

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF TONYA MALIA ADAMS AND RONALD DEAN ADAMS

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Upon the Petition of)

TONYA MALIA ADAMS,)

Filed September 21, 1982

Petitioner-Appellant,)

And Concerning)

RONALD DEAN ADAMS,)

2-136
3-66419

Respondent-Appellee.)

Appeal from Boone District Court - M. D. Seiser, Judge.

Petitioner-wife appeals from the decree dissolving the parties' marriage asserting (1) that the trial court should not have awarded custody of their son to respondent-husband; and (2) that respondent-husband should be directed to contribute to petitioner-wife's attorney fees and costs on appeal. AFFIRMED.

Lynn B. Clark of Coppola, Coppola & Clark, Des Moines, Iowa, for petitioner-appellant.

Jere C. Maddux of Hegland, Newbrough, Johnston, Brewer & Maddux, Ames, Iowa, for respondent-appellee.

Heard en banc.

Petitioner-wife, Tonya Malia Adams, appeals from the decree dissolving her marriage to respondent-husband, Ronald Dean Adams, asserting (1) that the trial court should not have awarded custody of the parties' minor child to respondent; and (2) that respondent should be directed to contribute to petitioner's attorney fees and costs on appeal. We affirm the trial court's decree.

The parties were married on April 25, 1976. One child, Nathan LaVern Adams, was born to this marriage on January 23, 1978. At the time of the marriage, respondent was age 39 and petitioner was age 20. This was petitioner's first marriage, respondent's second marriage.

When petitioner was eight months pregnant with Nathan, respondent's ex-wife committed suicide. His two sons, Jeff, age 16, and Rodney, age 13, came to live with petitioner and respondent the same day. The marriage rapidly deteriorated thereafter because petitioner and the boys could not successfully work out a parent-child relationship. In the next year and one-half, the parties separated at least seven times. Nathan remained with petitioner during these separations.

During the pendency of the dissolution action, the court ordered the family to go to Beloit of Iowa for interviews and evaluation so that Beloit could make a recommendation regarding the custody of Nathan. The report unequivocally recommended that custody be given to respondent and that petitioner be given liberal visitation rights. Shortly before trial, petitioner filed a request that the parties be evaluated at the Child Guidance Center in Des Moines. The court refused to continue the case but did order that the evaluation at the Child Guidance Center be arranged, so as not to delay trial. The Center's report also was equally positive in stating that the best interests of Nathan required his father have custody, subject to his mother's liberal visitation rights.

Following trial the court placed permanent custody of Nathan with respondent. Petitioner's appeal followed.

I. Scope of Review. Our review of dissolution proceedings is *de novo*. Iowa R. App. P. 4. We review the facts as well as the law and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to the trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Custody. Petitioner claims that trial court erred in placing permanent custody of Nathan, the minor child, with respondent. Petitioner argues that the court placed excessive emphasis on the recommendation made by the experts submitting reports on the parenting skills of the parties. We disagree.

The central question in the governing consideration of the courts in any proceeding which concerns the custody of minor children is what is in the "best interests of the children." See, e.g., Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). The numerous factors which the court must consider in deciding custody issues are set out in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

At the time of dissolution, Nathan was a fine, healthy young boy of two and one-half years of age. He was bright and alert by reports of all witnesses. Respondent appeared to be a healthy man of 43 years of age. He was secure in his home in the country and his employment at Firestone Tire and Rubber in Des Moines, where he had been employed for almost 25 years. All the witnesses at the trial spoke well of him. Testimony also indicated that petitioner was a nice young woman of good habits and good morals. No one spoke disparagingly of her or her parenting abilities. There was testimony, however, that she was "stubborn" and "bullheaded." At one point, she had not talked to her mother for a five year period, even though they lived close to each other geographically. This resulted in her mother's not attending petitioner's wedding or having anything to do with Nathan until he was almost two years old.

Both petitioner and respondent exhibit a love for their child and a capacity and desire to provide for his needs. Neither party attacks the ability of the other parent to provide for Nathan, but rather, simply states that it would be in Nathan's best interests if he or she individually had custody. Joint custody was discussed between the parties but was refused.

Testimony indicated that respondent's two older sons got along extremely well with Nathan and that there was a close, solid bond of a brotherly relationship. Both professional evaluations recommended Nathan's custody be with respondent.

The trial court observed in its conclusions of law, after making a factual finding that respondent was a fit and suitable person to have custody of Nathan, that placement of such custody with respondent was in Nathan's best interests. Under our review of the record, and considering all of the relevant factors, we reach the same conclusion. While we have considered the professional reports in making our *de novo* review in this matter, we find that even in their absence we would affirm the award of trial court, for where there are two competent, loving parents and where the operative facts under the Winter criteria are in equipoise, the scales are tipped in the respondent's favor by the rule that we give weight to the findings of trial court. See In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976).

III. Attorney for Child. Plaintiff claims the trial court erred in failing to appoint an attorney for the child in this case. The appointment of an attorney for the child is governed by Iowa Code § 598.12(1979) which provides: "The court may appoint an attorney to represent the interests of the minor child or children of the parties." This provision of the Code is "directory only and not mandatory." Bozer v. Bozer, 247 N.W.2d 265, 268 (Iowa 1977). In this case we find trial court acted well within its latitude of discretion in refusing to appoint an attorney to represent the child.

IV. Expenses on Appeal. Petitioner alleges that she is entitled to contribution from respondent towards her expenses, charges and attorney fees for this appeal. Petitioner, however, does not supply the court with an itemization of her attorney's fees. It is her duty to provide this information to the court. We will not award attorney's fees based merely upon conjecture.

The appendix in this case consists of 493 pages. Most of the transcript of testimony is unnecessary for the issues which were to be resolved on appeal. The cost certificate of appellant's attorney and the printer indicate the costs of printing this appendix is \$1,603.56. This would appear to be in violation of Iowa Rules of Appellate Procedure 15. From our review, we believe the parties must share the responsibility for the unnecessary expenditure of moneys and printer's fees for the preparation of the appendix. See, e.g., Boyes v. Boyes, 247 N.W.2d 265, 268 (Iowa 1976). Accordingly, we order appellee to contribute \$508.00 toward the cost of printing the appendix.

The decree of the trial court is affirmed.

AFFIRMED.