

APR 28 1978

568

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF THOMAS H. TREINEN AND KATHLEEN ANNE TREINEN

UPON THE PETITION OF
THOMAS H. TREINEN,

Appellant,

ROBERT TREINEN, RYAN TREINEN
and MATTHEW TREINEN, Minor Children,

Appellants,

AND CONCERNING
KATHLEEN ANNE TREINEN,

Appellee.

Filed April 28, 1978

491
3-61162

Appeal from Ida District Court - George F. Davis, Judge.

Petitioner husband appeals custody, child support and alimony provisions of dissolution decree and seeks remand to reopen case for further factfinding regarding personal property and debts.—Affirmed with modification and remanded with instructions.

Stewart A. Huff and Daryl Hecht, of Crary, Huff, Yates & Clem, P.C., Sioux City, for Appellant.

N. Richard Willia, of Margolin, Goldblatt, Stienstra, Ryan & Gildemeister, Sioux City, for Minor Children.

Jeffrey A. Sar, Sioux City, for Appellee.

Heard by Allbee, C.J., and Donielson, Oxberger and Carter, JJ. Snell, J. takes no part.

PER CURIAM

Petitioner Thomas H. Treinen appeals the custody, child support, and alimony provisions of the decree dissolving his marriage with Kathleen Anne Treinen. We affirm with modification and remand with instructions regarding the division of personalty and debts.

In rendering its custodial decision we think the trial court rightly considered which parent has the greater capacity to provide more love, affection and kindness to the children, *In re Marriage of Dawson*, 214 N.W.2d 131, 133 (Iowa 1974); also, which parent had better "settled down" after the trauma of the separation and began to establish personal stability and a loving home for the children, *In re Marriage of Snyder*, 241 N.W.2d 733, 734 (Iowa 1976); and, whether the moral misconduct alleged had adversely affected the children, *In re Marriage of Kehrl*, 241 N.W.2d 923, 924 (Iowa 1976). Our de novo review leaves us in accord with the trial court: the long range best interests of the children lie with Kathleen serving as the custodial parent. Thomas's assurances of extended future parental activity can be of inestimable value to father and sons; we trust "...he will fulfill this promise in every way reasonably possible during the liberal visitation periods accorded him." *Kehrl*, 241 N.W.2d at 925.

Thomas argues his private law practice has suffered considerably from the dissolution action and that his total after-tax income for 1976 was \$13,700. He argues the \$700 monthly support provision exceeds 50% of his disposable income. We are convinced he is entitled to some relief. Kathleen estimated the monthly expense for herself and the three children was \$550, with the expense for food and rent listed at an unrealistically low figure. We reduce the \$200 per child per month child support to \$165 per child per month and we affirm the \$100 per month alimony provision. We find no merit in Thomas's claim alimony is improper in this case. In recent years Kathleen has devoted herself full time to home and family. She anticipates beginning a two-year nursing program; she is not now equipped to command wages commensurate with her income needs and still maintain the quality of care the children are accustomed to receiving from her. *In re Marriage of Beeh*, 214 N.W.2d 170, 174 (Iowa 1974).

Thomas seeks a remand for a reopening of the case for the taking of further evidence regarding division of the personalty and debts. He did not point out the failure of the decree to dispose of the marital property and indebtedness in his motion to enlarge and correct the findings of the trial court. The parties filed financial statements and are essentially in agreement that these statements reflect the financial condition of the parties. Indeed, Kathleen urges this court make whatever division it deems necessary. We note only two liabilities--\$3600 to First State Bank of Battle Creek, Iowa, and \$500 to Raymond Treinen--which we cannot identify or trace as to their origin or use. We remand for a hearing limited to a determination of the proper disposition of these two debts. In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972). We do not disturb the trial court's ruling that the bills rendered for counseling and mental therapy, physical examinations and the attorney for the children are assessed equally to Kathleen and Thomas. We are in accord with the trial court's recognition that Kathleen's inheritance will serve as a source of her contribution to the children's support. Accordingly, we do not award Thomas any part of the value of the household goods inherited or of the cash distribution Kathleen received by inheritance.

On remand, after consideration of the \$3600 and \$500 indebtedness the trial court shall amend its decree to include provision for the payment of these two debts and to include the following specific provisions: 1) Kathleen and Thomas shall each receive the respective automobile in their possession at the time of the decree subject to any indebtedness remaining unpaid. 2) Kathleen shall receive all household goods in her possession excepting any personal items the trial court shall rule should be awarded to Thomas. 3) Thomas shall assume his school loan indebtedness of \$3,850.54, the Commerce Clearing House debt of \$299.43 and the office copy machine debt of \$565.10. His accounts receivable of \$1000 are awarded to him. 4) Thomas shall assume the Field Enterprise indebtedness for the children's encyclopedias of \$201.74. 5) Thomas shall receive all funds deposited in joint checking or savings accounts at the time of the decree. 6) Thomas shall assume all other debts not disposed of above and incurred for the benefit of the family prior to the entry of the decree. 7) Thomas shall maintain the health insurance coverage on

the children; any life insurance he held at the time of the decree shall be maintained with the children designated as beneficiaries.

Kathleen seeks an award of attorney fees on appeal. The costs of appeal are assessed to Thomas. Each party shall pay their own attorney fees.

Affirmed with modification and remanded for further proceedings consistent with this opinion.

DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

I dissent. Although evidence was presented at trial which would support an award of custody to Kathleen, I conclude, contrary to the trial court and a majority of this court, that the greater weight of the evidence justifies an award of custody of these children to Thomas, especially in light of the testimony of the several acquaintances of the parties and the attorney for the children.

It is apparent from a reading of the record that both Kathleen and Thomas have had many problems, both marital and personal. However, on the basis of the report and recommendation of the attorney for the children and the testimony of the acquaintances of the parties, I conclude that Thomas should be awarded custody. The attorney's recommendation was based upon the fact that Kathleen was going through a big change in her life and was deeply involved in activities relating to Alcoholics Anonymous which, unfortunately, infringed upon the amount of time she would otherwise have to spend with the children. The attorney also expressed concern about her relationship with a man who also had an alcohol problem. On the basis of this recommendation and the other testimony at trial, I would award custody to Thomas.