

FILED

OCT 21 1980

72

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF BONNIE RAE MCCUSKEY & SCOTT CASEY MCCUSKEY

Upon the Petition of

)

BONNIE RAE MCCUSKEY,

)

Filed October 21, 1980

Appellee,

)

And Concerning

)

SCOTT CASEY MCCUSKEY,

)

0-185

3-64482

Appellant.

)

Appeal from Dubuque District Court - Karl Kenline, Judge.

Husband appeals various provisions of dissolution of marriage decree.

AFFIRMED AS MODIFIED.

Robert M. Bertsch, of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, for respondent-appellant.

Thomas W. McKay, of Reynolds, Kenline, Breitbach, McCarthy, Clemens, McKay & Naughton, Dubuque, for petitioner-appellee.

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

PER CURIAM

Respondent-husband appeals various provisions of the decree dissolving his marriage to petitioner-wife. He urges the trial court erred in giving custody of the two daughters to petitioner, awarding \$750 per child per month in child support; not granting more liberal visitation rights, awarding \$18,150 to petitioner in the form of a periodic property settlement, ordering respondent to pay petitioner's attorney fees and fees for the attorney representing the children and granting dependency tax exemptions for the two daughters to petitioner for the 1979 tax year. Our review is de novo. Iowa R. App.

P. 4. We modify and affirm.

I. The parties, Bonnie and Scott McCuskey, were married in October, 1975. This was the second marriage for both. Bonnie had one child, Megan, by her first marriage; Scott had none. This marriage produced two children - Molly, born in July, 1976, and Colleen, born in July, 1977. On September 27, 1978, Bonnie filed a petition seeking dissolution of the marriage and requesting custody of the two girls, child support, alimony and an equitable property division. A guardian ad litem was appointed to represent the interests of the children.

After a hearing in October, 1979, the trial court issued its findings of fact, conclusions of law and decree on December 14, 1979. Under the decree, Bonnie was awarded custody of Molly and Colleen with Scott getting "reasonable and liberal" visitation rights, including one period of at least two weeks each summer. Scott was ordered to pay child support in the amount of \$750 per month per child until the age of 18 or, if the child becomes a full-time student in a college or vocational school, until the age of 22 or upon the completion of such college or school, whichever comes first. Bonnie was awarded the dependency tax exemptions for the children under section 152 of the Internal Revenue Code (26 U.S.C. § 152) for the 1979 tax year; Scott gets the exemptions for 1980 and succeeding years. Bonnie was to quitclaim her interest in the Dubuque marital residence; in addition, Scott was awarded all the personal property located in the house. Scott was held solely responsible for the mortgages on the house in the sum of \$130,000.

Bonnie was awarded various bank accounts in her name in Michigan where she currently resides with her children and an attorney whom she plans to marry. Scott was awarded other accounts in Dubuque as well as his interest in a trust established by his

father. He was also awarded two of the three family automobiles, his two motorcycles and other personal property held in his name. The sum of \$18,150 was awarded to Bonnie in the form of a periodic property settlement, \$150 payable monthly for 121 months. Scott was ordered to pay \$5000 of Bonnie's attorney fees in addition to court costs which included \$1209.60 for fees for the attorney representing the children. The decree contained other provisions not at issue here. Scott filed a timely appeal.

II. The primary issue here and the one giving the most difficulty is custody of Molly and Colleen, the parties' daughters. Scott contends the trial court erred in granting custody to Bonnie instead of him. Although the question is close, we affirm the trial court's decision.

The governing principles in disputes over child custody are set out in In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974):

Our review is de novo. Although we are not bound by trial court findings we give them weight. The status of children should be quickly fixed and, thereafter, little disturbed. Siblings should not usually be separated. No hard and fast rule governs which parent should have custody. It is not a matter of reward or punishment. The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range interests of the children. (citations omitted).

The relevant factors to consider are familiar and need not be repeated here. See Bowen, 219 N.W.2d at 688; In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Our primary concern here is the best interests of Molly and Colleen. Iowa R. App. P. 14(f)(15).

With these rules in mind, we must review the testimony. Bonnie testified at length regarding Scott's lack of concern for her and the children. She said he refused to help take care of Molly when she was born and did not help take care of the children after they had moved to Dubuque in 1978. While pregnant with Colleen, Bonnie became very upset when Scott told her that he did not want another child and suggested she get an abortion. After Colleen's birth, Scott demanded she undergo a tubal ligation to prevent further pregnancies. Bonnie did so with reluctance as she was looking forward to having more children in the future.

Bonnie had one child by her first marriage, Megan, and has custody of her. Bonnie

testified Molly and Colleen have a very good relationship with Megan; it would be very difficult on all of them if Scott was awarded custody of Molly and Colleen while Megan stayed with Bonnie. (Scott admitted as much in his own testimony.) Bonnie also described her current living situation. She is living with Jim Bergesen, a Michigan attorney, who is in the process of dissolving his own marriage, after which they plan to be married. Jim has three children from the prior marriage who visit him and Bonnie and her three children regularly. Bonnie said when the six children are together, they get along very well. She also said their daily routine has been going smoothly. In summary, they appear to be enjoying a good family life together.

Bonnie also testified concerning Scott's psychological problems. There appeared to be a time in the marriage when Scott was having difficulty obtaining a job. This difficulty produced anxiety and stress; Scott told Bonnie he was afraid of not being successful and he was beginning to have nightmares. After he accepted a job offer in Dubuque he became very arrogant. When he moved to the new home there (Bonnie and the children had already moved in), he told Bonnie to get out of the master bedroom so he could have it for himself. She then slept on the living room floor. On one occasion he told her that she was the problem, that she was too demanding, and called her bad names. Bonnie was upset by this and threw a shoe at him. Scott responded by pinning her against the floor. It was at this time Bonnie decided to leave him - she feared for her physical safety and that of the children.

Predictably, Scott's testimony contradicts Bonnie in almost all respects. His main point was that he loves his daughters very much and has taken a large role in helping to raise them and care for them, both before and after the move to Dubuque. He also produced witnesses (including a neighbor and a former babysitter) who testified to his exemplary qualities as a father. He said he had no overwhelming anxiety about finding a job. He gave his own version of the physical incident described above in which Bonnie was the alleged instigator. He admits discussing the possibility of abortion with Bonnie but does not recall who started it. He disclaimed any knowledge of Bonnie's qualms regarding her tubal ligation.

Scott went on to describe how, in his opinion, Bonnie was an unfit parent. She was very interested in having a profession; she obtained training as a nurse anaesthetist.

She began to be very demanding of Scott. His psychologist testified that Bonnie appeared to have a character disorder which manifested itself when things would go wrong. He also said her leaving for Michigan without telling Scott shows impulsiveness and lack of control on her part. He admitted, however, that his opinions were based solely on conversations with Scott; he never talked directly with Bonnie.

While the question is difficult, we conclude the trial court was correct in awarding custody of Molly and Colleen to Bonnie. First, although our review is de novo, trial court has considerable discretion in deciding custody issues and its decision should not be reversed unless that discretion is abused. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). Second, we consider the report of the attorney representing the children although we are not required to accept his recommendations. In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). See section 598.12, The Code 1979. The report recommended custody be given to Bonnie, "given the young ages of the children, the fact the children are and have been settled in Birmingham, Michigan, and that they are without question presently well-cared for and happy." Finally, we take special notice of the uncontradicted testimony that giving custody of Molly and Colleen to Scott, thereby separating them from Megan, their half-sister, would be very hard on them.

As was the trial court, we are concerned about the present extra-marital living arrangement between Bonnie and Jim Bergesen. However, this alone is insufficient to deny custody to Bonnie. Dawson, 214 N.W.2d at 132. In addition, we concur with the trial court in finding this living arrangement "does not impact negatively on the fitness of Mrs. McCuskey to have custody of the children, nor on Mr. Bergesen's fitness as a potential stepparent," especially since they intend to marry as soon as their respective divorces are finalized.

We affirm the custody portion of the decree.

III. Scott contends the child support award of \$750 per month per child is erroneous and excessive. It is first necessary to examine the financial positions of Scott and Bonnie. Scott is a board-certified orthopedic surgeon in Dubuque grossing about \$90,000 in wages and bonus annually. He also receives an annual payment of \$1000-1400 from a trust established by his father. Bonnie works as a nurse-anesthetist in a Michigan hospital three days a week and grosses about \$13,000 per year. Jim Bergesen,

who Bonnie is now living with and plans to marry, is an attorney whose gross annual salary exceeds \$42,000. Together they own a 1979 car against which there is a note for over \$10,000. Their house in Michigan is encumbered in the amount of \$97,800. The house in Dubuque was awarded to Scott who is to assume sole liability for the unpaid balance on two mortgages in the amount of nearly \$129,000. Both parties have other comparatively small debts.

Relevant factors in determining the proper level of child support to be awarded are found in In re Marriage of Zoelner, 219 N.W.2d 517, 525 (Iowa 1974). Trial court awarded \$750 per month per child in support, or a total of \$1500 per month. The consideration of Jim Bergeson's income is limited to the comparison of living scales by virtue of the children's being in his house and while living in their parents' house. Here, there appears to be no significant difference. See Mears v. Mears, 213 N.W.2d 511, 518 (Iowa 1973). Nevertheless, we agree with Scott that the child support award is excessive and reduce the support award to \$500 per child per month. While Scott's income is substantial, he also has substantial expenses. The record indicates he has a gross monthly income of \$6300 and total monthly expenses of nearly \$4700 exclusive of child support.

Scott also complains about that part of the award which requires him to pay child support until each child reaches age twenty-two if the child becomes enrolled as a full-time student in a college or vocational school. He argues that part of the award is premature and that if the children decide to pursue post-secondary education, Bonnie should wait until then and petition for modification and extension of the support decree at that time. This argument is answered by In re Marriage of Urban, 293 N.W.2d 198, 202-03 (Iowa 1980). There the court interpreted section 598.1(2), The Code, which reads in part as follows:

[Support] obligations may include support for a child who is between the ages of eighteen and twenty-two years who is ...regularly attending a course of vocational training ... or is, in good faith, a full-time student in a college, university or area school....

The Urban court said this statute is not limited in application to situations where the children are already in or about to begin post-secondary education. 293 N.W.2d at 203. In addition, the decree explicitly states support is to continue past age eighteen only if

a child enrolls as a full-time student. Scott appears to be willing to pay support during such a period; it is difficult to understand his complaint.

Except for reducing the child support award from \$750 to \$500 per child per month, we affirm the support provisions in all respects.

IV. Scott's next claim relates to the portion of the decree relating to visitation. Trial court granted him "reasonable and liberal" visitation rights with at least two weeks in the summer at his home in Dubuque. Scott claims this is grossly inadequate. While the decree seems to allow Scott adequate assurance of reasonable visitation, the record indicates Bonnie refused to obey a 1979 order granting Scott temporary custody for a portion of the summer of 1979. While Bonnie explained her refusal, we are troubled by her apparent willingness to disregard court orders. To ensure that Scott has at least minimum adequate visitation, we expand that portion of the decree to allow him at least one monthly visit at the community of the children's residence for a period of at least three days. In addition, Scott is allowed to have the children with him for a ten-day period over the Christmas holiday every other year beginning 1980. He may have the children during the Thanksgiving holiday on the alternate years (when he does not have them for Christmas) with appropriate time to travel to and from Bonnie's Michigan residence. Finally, Scott's summer visitation period is extended to three weeks instead of two as decreed by the trial court. Scott's professed love and care for Molly and Colleen finds ample support in the record; we therefore encourage the parties to make every effort to reach agreement so that Scott may enjoy a frequent and continuous relationship with his children.

V. Scott's next complaint concerns the property settlement. Since the great majority of the material property was awarded to Scott, trial court attempted to strike a balance by ordering him to pay \$18,150 to Bonnie in the form of periodic property settlement payments of \$150 per month for 121 months. We affirm the settlement.

The familiar factors from Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) used in determining the division of property are summarized in Vrban, 293 N.W.2d at 204. In this case it is particularly instructive to look at the contributions of the parties to the marriage. When first married, Bonnie was earning a higher income than Scott who at the time was in his last year of residency as an orthopedic surgeon. Bonnie

worked as a nurse-anesthetist for a substantial amount of time during the marriage, largely at Scott's request in order to meet their expenses. She testified she did the housework and yardwork herself, even when pregnant, although Scott disagreed with that testimony to some extent. She also accompanied him on nearly every job-hunting trip and made all the arrangements for purchasing the house in Dubuque.

In view of Bonnie's significant contributions to the marriage, the fact that most of the material property was awarded to Scott and the other relevant factors of Schantz and Urban, we see no reason to change the periodic property settlement portion of the decree. We therefore affirm.

VI. The trial court directed Scott to pay \$5000 of Bonnie's attorney fees and court costs which includes \$1209.60 as fees for the attorney appointed to represent the children's interests pursuant to section 598.12, The Code.

Attorney fees are not recoverable as of right in a dissolution proceeding; rather, such an award depends on the financial circumstances of each party. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). Bonnie's request for \$3000 in appellate attorney fees is governed by the same principles. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). We see no reason to disturb the \$5000 award for Bonnie's fees incurred at trial and therefore affirm that portion of the judgment. As for her fees incurred on this appeal, however, we do not think it fair to impose the entire cost of this litigation and appeal on Scott when Bonnie and Mr. Bergeson have a more than adequate joint income. We therefore hold each party responsible for his or her own fees incurred on this appeal.

Trial court taxed court costs to Scott. These costs included \$1209.60 in fees for the attorney representing the children. Scott urges error in assessing those fees against him. We disagree.

Section 598.12, The Code provides in part as follows:

The court shall enter an order in favor of such attorney for fees and disbursements, which amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent in which event the fees shall be borne by the county.

Since costs were assessed against Scott, trial court properly assessed the guardian ad litem fees against him as well and we affirm that decision.

VII. Finally, Scott claims trial court erred in awarding Bonnie the dependency

exemptions for Molly and Colleen for 1979 federal and state income tax purposes. Scott gets the exemptions for 1980 and thereafter; thus, we are concerned here only with the 1979 tax year. He claims he meets the special rule relating to exemptions for children of divorced or separated parents in section 152(e)(2)(B), Internal Revenue Code 1954 as amended (26 U.S.C. § 152(e)(2)(B)) and is therefore entitled to claim Molly and Colleen as exemptions for 1979. However, the special rule in section 152(e)(2)(B) is inapplicable for the 1979 tax year. During the time Scott was making the temporary support payments to Bonnie (November, 1978 to June, 1979), the parties were not yet divorced or legally separated under a decree of divorce or separate maintenance or under a written separation agreement. The special rule in section 152(e)(2)(B) applies only when the parties are divorced or legally separated; therefore, trial court properly refused to grant Scott the exemptions for the 1979 tax year.

AFFIRMED AS MODIFIED.

All judges concur, except Oxberger, C.J., who dissents.

OXBERGER, C. J. (dissenting)

I would affirm the trial court decision in its entirety. Its ruling is within the realm of reasonableness.