

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CAROL LYNNE PAYTON
AND PATRICK HOWARD PAYTON

FILED

DEC 18 1985

CLERK SUPREME COURT

UPON THE PETITION OF
CAROL LYNNE PAYTON,

233

Petitioner-Appellant/
Cross-Appellee,

Filed December 18, 1985

AND CONCERNING
PATRICK HOWARD PAYTON,

5-540
85-266

Respondent-Appellee/
Cross-Appellant.

Appeal from the Iowa District Court for Polk County - Van Wifvat, Judge.

Petitioner wife appeals and respondent husband cross-appeals from the
decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Barbara G. Barrett, of Dickinson, Throckmorton, Parker, Mannheimer
& Raife, Des Moines, for petitioner/appellant/cross-appellee.

Anna I. Shinkle, Des Moines, for respondent/appellee/cross-appellant.

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

PER CURIAM

Petitioner Carol Lynne Payton and respondent Patrick Howard Payton were married in 1967. They have five children: Anastasia, born in 1968; Kathryn, born in 1970; Stephanie, born in 1973; Felicia, born in 1976; and Tiffany, born in 1978. At the time of trial Carol was 38 years old and Patrick was 39 years old. During the first years of the marriage, Carol taught school; she has a Master's degree in education and a Cosmetologist license. Carol resumed teaching at St. Joseph's Elementary School after the parties separated in 1983. She presently grosses \$10,800 per year and nets approximately \$600 per month. Patrick is an attorney. His gross income for the past several years was between \$25,000 and \$30,000 annually.

Before trial, the parties signed a stipulation dividing their property and waiving alimony. Patrick received the majority of the parties' income-producing property, including real estate contracts and rental properties valued in excess of \$60,000. These properties should generate income of between \$4,000 and \$6,000 annually. Carol later requested alimony, because her attorney became aware of a hearing loss she suffered in one ear. The trial court allowed her petition to be amended to request alimony. However, the request was denied in the court's final order because the court found that Carol's hearing loss would not affect her ability to support herself.

The trial court found that a joint custodial arrangement would be unworkable and awarded Carol sole custody of the parties' children. It then stated:

The parties shall make every reasonable effort to consult with each other in regard to major decisions affecting the health (except in the event of a medical emergency), education and welfare of the minor children, shall share responsibilities and duties of parenting the children, and shall maintain an atmosphere of cooperation and understanding all to the end that the children will not be deprived of the care, guidance, love and affection of either parent.

The trial court allowed Patrick visitation of one evening a week, two weekends a month, two weeks in the summer, alternate holidays, Father's Day, his birthday, his parent's birthday, and half of each child's birthday. The trial court allowed Carol to have the children on Mother's Day and her birthday even if they fell on Patrick's visitation days. The trial court denied Carol's request that she have the children for two weeks in the summer without visitation by Patrick and for her parents' birthdays even if they fell on Patrick's visitation days. The trial court stated that during scheduled visitation for Patrick "there shall be no extra activities planned for any of the minor children herein." The trial court also stated that a hearing was to be held if Carol should decide to remove the children permanently from Iowa.

The trial court directed Patrick to pay child support of \$200 per child per month. The trial court denied Carol's request that Patrick be made responsible for half of the children's medical and dental expenses not covered by insurance. The court reasoned that Carol was not capable of discussing the expenses with Patrick before she incurred them, and also that a trust the parties had established for the children might cover expenses of serious injuries and illnesses.

The trial court denied Carol's request that Patrick be required to pay the children's Catholic school tuition; it stated that the request was unconstitutional under Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956), and that Patrick had voluntarily paid the tuition during the parties' separation.

The trial court also denied Carol's request that Patrick's name be removed from the children's certificates of deposit. These accounts have always been in the names of the respective child and Patrick and Carol and Patrick had been in possession of the CD documentation during the parties' two-year separation.

On appeal, Carol asserts that (1) the trial court should have awarded her alimony, (2) her child support award is inadequate, (3) the trial court should have made Patrick responsible for half of the children's medical and dental expenses not covered by insurance, (4) the trial court should have directed respondent husband to pay the children's Catholic school tuition, (5) the trial court should have removed respondent husband's name from the children's certificates of deposit, and (6) several of the trial court's custody and visitation provisions are unreasonable. On cross-appeal, Patrick asserts that his child support obligation is excessive.

Our review is de novo. Iowa R. App. P. 4 (1983). We are not bound by the findings of the trial court, but we give them weight. Iowa R. App. P. 14(f)(7).

Child Support. Carol contends that the trial court erred in ordering child support of only \$200 per child per month. Patrick cross-appeals claiming that the amount of his child support is excessive. We must consider the factors enumerated in Iowa Code section 598.21(4)(1985) to determine the propriety of an award of child support. Both parties have an obligation to support their children, but this obligation is not necessarily to be borne equally by them. It should be apportioned according to the fair ability of each to contribute. In re Marriage of Heineman, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981).

The disparity between the financial positions of Carol and Patrick indicates that Patrick should provide the greater portion of support necessary for the children. However, Carol's request of \$300 per child per month is not reasonable or necessary for the support of the children.

We are confident that the amount awarded by the trial court will not be unduly burdensome to Patrick. Support of \$200 per child per month shall be paid until each child graduates from high school or turns eighteen whichever

last occurs. Support shall also cease if the child marries, dies, or becomes self-supporting.

Tuition for St. Joseph's. Carol asserts that the trial court erred in refusing to order Patrick to pay tuition expenses to the parochial schools which their children attend. Parents are under no legal obligation to send their children to private rather than public schools. There is no reason to impose such an obligation merely because the parents are divorced. Of course, Patrick may voluntarily contribute extra funds to assist Carol in sending the children to Catholic schools. However, we will not impose a legal obligation upon Patrick to do so.

Medical Expenses. Carol also argues that the trial court erred in placing the burden on her to pay for all medical and dental expenses not covered by insurance.

Carol agreed to provide health insurance and dental insurance coverage through her school system for the children. However, the insurance will not cover every physical calamity that the children may encounter. Because both parents have a legal obligation to support their children, which naturally includes expenses for their physical well being, Carol and Patrick shall each pay one-half of the medical expenses not covered by insurance or trust monies available for such purposes.

Certificates of Deposit. Carol further requests that Patrick's name be removed from the children's certificates of deposit and her father's name added instead. She claims that her father was the prime contributor to those funds and, therefore, her father should have control of the accounts.

Each child of the parties' has a certificate of deposit in their name and/or the names of both parents. The accounts were established by Patrick and Carol's father to provide for the children's college education. Both men contributed

to these accounts and Patrick has always managed them. We agree with the trial court that Carol has presented no evidence to justify removing Patrick's name from the certificates of deposit.

Visitation. Carol next argues that the visitation award was unreasonable. She initially asserts that she is entitled to have the children for a two-week period during the summer and on her parents' birthdays even if they fall on dates which conflict with Patrick's scheduled visitation. Patrick concedes that Carol should have an uninterrupted two-week summer vacation with the children and have the children on her parents' birthdays.

Carol also objects to several paragraphs of the visitation award and requests their deletion from the decree. Patrick does not agree that the following provisions are unreasonable:

F. During any scheduled visitation for PATRICK HOWARD PAYTON, there shall be no extra activities planned for any of the minor children herein.

G. CAROL LYNNE PAYTON shall not be able to remove the minor children herein from the State of Iowa, permanently, without a hearing before the Court with notice given as prescribed by the Rules of Civil Procedure.

H. The parties shall make every reasonable effort to consult with each other in regard to major decisions affecting the health (except in the event of a medical emergency), education and welfare of the minor children, shall share responsibilities and duties of parenting the children and shall maintain an atmosphere of cooperation and understanding all to end that the children will not be deprived of the care, guidance, love and affection of either parent.

Carol contends that paragraph F is ambiguous because it is not clear whether Patrick or Carol or both are precluded from planning activities for the children during Patrick's visitation. Patrick argues that the clause is an attempt to protect his visitation rights and to allow a meaningful relationship to exist between the children and their noncustodial parent despite the children's

busy schedule. It is difficult for us to comprehend how Carol could coordinate gymnastics, dancing classes, and school activities around Patrick's extensive visitation without denying the children the opportunity to participate in extra-curricular activities. We find that it is not in the children's best interests to so restrict their participation in such activities. Patrick must bear some of the responsibility for the children's activities even if those activities do not allow the children's visitation time to be spent exclusively with him. Paragraph F shall be deleted from the dissolution decree.

Carol argues that paragraph G should be deleted because the Iowa Supreme Court affirmed the trial court's refusal to retain such jurisdiction in In re Marriage of Weidner, 338 N.W.2d 351, 361 (Iowa 1983). It is evident from the Iowa Supreme Court's discussion in Weidner that a trial court's determination to retain jurisdiction and require a hearing in case of removal of the children from the state is within the court's sound discretion. No abuse of such discretion has been pointed out to us nor do we find any in the record. Therefore, the trial court did not err in retaining jurisdiction.

Carol argues that paragraph H should be deleted from the decree because it allows Patrick to interfere with Carol's decisions as the sole custodian of the children. She asserts that the trial court's denial of joint custody prohibits granting Patrick such broad input into custodial decisions.

The trial court concluded in the decree that joint custody was not possible given the parents' antagonism toward each other and awarded sole custody to Carol. The court continued:

However, this Court believes that PATRICK HOWARD PAYTON should have an input into his children's upbringing. The Court is not unaware of the fact and the evidence seems to indicate that the children prefer the indulgence shown by CAROL LYNNE PAYTON rather than PATRICK HOWARD PAYTON'S parental discipline which school,

church, homework, and daily living is required and emphasized.

The Court finds that PATRICK HOWARD PAYTON'S visitation rights should be generous to insure continual contact with the children and to maintain the necessary discipline and guidance all children need.

The trial court apparently included paragraph H in the decree to guarantee that Patrick would have some input into decisions about his children.

Iowa Code section 598.41(5)(1985) explains that joint custodial arrangements which award physical care to one parent do not affect the other parent's rights and responsibilities as a legal custodian. When both parents are determined to be legal custodians, the parent without physical care has rights and responsibilities including "equal participation in decisions affecting the child's legal status, medical care, education, extra curricular activities, and religious instruction." Iowa Code § 598.41(5)(1985).

Neither party contests the trial court's decision to award sole custody of the parties' children to Carol. While the trial court found that Patrick is not to be a legal custodian of the children, paragraph H essentially gives Patrick the rights of a legal custodian. This provision is inappropriate in a sole custody arrangement, where the custodial parent alone makes the decisions regarding the children's medical care, education, and other activities. Therefore, paragraph H shall be deleted from the dissolution decree.

Alimony. Carol also contends that the trial court erred in refusing to award her alimony. Payment of alimony is not an absolute right. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Alimony is awarded out of fairness, according to the peculiar circumstances of each case. Kjar v. Kjar, 261 Iowa 334, 154 N.W.2d 123, 126 (1967). Two of the factors to be given great weight in such a determination are the duration of the marriage and the ability of the

supported spouse to engage in gainful employment In re Marriage of Williams,
199 N W 2d 339, 345 (Iowa 1972)

Carol testified that she would not demand alimony if not for her impaired hearing. She is 38 years old, highly educated, and capable of earning her own support by teaching. While physical health of the parties is one of the considerations listed in Iowa Code section 598.21(2)(1985), the record in this instance does not demonstrate that Carol's hearing loss in any way impairs her ability to earn her own support. However, because her hearing loss may impair her earning capacity in the future, we award her \$1.00 alimony per year.

AFFIRMED AS MODIFIED