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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MELODY ANN BANKS
AND DOUGLAS VERL BANKS

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Upon the Petition of)
MELODY ANN BANKS,)
Petitioner-Appellant,)
And Concerning)
DOUGLAS VERL BANKS,)
Respondent-Appellee.)

Filed November 26, 1986

6-278
86-88

Appeal from the Iowa District Court for Polk County (No. CD 29181) - Gene L. Needles, Judge.

Petitioner wife appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Thomas A. DeSio of Nick Critelli & Associates, Des Moines; Roger J. Kuhle of Mumford, Schrage, Zurek & Kuhle of Des Moines; and Lee Gaudineer of Austin & Gaudineer of Des Moines for appellant.

Richard D. Hermann of Dick Hermann Law Office of Ankeny and Ray Sullins of Riemenschneider, Rydell & Smalley for appellee.

Considered by Oxberger, C.J., Snell and Sackett, JJ.

OXBERGER, C.J.

In this appeal, petitioner Melody Ann Banks challenges several provisions of the trial court's decree in the underlying dissolution proceeding. She asserts that the trial court erred: (1) in granting respondent Douglas Banks physical care in the joint custody arrangement concerning the parties' three-year-old daughter, Whitney; (2) in dividing the parties' marital assets in an allegedly inequitable manner; and (3) in failing to direct the respondent to pay a greater portion of her attorney's fees and all of the court costs. We modify as to physical custody, and affirm the economic aspects of the decree as modified.

I. STANDARD OF REVIEW

Our standard of review in this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of fact made by the trial court, we give them weight, particularly where they involve a determination of the credibility of witnesses. Iowa R. App. P. 14(f)(7).

II. PHYSICAL CUSTODY OF WHITNEY

In child custody cases, the primary and governing consideration is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). The factors upon which this determination is predicated are enumerated in Section 598.41(3) of the Iowa Code and in In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). The pivotal issue in ascertaining the child's best interest involves a determination of which parent is capable of administering more effectively to the long-range best interests of the child. In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982).

We agree with the trial court's finding that both Melody and Doug possess the necessary parenting skills to provide Whitney with an effective and loving environment.

Although we pay deference to the superior position of the trial court in assessing the credibility and demeanor of the parties, we are nevertheless convinced that Whitney's best interests will be better served if Melody is named physical custodian. We are cognizant of the fact that Melody's alleged acts of misconduct with her male friend are factors properly considered as bearing upon her suitability as a parent. See Iowa Code § 598.41(3)(a); In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974).

We note with significance that Whitney has resided with Melody and Marshall since April of 1985, the date of the parties' separation, by agreement of the parties. During this time she has continued to flourish and is described as a bright, intelligent, and well-adjusted child. In addition to her effective development in her current environment, Whitney has formed close alliances with both her brother Marshall and her maternal grandparents. If Doug is named physical custodian, Whitney will reside with him in Michigan; she will be uprooted and placed in an entirely new and unfamiliar environment. Although a child's temporary custody placement does not create a presumption in favor of the custodial parent, Iowa Code section 598.41(3)(d) provides that the active care contributed by each parent both before and during the separation is a relevant consideration. In these circumstances, we find the potential disruptive effect of removing Whitney an extremely important factor. Iowa Code § 598.41(3)(h) (1985)(geographic proximity of parents is a statutory consideration).

Moreover, we think that the relationship between Whitney and Marshall is a highly significant factor. The courts of this state have continually recognized the importance of preventing the separation of children whose parents have divorced. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986); see also In re Marriage of Ellerbrook, 377 N.W.2d 575, 260 (Iowa Ct. App. 1985); In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981); In re Marriage of Wahl,

246 N.W.2d 268, 270 (Iowa 1976). This policy is premised upon the notion that "split custody deprives the children of the constant association with each other which, as innocent victims of marital bankruptcy, they should not be subjected to." In re Marriage of Wahl, 246 N.W.2d at 270. Moreover, in In re Marriage of Orte, the supreme court stated that: "In order for a court to depart from this general rule, it must appear that separation 'may better promote the long-range interests of the children.'" 389 N.W.2d at 374 (quoting In re Marriage of Jones, 309 N.W.2d at 461).

III. DIVISION OF PROPERTY

We next address Melody's contention that the property division made by the court was inequitable. The principles governing the division of a marital couple's assets are familiar and well established. The factors we consider in determining whether the district court's division was equitable are set forth in Iowa Code section 598.21(1). Our critical inquiry implicates a determination of whether the division was equitable in the peculiar circumstances of the case. In re Marriage of Wallace, 315 N.W.2d 827, 830 (Iowa Ct. App. 1980).

We agree with the trial court's conclusion that Doug should be compensated for his contribution to Melody's acquisition of the trailer; marital assets were expended both on the trailer and on the deck and shed which were added on. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982) (an important factor in dividing property accumulated during the marriage is whether its acquisition was the result of a joint effort). Accordingly, we affirm the trial court's award in this respect.

In addition, Melody asserts that the trial court erred in making her responsible for the parties' Visa, Mastercard, Penny's and Pidgeon's obligations, which totalled approximately $1,089. We have repeatedly recognized that the various divisions of property and awards attendant with a dissolution "can neither be

made nor evaluated in a vacuum," but rather must be viewed as an integrated whole. In re Marriage of Behn, 385 N.W.2d 540, 543 (Iowa 1986); In re Marriage of McFarland, 239 N.E.2d 175, 179 (Iowa 1976). In light of the fact that Melody was awarded all of the parties' furniture and household effects, we think that the court's allocation of the marital debts results in an equitable overall property division.

Finally, Melody contends that the trial court erroneously awarded Doug a $600 judgment for the amount which he contributed to Marshall's care during the marriage. We agree. In Simpkins v. Simpkins, 256 Iowa 989, 129 N.W.2d 723 (1964), the supreme court noted that a step-father stands in "loco parentis" to his wife's children from a prior marriage, "and owes a duty of support so long as they are in his home." 256 Iowa at 992, 129 N.W.2d at 725. This concept was further clarified in Mears v. Mears, 213 N.W.2d 511, 517:

> 'The term "in loco parentis," according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.' (quoting In re Marriage of Carney, 206 N.W.2d 107, 113 (Iowa 1973)).

In light of the foregoing, we think it clear that Doug was not entitled to recover for his contributions to Marshall's care, and modify the trial court's decree in this respect.

IV. ATTORNEY'S FEES

Melody's final assignment of error is that the trial court erroneously required both of the parties to pay their individual attorney's fees and one-half of the court costs. Trial courts are vested with considerable discretion in allowing attorney's fees in dissolution cases. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). Furthermore, the proper amount of attorney's fees awarded in such an action depends upon the relative financial circumstances

of the parties. In re Marriage of Orgren, 375 N.W.2d 710, 714 (Iowa Ct. App. 1985). We have carefully reviewed the relative finances of the parties, and find no reason to disturb the trial court's allocation of the fees and court obligations.

In addition, Melody has requested that Doug pay her attorney's fees and the court costs associated with this appeal. In evaluating such a request, we must consider the needs of the party seeking the payment of fees and the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We acknowledge that both parties will face difficulty in paying the attorney's fees. We think it most equitable if both parties pay their individual costs incurred in connection with this appeal, and split the court costs equally.

In summary, we hold that Melody should be named physical custodian of Whitney. In addition, we affirm the liberal visitation provisions pronounced by the trial court in its original decree. We have carefully considered the factors enumerated in Iowa Code section 598.21(4), and conclude that Doug should be required to pay Melody child support of $50 per week based on $1200 month gross income. We think that this amount fairly reflects the financial ability of each party to contribute to Whitney's care. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa Ct. App. 1984). Furthermore, the property division calculated by the trial court is affirmed as modified in Part III of this opinion.

AFFIRMED AS MODIFIED.