part of one file, and his efforts to address the issues and change

> his approach to child discipline. Shelly openly acknowledged Dan's involvement with the children and demonstrated her vigilance in protecting them from harm. She sought specific advice from the D.H.S. investigator regarding potential for danger to Ashlee and Derran and was assured that Dan's presence with the children does not expose them to harm any more than their contact with other persons in discipline situations.
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> The children have not suffered physical or emotional problems as a result of Shelly's past treatment for depression, her extra-marital relationship with Dan, or the circumstances surrounding the termination of her late 1996 pregnancy. Ashlee and Derran are well-adjusted, but they are saddened by their parents' marriage ending. They remain close to both Tom and Shelly. . . .
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> The children have thrived in Shelly's care and they continue to need the stability and nurture they have always known. Shelly's relationship with Dan may convey confusing messages to the children in their moral upbringing, particularly given the parents' different opinions on moral issues. It is not proven that she engages in intimate relations in the children's presence; and she is not indifferent to the risks posed by her romantic involvement. The children's long-term interests are secure in her care. Shelly's openness to Tom's active involvement as a co-parent will permit him to teach appropriate moral and Christian values and positively influence the children's lives.

We have closely reviewed the record in this matter. It was certainly important for the district court to have the opportunity to see Shelly and judge her actions and health. It was also important for the district court to see Terrell and judge his temperament and credibility. This is a very close case. While we do not condone Terrell's actions, it does appear he and Shelly have taken steps to ensure a safe environment for Ashlee and Derran. We defer to the findings of the district court and therefore affirm the award of primary physical care.

III. CHILD SUPPORT. The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 464 (Iowa App. 1995). "In applying the child support guidelines, the

court must determine the parents' current monthly income from most reliable evidence presented." *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). "This often requires the court to carefully consider all of the circumstances relating to parents' income." *Id.* All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993).

Thomas contends the district court's child support figure is based upon a significantly inaccurate figure. He argues overtime should not be used to figure his obligation because it is not consistent, required, anticipated, nor expected. He contends his net monthly income should be $1330.18. At trial, Thomas testified overtime is mandatory if the need is there. When Thomas works overtime he earns time-and-a-half.

Thomas's year-to-date income as of October 17, 1997 was $19,658.85. When divided by the number of weeks, Thomas's gross monthly wage equals $2129.70 and a net of $1569.30. We find the district court correctly determined Thomas overtime was not anomalous, uncertain, or speculative. We also find the district court correctly applied the child support guidelines.

IV. ATTORNEY FEES. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We will not find an abuse of discretion unless such discretion was

exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994).

In awarding attorney fees, the district court stated:

> Both parties have incurred substantial attorney fees in preparation for, and presentation of a two days of trial evidence. Shelly has incurred over $2,500 and seeks contribution from Tom for all or part of this expense. Although this litigation was not the result of improper motives or unreasonable actions of either party, a substantial amount of the trial time was consumed by presentation of cumulative and repetitive evidence, including numerous child-custody endorsements by Tom's family members and friends. Tom has the greater ability to pay legal costs, as between the parties.

In the conclusions of law, the district court noted, "The number of witnesses testifying for one party or for the other is not a factor, and the presence or absence of family members to bolster a party's position is not legally relevant to any issues before the court." Thomas contends the district court penalized him because his family and friends supported him. We disagree and affirm the district court's award of attorney fees.

V. INCLUSION OF RACE CAR. Thomas asks this court to reduce the value of the assets assigned to him by $2000 for the value of a 1972 Chevelle race car and parts. Wayne Fisher testified the car belonged to him. However, Thomas testified he depreciated the car on his 1996 personal income taxes. According to Thomas, only certain parts of the car belonged to him, and the major parts belonged to Fisher. Shelly testified she always believed the car belonged to Thomas. The district court found the race car and its parts were a marital asset. We find the race car and its parts are a marital asset and correctly included by the district court.

VI. APPELLATE ATTORNEY FEES. Shelly requests attorney fees on appeal. She has submitted a fee statement showing $2670 in legal fees and $182 in copy charges and transcript charges. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We decline to award appellate attorney fees in this case. Each party shall be responsible for his or her own appellate attorney fees.

AFFIRMED.