FILED
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IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF JANE ELISE NELSON & DANIEL RICHARD NELSON

Upon the Petition of,
JANE ELISE NELSON,
Petitioner-Appellee,
Cross-Appellant,

And Concerning,
DANIEL RICHARD NELSON,
Respondent-Appellant.
Cross-Appellee.

Filed April 21, 1981

0-413
3-64727

Appeal from Calhoun District Court. James C. Smith, Judge.

Respondent-husband appeals and petitioner-wife cross-appeals from child custody and economic provisions of the parties' dissolution decree. MODIFIED AND AFFIRMED.

Joseph G. Bertogli, Des Moines, Ia., for petitioner-appellant.

Dan T. McGrevey, Fort Dodge, Ia., for respondent-appellee.

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

PER CURIAM

Respondent-husband appeals and petitioner-wife cross-appeals from child custody and economic provisions of the parties' dissolution decree. Both parties argue that each should have been awarded custody of all three children; respondent also claims that the provisions of the decree relating to division of property, child support and attorney fees are inequitable. We modify the property division and otherwise affirm the decree.

Jane and Daniel Nelson were married on September 27, 1968. They had three children—Scott, born on October 29, 1969; Elissa, born on March 21, 1973; and Heidi, born on May 19, 1977. Jane filed this petition for divorce on July 12, 1979. On November 5, 1979, Daniel was ordered to pay temporary support of $500 per month and $500 toward Jane's attorney fee obligation. Under the final decree, Daniel was awarded custody of Scott and Jane was awarded custody of the two girls; specific visitation schedules were set up for both parties. Daniel was ordered to pay $390 per month in child support; this amount is to be reduced to $260 per month when one of the girls reaches majority, dies or is otherwise emancipated and further reduced to zero when the other girl reaches majority, dies or is otherwise emancipated. Jane was awarded an undivided two-thirds interest in the parties' farm, subject to two-thirds of the remaining debts and interest encumbering the farm; Daniel was awarded the remaining one-third interest subject to one-third of the outstanding debts. The rest of the parties' property, real and personal, was divided between them on a relatively equal basis. Finally, Daniel was ordered to pay costs, an additional $1,500 for Jane's attorney fees, and $2,500 for the attorney appointed to represent the children's interests. Daniel's appeal and Jane's cross-appeal followed.

I. The main issue in this case is the propriety of the court's decree mandating split custody, with Scott going to Daniel and the girls going to Jane. As always in cases like this, our primary concern is the best interests of the children. Iowa R. App. P. 14(f)(15). The trial court found that Jane was having problems in disciplining Scott, and that, despite the fact that the law generally views the separation of siblings with disfavor, there was nothing in this record to indicate any special closeness between Scott and his sisters. The court concluded that the interests of all three children would best be served by placing Scott with Daniel and the girls with Jane.

We see no reason to disturb these conclusions. We also recognize the problems

inhering in a split-custody decree, see In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976), but we note that these problems are mitigated somewhat in this case by the fact that Jane and Daniel are still living relatively close to each other. This will make it much easier for the children to see each other on a somewhat regular basis. As for the fitness of the parties to be custodial parents, it is an understatement to say that the evidence is conflicting with accusations of lying and misrepresentations coming from both sides. Neither parent may claim to be the ideal—June began having an affair with Randy Mosher, Daniel's hired hand who is ten years her junior. Daniel had a serious drinking problem up until mid-1979 when he converted to born-again Christianity. The bitterness displayed by each of the parties and the many conflicts in the testimony make it difficult to determine who would be the better custodial parent. The trial court was in a much better position to weigh the evidence and determine the credibility of the various witnesses. After doing so, it found that split custody was in the best interests of the three children. See Iowa R. App. P. 14(f)(7). We find nothing to make us think otherwise.

II. Daniel also complains about the property division decree under which Jane was awarded a two-thirds interest in the farm. In determining a proper division of property, we are guided by the familiar factors found in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) except fault. The trial court appears to have made an approximately equal division of property as to everything except the farm; we think that such an equal division is justified in this case. The court, however, gave no reason for departing from this plan in giving Jane two-thirds of the farm. We conclude that the decree should be modified so that each party is awarded an undivided one-half interest in the farm and is responsible for paying one-half of the debts and interest against the farm. While an equal division is not necessarily mandated in every case, see In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975), we think it is proper here and that it should extend to all of the marital property, including the farm.

III. Daniel alleges that the award of child support of $390 per month is too high. After considering the relevant factors found in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974), we must disagree. Jane has monthly expenses of approximately

$1,160 but has no current income other than a relatively small annual dividend for her interest in a family-owned corporation. Nor was Jane awarded any alimony under the decree. Daniel has a net annual income of $8,000-$10,000 and is therefore in a better position to provide for the support of the two girls. We are not disposed to alter the award of child support.

IV. Finally, Daniel claims that he should not have been ordered to pay a total of $4,500 in fees for attorneys for Jane and the children. Although he correctly states that such fees are not recoverable as a matter of right, Locke v. Locke, 246 N.W.2d 246, 255 (Iowa 1976), we think that, given the financial circumstances, Daniel is in a better position to meet those expenses. We therefore affirm those provisions of the decree. However, given the sizable award to Jane, we do not think it fair to impose the entire cost of this litigation upon Daniel. We therefore hold that each party is responsible for paying his or her own attorney fees incurred in this appeal.

We order that the farm and its encumbrances be divided equally between the parties. In all other respects the decree is affirmed. Costs are taxed three-fourths to Daniel and one-fourth to Jane.

MODIFIED AND AFFIRMED.