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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARCIA L. BOELLING AND JAMES E. BOELLING

Upon the Petition of	)	35
MARCIA L. BOELLING,	)	Filed November 26, 1986
Petitioner-Appellee,	)	
And Concerning	)	
JAMES E. BOELLING,	)	6-338 85-1896
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 48-28311) - Theodore H. Miller, Judge.

Respondent husband appeals the judgment and decree dissolving the parties' marriage, asserting that the trial court erred in awarding physical care of the parties' two minor children to petitioner wife; in refusing to award respondent interest on his portion of the parties' homestead equity, received by him as a part of the property division; in requiring respondent to pay child support of $350 per child per month; and in ordering respondent to pay $3,000 toward petitioner's attorney fees. Petitioner requests that the respondent be ordered to pay an additional $1,500 for her attorney fees on appeal. **AFFIRMED AS MODIFIED.**

Philip F. Miller and Timothy McCarthy II of Rogers, Miller, Reavely & Schuster, Des Moines, for appellant.

Gary D. Ordway of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Orday, Des Moines, for appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

The parties to this appeal, Marcia and James Boelling, were granted a dissolution of their marriage by the District Court for Polk County on December 2, 1985. The district court, in the dissolution decree, granted the parties joint legal custody of their children, Joel and Erin, with Marcia having primary physical custody of both. At the time the dissolution decree was entered, these children were eight and seven years old, respectively. The district court also divided the parties' property and imposed certain financial obligations on James. Following an unsuccessful motion for a new trial James brought this appeal, challenging the district court's award of physical custody, denial of interest on his homestead equity, and imposition of certain child support and attorney's fees obligations. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's findings of fact, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

We begin our analysis of the custody issue with the recitation of what is certainly one of the most firmly-established propositions in the jurisprudence of our state: In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15); In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). The general principles applicable to the custody issue are summarized in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), and In re Marriage of Bowen, 219 N.W.2d 638, 687-88 (1974), and need not be set out at length here. In addition to the cases, we find guidance in the statutes. Iowa Code Chapter 598 (1985).

James contends that the district court, in making the determination of physical custody, relied upon an inference that the best interests of younger children are served by placing them in their mother's custody. As this inference was discarded by our state's highest court in In re Marriage of Bowen, 219 N.W.2d

683 (Iowa 1974), James argues the district court's custody determination was based upon an erroneous application of the law. James also applies the flip side of this argument in contending that the district court found his role as a father working outside of the home to be a negative factor in the custody determination. As such, James maintains the district court violated his right to due process of law as secured by the Iowa and federal constitutions and his right to equal protection of the laws guaranteed by the federal constitution.

We disagree with James's contention that the district court relied upon the inference favoring maternal custody which this state left behind in Bowen. Although James argues the district court found the parties equally willing and capable of parenting the children and merely used Marcia's status as mother to break a deadlock on the issue of physical custody, a careful reading of the district court's findings, conclusions, and decree along with the remaining portions of the record proves otherwise.

At the crux of the district court's reasoning in support of the physical custody award lies Marcia's "demonstrated superior ability to tend to the children's physical and emotional needs and her proven role in child parenting . . . ." This superiority is bottomed not only on Marcia's role over the last eight years as a "traditional" mother, but also on the "little, if any, time" the district court found James to have spent with his family. We fully appreciate the fact that part of this time away from his family was spent at either his full-time employment as a project supervisor for Wood Magazine or his part-time employment as a teacher. We recognize his efforts as a provider for his family and in no sense denigrate this role. The courts of this state are bound, however, by certain criteria established and sanctioned by years of experience in child custody cases. Among those criteria are the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the children.

Winter, 223 N.W.2d at 166. While we agree with the district court that James and Marcia are "in equipoise as it relates to their good intentions for their children's physical care and needs," we also think, as did the district court, that Marcia's proven capacity to provide for the spectrum of needs delineated above mandates an award of physical custody to her. This decision is based, as was the district court's, on Marcia's abilities as a parent, not on her status as the children's mother. Contra Blundi v. Blundi, 55 N.W.2d 239, 245 (Iowa 1952). Our guide is the best interests of the children, Iowa R. App. P. 14(f)(15), which counsels that, in this case, we side with certainty as opposed to potential.

We recognize this case presents us with two capable parents. We compliment both on their sincere interest in providing the best for their children. Sadly it is the rare case where, as here, we have the opportunity to determine the most beneficial, as opposed to the least detrimental, custodial arrangement for the children. We believe the district court reached the proper arrangement and did so without reliance upon an inference in favor of maternal custody. Nor do we believe that James's role as a provider working outside the home was considered as a negative factor in the custody determination. Accordingly, we do not need to address his constitutional claims.

James's next contention is that the district court erred in failing to award him interest on the equity he received on the parties' homestead pursuant to the property division. The district court awarded the homestead to Marcia, subject to James's equity of $6,123.64 and decreed that the same will be sold when Erin reaches eighteen years of age and graduates from high school. At the time of sale, James's equity becomes due and payable. The district court then stated that James's equity is not to draw interest.

Iowa Code section 535.3 (1985) provides that

> [i]nterest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

James argues that the district court's disallowance of interest on his equity in the homestead violates our supreme court's holding in Sheer Construction Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328 (Iowa 1982), which interpreted section 535.3 as stripping the district court of any discretion to withhold interest on judgment. Id. at 334. We disagree. Section 535.3 clearly relates only to money due on judgments and decrees. This is consistent with the general rule that interest runs from the time money becomes due and payable. Lemrick v. Grinnell Mutual Reinsurance Company, 263 N.W.2d 714, 720 (Iowa 1978); 47 C.J.S. Interest & Usury § 46 (1982). James's equity share is not due him until Eric turns eighteen and graduates from high school. Assuming good health and educational progress, that will occur in 1996. We do not think, therefore, that the district court violated the mandate of section 535.3 as interpreted by Sheer Construction when it refused James's interest on his homestead equity.

James's fourth point of contention with the district court's decree is that his child support obligations are in excess of his ability to pay. We must consider the factors enumerated in Iowa Code section 598.21(4) (1985) to determine the propriety of an award of child support. Both parties have an obligation to support their children, but this obligation is not necessarily to be borne equally by them. It should be apportioned according to the fair ability of each to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa Ct. App. 1984).

James testified at trial that his monthly net income is approximately $2,146. Marcia's net monthly income is approximately $820. James's affidavit of financial status shows monthly expenditures of $1,135. Marcia's affidavit of financial status estimates the monthly expenditures for herself and the two children to be approximately $1,187. Under these circumstances, we find the district court's award to be excessive. We are confident, however, that an award of $275 per month per child will not be unduly burdensome to James. His liability for child support payments shall terminate in accordance with the child support provision in the district court's dissolution decree.

Finally, James argues the district court erred in awarding Marcia attorney's fees. The court, in the dissolution decree, ordered James to pay $3,000 toward Marcia's suit moneys and attorney's fees. Recognizing that the district court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution decrees, In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983), we think the allowance of attorney's fees here is reasonable and should not be disturbed. See In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984).

Marcia requests attorney's fees for this appeal. In evaluating such a request, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We conclude that Marcia is entitled to an award of $1,500 to apply toward her attorney's fees incurred upon this appeal. See Pittman, 346 N.W.2d at 37. Costs are assessed to James.

AFFIRMED AS MODIFIED.