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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DE LANGE

201

Upon the Petition of	)	
GERTRUDE J. DE LANGE,	)	
Petitioner-Appellee,	)	Filed February 24, 1982
And Concerning	)	
HAROLD J. DE LANGE II,	)	1-385 / 3-66482
Respondent-Appellant.	)	

Appeal from Scott District Court - R. K. Stohr, Judge.

Respondent-husband appeals and the petitioner-wife cross-appeals from their dissolution decree. AFFIRMED AS MODIFIED.

A. Fred Berger, Davenport, Iowa, for respondent-appellant.

Dorthea O'Deen and Glenn F. Ruud, Rock Island, Illinois, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

The respondent-husband appeals and the petitioner-wife cross-appeals from their dissolution decree. The husband argues that joint custody should have been ordered as to the parties' only child, that the amount of child support was too high, that the property settlement and lump sum award to the wife were inequitable, and that he should not have been ordered to pay attorney's fees. The wife contends that custody was proper, the amount of child support should have been higher, she should have received an additional lump sum property award, and that attorney's fees were correctly awarded and should also be awarded to her for this appeal. With some modification as to the amount of child support, we affirm the trial court.

Petitioner-wife, Gertrude, and respondent-husband, Harold DeLange, were married August 4, 1972. Their only child, a daughter, was born November 4, 1978. Petitioner was a registered nurse and began her career in July 1972. During the course of the marriage she worked virtually continuously; she also took coursework at a local college and the University of North Dakota which led to a degree as a family-nurse practitioner and certification as a physician's assistant. Her annual income at time of trial was $16,300.

The respondent completed his undergraduate degree in 1973, entered the University of Iowa's accelerated law degree program in May 1974, and graduated with his J.D. in August of 1976. Until the commencement of law school, respondent earned money through parttime work. Because he was on an accelerated program in law school, he did not work during that period, and petitioner was the sole supporter of the family. In the last full year before trial, respondent earned $40,000; his projected earnings for the following year were $42,000 to $45,000.

Petitioner filed for dissolution June 21, 1979, almost three years after respondent's completion of law school. At time of trial the parties had

approximately $14,000 equity in a home, household furnishings worth about $5,000, two cars (one of which had debt owing for more than its value), and a small amount of cash in various accounts. The couple also had debts of roughly $23,000, some of which represented student loans of each.

The trial court awarded custody of their daughter to petitioner and ordered respondent to pay $110 each week in child support. Petitioner was awarded the house and made responsible for all house payments. Respondent received a few itemized furnishings from the house; the rest were awarded to petitioner. The debts were divided between the parties, but one, the repayment of a private loan in the amount of $4,447.56, used to assist in the procurement of the house, was ordered paid by petitioner, a decision which she challenges. Respondent was also ordered to pay petitioner lump sum alimony of $25,000 in monthly installments of $200; these payments were to continue if petitioner remarried before the full sum was paid, but not if she died. Petitioner was also awarded $2,000 towards her attorney's fees.

I. Child Custody and Support. On appeal, as at trial, respondent seeks joint custody of his daughter. Essentially, he argues that, with the exception of petitioner's agreement, the present situation meets all of the criteria approved by the supreme court in In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979), and is thus an ideal case for awarding joint custody. Petitioner does not want joint custody. She concedes that until now the parties have been able to work out decisions affecting their daughter together, but she is concerned that they may not always agree on a particular course. She points out that their daughter has always lived with her and would continue to do so even if joint custody were awarded (a condition agreed to by respondent while the child is young) and, as the custodial parent, believes she must have the final responsibility regarding the daughter's welfare.

Our review of this case is de novo, Iowa R. App. P. 4, and the first and governing consideration of this court is the best interest of this child. Iowa R. App. P. 14(f)(15). We have studied the whole record and agree with the trial court that both parents love their daughter and are interested in her "receiving the best of all things available." However, we also agree with the trial court that custody should rest with petitioner.

We reach this conclusion under the guidelines set forth in Burham. In support of the trial court's custodial arrangement, we note that both parties live in the same town, have similar lifestyles, and respondent apparently enjoys easy access to his daughter. We see no reason to disturb the custodial arrangement ordered by the trial court.

The trial court, as well as placing custody with petitioner, ordered respondent to pay $110 each week in child support. Each case involving amount of child support depends on its individual facts, but relevant factors to be considered include the age, health, present and future earning capacities, resources, contributions, and indebtedness of each party, as well as the duration of the marriage and the number of children involved. In addition, child support must bear some relationship to the needs of the child in the particular case. In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). Considering all of these factors in the present case, we believe $110 each week in child support is too high. Consequently, we modify the decree so as to reduce respondent's child support obligations to $80 per week, effective from the date of the decree. Respondent is to be given credit for any amounts paid in excess of that figure and is still entitled to the federal income tax deduction for his daughter so long as his payments are current at the end of any given year. Child support payments shall continue for the period fixed in the trial court's decree.

II. Property Division and Lump Sum Alimony. The trial court awarded virtually all of the parties' assets to petitioner, as well as $25,000 lump sum alimony to be paid in increments of $200 each month. Petitioner argues that the present case is like In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978), and that the property and money awarded to her is insufficient to compensate her for the efforts she contributed towards respondent's achievement of his law degree and resultant increased earning capacity. Respondent maintains that this case is easily distinguishable from Horstmann, that petitioner received almost all of the couple's assets, and that she is not entitled to any lump sum award.

We agree with respondent that the present case is factually distinguishable from Horstmann. There, the wife gave up her educational opportunities to work and support the family unit so that the husband could obtain a Masters' and a law degree. At the time of the dissolution in Horstmann, the marriage unit had earned no assets since all money had been used for living expenses and education, the wife had ability to earn little more than half of the husband's earnings even at his initial legal job, and, because of the dissolution, she lost all opportunity to enjoy any of the increased benefits to be gained from the law degree she had helped to make possible. In re Marriage of Horstmann, 263 N.W.2d at 886-87. In the present case, respondent did earn undergraduate and law degrees during the course of the marriage. However, petitioner had earned a nursing degree prior to the marriage. She continued to work at her chosen profession throughout the marriage and, rather than sacrificing her career for that of respondent's, was able to complete a further degree as a family nurse practitioner and became certified as a physician's assistant. The marriage continued for almost three years after respondent's graduation; the couple was able to aequire some assets and petitioner enjoyed some benefit from respondent's increased earning abilities because of the law degree.

The court in Horstmann made clear that the earning of a law degree, in and of itself, is not an asset of the parties for the court to divide upon the dissolution of a marriage. What the court did say is:

> We hold a trial court in a dissolution case where proper evidence is presented may consider the future earning capacities of both parties and in determining those capacities it may consider the education, skill or talent of both parties. This statement of principle, articulated in Schantz, applies to the court's determination of an equitable distribution of assets and property and to a determination of whether alimony should be awarded and, if so, to the amount to be awarded.

In re Marriage of Horstmann, 263 N.W.2d at 891

In applying these principles to the facts before us, the trial court awarded petitioner an additional $25,000 in lump sum alimony to compensate her for her efforts that helped respondent to achieve his present economic status as a lawyer.

In applying the principles of Horstmann and Schantz, to the present dispute, we must attempt to balance the following factors: (1) the expenditure of time and money by petitioner which contributed to the increased earning capacity which will flow from respondent's professional education (in this regard, we make some allocation of petitioner's efforts to the securing of her own advanced degree); (2) petitioner's share of the loss to the marital estate which resulted from respondent's pursuing his professional education rather than seeking available employment; and (3) the extent to which petitioner has already shared in the increased earning capacity and other benefits which flow from respondent's professional education. When these factors are balanced and considered in conjunction with the assets awarded to petitioner in the trial court's property division, we conclude that the $25,000 lump sum alimony award is excessive. We accordingly reduce said award to lump sum alimony of $10,000, payable within 120 days of issuance of procedendo. This award shall carry no interest until the time we have specified for payment thereof and shall bear interest at the legal rate thereafter.

Petitioner also questions the assignment to her of a debt of $4,447.56 owed to her grandmother that had been used to make the downpayment on the couple's house. We agree with the trial court's ruling on respondent's motion for amendment and enlargement of findings that this debt properly ought to be the responsibility of petitioner. She has received the couple's house in the property division, including more than $14,000 in equity, free and clear of any remaining interest in the house by respondent. She will continue to live in the house and make the mortgage payments; she will also receive the value of the house if it is sold. Therefore, the remaining obligation on the down payment loan should also be hers.

III. Attorney's Fees and Costs. Petitioner was awarded $2,000 by the trial court to be used towards payment of her attorney's fees. She also requests attorney's fees for this appeal. The awarding of attorney's fees is not done as a matter of right, but depends upon the financial circumstances of each party. In re Marriage of Burham, 283 N.W.2d at 278. Considerable discretion is given to the trial court in this matter; consequently, we will not disturb the award of $2,000 given at trial. However, upon considering the current financial position of each party, we order that each shall pay individual attorney fees for this appeal, and costs of the appeal are to be assessed equally between the parties. Subject to the modification herein made as to respondent's child support obligation and the reduction of lump sum alimony, the trial court's decree is affirmed.

AFFIRMED AS MODIFIED.

All judges concur except Johnson, J., and Oxberger, C.J., who specially concur.

JOHNSON, J. (specially concurring)

My views with regard to joint custody, expressed at length in my special concurrence in In re Marriage of Castle, 312 N.W.2d 147, 150-51 (Iowa App. 1981), apply with equal force to the facts of this case. Thus, but for the current status of Iowa law, I believe joint custody should have been awarded.

Oxberger, C.J., joins this special concurrence.