FILED
NOV 29 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-487 / 93-589

000347

IN RE THE MARRIAGE OF TRACY D. LONG AND CHERIE LYNN LONG

Upon the Petition of
TRACY D. LONG,

Appellant/Cross-Appellee,

And Concerning
CHERIE LYNN LONG,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Husband appeals economic and custodial provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Michael L. Mollman and David J. Winkelman, Cedar Rapids, for appellant.

James W. Affeldt of Elderkin & Pirnie, Cedar Rapids, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.* Donielson, J., takes no part.

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

HAYDEN, J. 000248

Tracy and Cherie Long were married on October 6, 1985. Their first child, Jennifer, was born April 2, 1986, and their second child, Jacob, on March 18, 1988.

Tracy filed a petition for dissolution in August 1991. At the time of trial Tracy was almost twenty-eight years old. He has been employed as a truck driver since graduating from high school. The district court calculated his monthly net income to be $2617.78. Cherie was twenty-seven years old and a high school graduate. She has been employed by Rockwell International for the past eight years. She can work up to forty hours a week, but is a "temporary" employee with no health, dental, or pension benefits. The district court calculated her net monthly income at $1084.58.

During the marriage the parties purchased a house for $51,000. They agreed its value at the time of dissolution was $68,000.

In 1989 the parties separated for approximately one and one-half months. Tracy moved out of the family home during this time. Cherie and the children remained in the home. A second separation occurred in the fall of 1990 and lasted two weeks.

The third and final separation occurred in August 1991. This time Cherie moved out of the family home without the children. Cherie had regular contact with the children after moving out. She did not, however, assist

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Tracy financially during the one and one-half years between the final separation and the dissolution.

The district court awarded temporary custody of the children to Tracy. After Cherie moved out, Tracy arranged for his stepmother to be with the children while he was at work. He also changed his work schedule so he would be gone from the home on the average only one to two nights per week. In August 1992 Tracy hired a live-in nanny, Joni Eirp. At the time of trial their relationship had become romantic, and they planned to marry.

The district court filed a decree of dissolution on March 18, 1993. The court awarded joint custody of the two minor children to the parties and primary physical care to Cherie. It stated the decision was close but that it decided Cherie should get custody because she had been the primary caregiver before the final separation. The court awarded the house to the parties as tenants in common but gave Cherie the right to occupy the house until ninety days after their younger child graduated from high school. The court granted Tracy visitation, including six weeks in the summer. The court calculated Tracy's child support under the guidelines to be $181.24 per week but decreased the support order because of the extended summer visitation. The court deducted three weeks of payments from the yearly total and divided by fifty-two, ordering support payments of $170.78.

Tracy appeals, and Cherie cross-appeals.

Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). In child custody cases the best interests of the children is the governing consideration. In re Marriage of Wilhelm, 491 N.W.2d 171, 172 (Iowa App. 1992) (citing In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); Iowa R. App. P. 14(f)(7)). The critical issue in determining the best interests of the children is which parent will do better in raising the children and which environment would "bring the children to healthy, physical, mental, and social maturity." Id. (citations omitted).

I. Custody. Tracy contends the district court erred in awarding primary physical care of the parties' two minor children to Cherie. In awarding custody to Cherie the court found she had been "the historical primary caretaker" and Tracy had not performed as a single parent.

Our courts recognize a finding Cherie was the primary caretaker prior to the separation does not assure she be awarded custody of the children. Wilhelm, 491 N.W.2d at 172 (citing In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa App. 1991)). More significantly we determine these findings of the trial court are not supported by the record. While the parties were residing together Tracy shared in the responsibilities of parenting. He also helped with the cooking and cleaning responsibilities

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around the house. Cherie was not solely a homemaker during the marriage. The evidence shows during the marriage both parties worked and a baby-sitter cared for the children during the day.

The trial court also found Tracy's stepmother, Gail Long, "was a virtual live-in caretaker" and Joni Eirp was substantially responsible for child care and housework when Tracy was not working. These findings also are not supported in the record. Gail testified Tracy was the primary caretaker and provided for the children and maintained the home when he was not working. Tracy was gone from the home usually two nights per week due to his job. She did not care for the children while Tracy was at home. Gail stated Tracy helped Jennifer with school work, disciplined the children, and played with them. Testimony also shows Tracy, not Joni Eirp, took care of the children when he was at home.

In addition Tracy was awarded temporary custody of the children for nineteen months between the parties' final separation and the dissolution hearing. During this time he provided the primary care and financial support for the children. Tracy prepared Jennifer for kindergarten, worked with her on her homework, and is more effective in disciplining the children as he is consistent and patient with them. The children were well-adjusted under Tracy's care and were doing well academically and socially. Tracy remained in the family home with the children during this

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period. This arrangement brought stability to the children's lives. Tracy tried to further stabilize their lives by changing his work schedule. Cherie, however, exposed the children to several unfamiliar surroundings. She resided in at least three different residences during the parties' separation, usually with different roommates. She also took the children to a boyfriend's trailer for overnight stays. At the time of dissolution she had not obtained adequate housing for her and the children. Cherie also left the children with other caretakers during her periods of visitation in order to go out with friends.

We determine the long-term best interests of the children require an award of primary physical care to Tracy. We modify the district court's award of custody and change primary physical care to Tracy.

II. Family Home. Due to our modification of the custody award, we also modify the trial court's award of the family home. Tracy shall have the exclusive right to occupy the home until ninety days after the younger child graduates from high school. In reaching this decision we have considered:

> The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of the children, or if the parties have joint legal custody, to the party having physical care of the children.

Iowa Code § 598.21(1)(g) (1991).

The other restrictions placed upon the home by the trial court shall simply be switched so to reflect Tracy as the party residing in the home, the custodial parent. The parties shall remain tenants in common with regard to the home. If upon graduation of the younger child from high school, or earlier if Tracy changes the children's residence, the house shall be sold. The net equity shall then be divided one-half to each party. While Tracy resides in the home he shall be responsible for the monthly payment of principal, interest, taxes, and insurance. Any repairs to the heating and cooling system and the structure of the home shall be borne one-half by each party. The furniture and appliances owned by the parties before the separation and in the residence at the time of trial shall be left in the residence for the benefit of the children.

We modify the district court's decision regarding the award of the family home.

III. Child Support. Based on the change of the custody award, we must determine Cherie's child support obligation to Tracy for the parties' two minor children. Cherie's net monthly income equals $1084.58, and Tracy's net monthly income totals $2617.78. We apply the guidelines and do not deviate from them. The Iowa Supreme Court held the child support guidelines are to be strictly followed unless their application would lead to an unjust or inappropriate result. In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992) (citation omitted). We modify

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the support award to relieve Tracy of his child support obligation and order Cherie to pay child support of $75 per week.

IV. Visitation. The visitation schedule as set forth in the dissolution decree shall now be modified and awarded to Cherie in light of the change of the custody award.

V. Attorney Fees. Cherie requests attorney fees on appeal. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We deny Cherie's request. Each party shall be responsible for his or her own attorney fees on appeal.

Costs of this appeal are taxed to Cherie. We do not retain jurisdiction.

AFFIRMED AS MODIFIED.