

FILED

JAN 24 1984

CLERK SUPREME COURT

MARJO MEYERS

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RAYMOND J. MEYERS AND MARJO MEYERS

Upon the Petition of)

93

RAYMOND J. MEYERS,)

Filed January 24, 1984

Petitioner-Appellee,)

And Concerning)

3-422
83-334

MARJO MEYERS,)

Respondent-Appellant.)

Appeal from the Iowa District Court for Carroll County - Paul E. Hellwege,
Judge.

Wife appeals from the decree dissolving the parties' marriage. **AFFIRMED.**

Gregory J. Siemann, Green & Siemann, Carroll, Iowa for petitioner-appellee.

Kenneth D. Benhart, Flagg, Hockett, Benhart & Golden, Des Moines, Iowa,
for petitioner-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Marijo Meyers, respondent, appeals from the decree dissolving the parties' marriage. She asserts: (1) that the trial court should have awarded her custody of the parties' two children and directed petitioner to pay child support; (2) that the trial court's property division was inequitable; (3) that the alimony award was inadequate in both amount and duration; and (4) that the trial court should have awarded her attorney fees. Marijo also requests attorney fees on appeal.

Raymond and Marijo Meyers were married in 1971. They subsequently established a residence on a farm in Carroll County. Two children were born of the marriage; Melissa in 1976, and Michael in 1978.

Raymond was a self-employed farmer throughout the marriage and at the time of trial. Farming has not been kind to Raymond. He has had net operating losses in the five tax years preceding the dissolution.

In 1975 the parties purchased 89 acres of farm real estate on a very advantageous contract from Raymond's parents. At the time of the dissolution the parties' assets consisted of the contract equity, grain, live stock, machinery, a vehicle and household goods. The parties also had a substantial debt load.

Marijo was not employed outside the home during the marriage. Until the parties' separation she was a homemaker and assumed primary responsibility for the care for the parties' two children. The record indicates she was a conscientious mother, took good care of the children, and involved them in many beneficial activities. Marijo was not employed at time of trial.

On October 26, of 1981, Marijo left the marital home and moved with the children to her parents' home in Des Moines. On November 1 of that year Marijo entered the mental unit of Iowa Lutheran home in Des Moines. She was treated for bi-polar illness, which is a new term for a manic depressive illness. She was an inpatient until January 22, 1982. Her release was contingent on follow-up on an outpatient basis, continuation of medication, and remaining in a supportive and caring environment.

At the time of trial, Marijo was still on medication. Her physician testified that she was capable of living alone and assuming custody of the children. He did indicate, however, that she would experience some stress during a period of readjustment and recommended that she continue to receive treatment on an out-patient basis. The doctor further indicated that he had some concern that the illness could manifest itself again and that there was a possibility of her being hospitalized again.

Raymond obtained temporary custody of the children in November of 1981. The children remained in Raymond's custody until the time of trial. Marijo was granted visitation. From November of 1981 until June of 1982, Raymond and the children lived with his parents. His 62-year-old mother, Irene, assumed primary responsibility for the children. Irene did an excellent job of caring for the children but did not feel she could offer the children long-term care. Raymond did not give the children the personal attention his family felt should be given them.

The case was scheduled for trial in June of 1982. Frank Comito had been appointed attorney for the children. Comito filed a report in June elaborating on the concerns of Raymond's family that Raymond had not assumed the care of the children and recommending that Marijo be awarded custody. The case was not heard until January of 1983. Apparently, Comito's report caused Raymond to do some soul-searching. He reevaluated his life and assumed additional care and responsibility for his children. He and the children moved back to the family home. He hired outside child care and began to exhibit an interest in the children and their activities. At the time of trial, Michael was attending preschool classes two afternoons a week. Michael's teacher was complimentary of Raymond's care of Michael. Melissa was enrolled in the first grade at St. Mary's Catholic School. Her teacher indicated that she was having no problems and that she was receiving parental assistance with her homework. Raymond was in frequent contact with

Melissa's teacher, and Melissa had a good relationship with her classmates. The record indicates that Raymond was doing an excellent job of parenting.

At the time of trial Comito hesitantly changed his recommendation with reference to custody. His concern regarding Marijo's medical prognosis, along with the fact that Raymond was then doing an excellent job of parenting, are the factors responsible for his change of position. The trial judge followed Comito's recommendation and awarded custody to Raymond, indicating in his decree that the primary reason he did so was because of Marijo's health problems.

The parties had stipulated to a division of their household goods which was affirmed. Raymond was ordered to pay Marijo \$6,552.90. He was further ordered to pay \$150.00 per month alimony from February 15, 1983 until February 15, 1985, when the alimony was to be reduced to \$50.00 per month to continue until the death of either party or until Marijo's remarriage. Raymond was also required to carry hospitalization insurance on Marijo as long as he was required to pay alimony. The trial court awarded real estate, livestock and machinery to Raymond subject to all liens and the payment by him of the parties' debts, including any balance owed to Marijo's doctors. Raymond was also ordered to pay Comito's fees of \$1,779.79. Each party was required to pay their own attorney fees.

I. Custody

Marijo contends that custody of the minor children should have been awarded to her. We disagree.

Our review is de novo. We are governed by the principles set forth in In re Marriage of Winter, 223 N.W. 2d 165, 166-67 (Iowa 1974). Marijo argues that she assumed primary care for the children during the period the parties lived together as husband and wife. The record supports her contention and also indicates that Raymond did not assume primary care for the children until after Comito's first report to the court.

I. Custody

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Despite the fact that Raymond exhibited earlier deficiencies in child care, we are impressed by the relationship he was established with the children in the past six months. He has the children in his own home. He has provided adequate child care. His parents are supportive, but he makes no demands on them; they offer assistance as they feel they can. The children's teachers verify that they have good parenting. Under Raymond's direction the children took summer swimming lessons. Melissa is taking piano lessons. The children have and enjoy a dog, cat and Shetland pony. Raymond has made home improvements to provide the children with a more comfortable environment.

In deciding a custody issue, we recognize that the most important consideration is not who was the better parent in the past, but who is better equipped to provide for the children now and in the future. As we said in In re Marriage of Bauder, 316 N.W. 2d 697, 700 (Iowa Ct. App. 1981), our most important objective is to place the child with the parent who will most effectively minister to the long-range best interests of the child. An award of custody is not a prize, nor is denial of custody to be viewed as punishment. Rather, the best interest of the child must be our first and governing consideration. We do not make a determination of custody to reward one of the parties or punish the other. In re Marriage of Bare, 203 N.W. 2d 551, 554 (Iowa 1973).

does create a stressful situation, particularly when the children have been living apart from her for an extended period of time.

We have also considered the fact that the children are extremely well cared for and well adjusted in their current environment. They like the farm and are well adjusted in their schools. They have good relationships with their peers and an excellent relationship with their paternal grandparents.

Both parties have established relationships with other persons. Raymond plans to be married. His fiancée, a graduate of Iowa State University, testified at trial. We are impressed with her background and her concern for the children. While we have refused to award custody based solely on the parenting skills of one's girlfriend, In re Marriage of Brogden, ____ N.W. 2d ____ (Iowa Ct. App. 1983)(filed November 30, 1983), we find nothing harmful to the children in the relationship which Raymond has established.

After considering all relevant factors, we affirm the trial court's award of custody of the parties' two children to Raymond.

II. Property Division

Marijo contends that the property division is not equitable. Our review is de novo. Iowa R. App. P. 4. We are governed by the criteria of Schantz v. Schantz, 163 N.W. 2d 398 (Iowa 1968), with the exception of the fault concept which has been abandoned. In re Marriage of Williams, 199 N.W. 2d 339, 344 (Iowa 1972).

Raymond's financial statement at the time of trial indicated a net worth of \$11,611.20. On May 11, 1982, Raymond had filed a financial statement for loan purposes indicating a net worth of \$28,868. The trial judge sought to make a division based on the May 11, 1982, financial statement with modifications for cash value of certain life insurance policies. The values of the farm assets were established by Raymond's appraisals. Marijo offered no evidence regarding valuation and filed no financial statements.

The trial judge arrived at a nearly equal division of the parties' assets based on the May 11th financial statement as adjusted. We find the award equitable and affirm the trial court's property award.

III. Alimony

Marijo contends that the alimony awarded to her was not equitable. When determining the appropriateness of alimony, the trial court must consider the earning capacity of each party and present standards of living and ability to pay balanced against the relative needs of the other. In re Marriage of Hitchcock, 309 N.W. 2d 432, 436-37 (Iowa 1981). We recognize that, in awarding alimony, precedent is of little value and each case must be decided on its own particular circumstances. In re Marriage of Fleener, 247 N.W. 2d 219, 220 (Iowa 1976). The trial court awarded Marijo alimony of \$150 per month for two years and then \$50 per month until the death of either party or Marijo's remarriage. Although Marijo is not employed, the evidence is that she is employable. While the net worth of the parties may have increased modestly during the marriage, the tax returns indicate that Raymond's farming operation had suffered a net operating loss in each of the five calendar years prior to the trial.

We have considered the alimony awarded together with the requirement that Raymond carry medical insurance and pay the premiums¹ during the period that he is responsible for alimony.²

Considering these factors, we affirm the alimony award made by the trial court.

¹ There is no evidence in the record of the cost to Raymond for such coverage. We assume that, at present rates the coverage will cost Raymond approximately \$70 per month.

² It is anticipated that the insurance premiums will increase annually.

IV. Attorney Fees

100

Finally, Marijo has requested attorney fees both in the trial court and on appeal. She has incurred substantial attorney fees. Her attorney fees and expenses for trial were \$8,916.07. Her attorney estimates that she will owe him an additional \$6,427.50 for this appeal.

Attorney fees are not allowed as a matter of right; any award must depend upon the financial circumstances and earnings of both parties. In re Marriage of Burham, 283 N.W. 2d 269, 278 (Iowa 1979). After considering the relative financial condition of the parties, we deny Marijo's request for attorney fees at trial and on appeal.

AFFIRMED.