

IN THE COURT OF APPEALS OF IOWA

No. 1-129 / 90-1256

IN RE THE MARRIAGE OF DAVID Q. ADAMS AND BEVERLY I.

Upon the Petition of

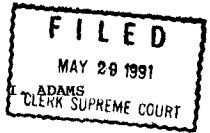
DAVID Q. ADAMS,

Appellant,

And Concerning

BEVERLY I. ADAMS,

Appellee.



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Appeal from the Iowa District Court for Boone County,
Timothy J. Finn, Judge.

Husband appeals a dissolution decree. **AFFIRMED AS
MODIFIED, AND REMANDED.**

Dorothy L. Dakin, Boone, for the appellant.

Jim P. Robbins, Boone, for the appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

David and Beverly Adams were married in 1983. They have one child, Danny, born in August 1984. Beverly has three sons from a previous marriage and David is the father of two children from a previous marriage. During the Adams' marriage, Beverly's three sons lived with the couple until 1985 when her oldest son moved out on his own. David's children lived with their mother.

At the time of trial, David was employed as a car salesman. In 1989 his net income was \$20,657, for an average of \$1,721 per month. For the first five months of 1990 his net income averaged \$1,512 per month. David testified that in the near future he hopes to quit his job and engage in full-time farming on land owned by his current girlfriend. David has farmed in the past, but he was forced to quit during the farm crisis of the early 1980s.

Beverly is a registered nurse. In 1989 her net income averaged \$1,166 per month.

The July 27, 1990, dissolution decree placed Danny in the parties' joint legal custody and in Beverly's primary physical care. The district court noted Beverly has been Danny's primary caretaker and has raised him well. The court also noted David has a violent temper, has physically abused his stepchildren, has a poor relationship with his older son, and absented himself from the marital home for extended periods due to marital strife with Beverly.

The district court directed David to pay Beverly child support of \$290 per month while noting that the new child support guidelines to be issued in December 1990 might call for an adjustment in the award. The trial court also attempted to divide the parties' property in an essentially equal fashion. In fashioning an equal division of the parties' property, the court entered judgment against David in favor of Beverly in the sum of \$2,720.16. The court directed David to contribute \$1,500 toward Beverly's trial attorney fees.

David has appealed the dissolution decree.

David contends Danny should be placed in his primary physical care. In the alternative, he contends his child support obligation is excessive. David also challenges the awards of property and trial attorney fees to Beverly.

Beverly, who has not filed a notice of cross-appeal, asks that her child support award be adjusted upward to \$379 per month; she asserts this is the appropriate figure under the new child support guidelines adopted in December 1990. Otherwise, Beverly asks the decree be affirmed and requests attorney's fees of \$1,500 on appeal.

SCOPE OF REVIEW. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the

fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

CHILD CUSTODY. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrbanc, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

David argues that Beverly will not promote a relationship between himself and Danny and would attempt to sabotage any such relationship. He also claims Beverly failed to properly parent her older sons. David portrays Beverly's older sons as lazy, destructive, poor students, engaged in criminal activity, and generally incorrigible, and states he fears they will be a bad influence on Danny.

David also claims Beverly is an alcoholic but presents no corroborating evidence for this claim other than the testimony of a psychiatrist employed by him, who had never met Beverly nor examined her.

The trial court heard Beverly's sons testify and found that although at least one of the boys has behavioral problems there was no evidence the boys were the incorrigible individuals portrayed by David. Additionally, the trial court noted the boys lived in David's home for several years so any problems they may have should not be placed solely at Beverly's feet. More significantly, the trial court found ample testimony supporting the fact David had verbally and physically abused Beverly's sons and his own older son as well as losing his temper with Danny and kicking him.

Based on our review of the record, we agree with the trial court that it is not in Danny's best interest to be placed in David's physical custody. At the time of trial, Danny appeared to be a happy healthy child and was thriving in Beverly's care, therefore, we affirm the decree's placement of Danny in Beverly's physical care.

CHILD SUPPORT. The dissolution decree ordered David to pay \$290 per month in support of Danny. The trial court found David's gross pay in 1989 from his commission-based salary as a car salesman was \$27,116. After deducting the federal withholding tax, state withholding tax, and social

David complains that the trial court erred by failing to deduct his expenses for providing insurance for himself and Danny. He also complains that the trial court erred by basing his support obligation on an assumption that he will have a net monthly income of at least \$1,721. David asserts that due to changes made in computing commissions at the car dealership he can no longer make as much money as a salesman as he did in 1989. Beverly asserts that based on the child support guidelines effective December 31, 1990, David should pay \$379 per month in support of Danny.

The record is inadequate for us to apply the child support guidelines which were in effect at the time of trial to ascertain the appropriate amount of support David should pay on the record before us. This is partly due to the unpredictability of David's actual income at the time of trial coupled with a lack of findings regarding whether the support guidelines are applicable to the circumstances of this case. Additionally, we note the guidelines require a medical support order, which was not present in the decree. See In re Marriage of Bergfeld, 465 N.W.2d 865, 871 (Iowa 1991). Therefore, we remand this case to the trial court to enter an appropriate order following the procedure mandated by the child support guidelines effective December 31, 1990. Pending the hearing on remand, we order child support to be paid as fixed by the dissolution decree. We do not retain jurisdiction.

PROPERTY DIVISION. The partners in a marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). David argues the trial court failed to equitably divide the parties' debts and assets in multiple ways. He claims the trial court failed to consider the property brought to the marriage by the parties, failed to properly value assets of the parties and failed to equitably distribute the parties' debts, among other complaints.

We note that although David makes much of the fact he brought considerably more assets into the marriage than Beverly did, the record clearly shows that both parties lost all of their assets during the farm crisis. Because both parties' assets were lost during the marriage, we do not find who lost the most a significant factor in fashioning an equitable division of the assets accumulated following the parties' financial disaster.

The trial court valued the IPERS account accumulated by Beverly during the marriage at \$1,979.68. Beverly concedes that this amount equals her contribution to the account only and with the earned interest included in the value the IPERS account was actually worth approximately \$2,400 at the time of trial. Accordingly, we modify the judgment entered against David in favor of Beverly to be \$2,510.00 to correct for the undervaluation of the IPERS account in the decree.

only and with the earned interest included in the value the IPERS account was actually worth approximately \$2,400 at the time of trial. Accordingly, we modify the judgment entered against David in favor of Beverly to be \$2,510.00 to correct for the undervaluation of the IPERS account in the decree.

David complains about other aspects of the property division. Upon our de novo review we find the property division as modified equitable and decline to further disturb the decree.

ATTORNEY FEES. David asserts the trial court abused its discretion by awarding Beverly attorney fees and that he should not be responsible for any of Beverly's attorney fees related to this appeal.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

The trial court did not abuse its discretion by awarding Beverly attorney fees. Upon our review of the record, we agree with the trial court that Beverly incurred

a considerable amount of attorney fees as a result of David's litigious posture throughout the proceedings.

An award of attorney fees is not a matter of right, but rests within our discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 App. 1981). In accordance with these considerations, we order David to pay Beverly \$750 towards her appellate attorney fees.

CONCLUSION. We affirm the parties' dissolution decree with respect to child custody. We remand this case to the trial court for further proceedings on the issue of child support without retaining jurisdiction over the matter. We modify the property division to correct for the undervaluation of Beverly's IPERS account and otherwise affirm the property division ordered in the decree. Lastly, we affirm Beverly's award of trial attorney fees and order David to pay Beverly \$750 towards her appellate attorney fees.

AFFIRMED AS MODIFIED, AND REMANDED.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court. There is no need to remand. I would modify to include a provision for medical support.