

FILED

MAR 31 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF SHEILA ANN GREEN
AND EDWARD JOSEPH GREEN**

Upon the Petition of
SHEILA ANN GREEN,

)

Filed March 31, 1986

Petitioner-Appellee,

)

85

And Concerning
EDWARD JOSEPH GREEN,

)

6-48
85-1219

Respondent-Appellant.

)

Appeal from the Iowa District Court for Dubuque County (No. DM 5112)

L. John Degnan, Judge.

Respondent appeals the decree dissolving the parties' marriage. **AFFIRMED.**

Paula M. Stenlund, Dubuque, Iowa, for respondent-appellant.

William J. Maiers, Dubuque, Iowa, for petitioner-appellee.

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

Respondent, Edward Joseph Green, appeals the decree dissolving the parties' seven year marriage. He contends the court should have ordered joint custody of the parties' two children; that his child support and alimony obligations are excessive; that the property division is inequitable; and finally, that the award to the wife for attorney's fees is excessive. Petitioner, Sheila Ann Green, asks for attorney fees on appeal. We modify the decree, and affirm.

Edward and Sheila were married in 1979, a short time after Sheila became sixteen years old and had finished her freshman year in high school. Edward was, at the time of the marriage, twenty-six years old, a high school graduate, and was employed by John Deere in Dubuque. Sheila was pregnant at the time of their marriage.

Two children were born of this marriage, one in 1979, and the second in 1982. Sheila cared for the children and the home, and did not seek or have gainful employment of any substantial nature during the marriage. She has no job skills, and plans to seek education in order to return to the job market when the second child commences school, approximately in 1987. During the marriage, she secured her high school equivalency certificate.

Prior to the marriage, Edward purchased a residence located on Elm Street, in Dubuque, which, at the time of the trial, was a rental property, producing rental income of \$225 per month. That property, purchased approximately four years before this marriage, according to Sheila for the sum of \$14,500, has an agreed value, at the time of trial, in the amount of \$25,000, with a debt in the amount of something over \$4,000. (At the time of this marriage, Sheila testified that the debt on that house was a bit over \$10,000.)

In addition to the Elm Street property, the parties purchased another residence property as their homestead, where they resided until the dissolution.

That residence has an agreed value of \$60,000, with a mortgage balance of approximately \$48,000. The monthly payments on that debt were in the amount of \$650, until Edward was laid off from his work for an extended time. Due to that layoff, the indebtedness was taken over by HUD, and the payments were reduced, on a temporary basis, to \$150 per month. The record is not clear as to the effect upon the outstanding balance of indebtedness as a result of the reduction in payments. The trial court ordered that property sold, with the balance of the sale proceeds, after the payment of certain obligations, to be divided equally between the parties.

At the time of trial, Edward was earning approximately \$11.25 per hour at his work at John Deere. He claimed that his net take home pay amounted to approximately \$1,141.5 per month. In addition, he received rental income from the Elm Street property in the amount of \$225 per month.

I. Joint Custody. Our review of this equity proceeding is de novo. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Castle, 312 N.W.2d 147, 148 (Iowa App. 1981). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Id.; Iowa R. App. P. 14(f) (7). Edward did not appeal the award of physical custody to Sheila. He does, however, state that there is no justification to deny an award of joint custody. The trial court awarded sole custody to Sheila, "subject to reasonable visitation to the respondent upon a minimum of 48 hours advance notice to the petitioner of the intended visitation." Edward does not object to the visitation provision, although he initially suggested 24 hours notice. The parties agreed that Sheila should have physical custody of the children.

On the application of either parent, the court shall consider granting joint custody in cases where the parents do not

agree on joint custody. If the court does not grant joint custody under this subsection, the court shall state in its decision the reasons for denying joint custody.

Section 598.41(2), Code of Iowa, 1985.

The trial court was completely silent on the reasons for granting sole custody to Sheila. The criteria set out in section 598.41(3) were not discussed by the court, and there is no evidence in the court's decree or in the record that the court gave any thought to those considerations. In the records Sheila alluded to disagreements in the care and planning for the education of the children, but did not show that the parties could not cooperate in those decisions necessary to the proper care and upbringing of the children. It appears, on our de novo review of the record, that while there may be disagreements between the parties, final decisions as to the children's care, education, activities and associations with each of their parents have been and will be made. We believe the psychological and emotional needs of the children will be best served by providing for joint legal custody, with physical custody to remain in Sheila. As a caveat to the granting of joint custody, it behooves both parents to cooperate in matters concerning the welfare of the children. Ultimately, of course, joint custody cannot be utilized to make the exercise of physical custody more difficult or impossible. In the event of an impasse between the parties, it is likely that the parent with physical custody will have to make the final decision, to be challenged in further court proceedings, if necessary. Because of the cost, inconvenience, and the potential emotional damage to the children, such disagreement is to be avoided, if possible through any reasonable means. See In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983).

We modify the decree to provide for both parties to have joint legal custody of the minor children, with physical custody to remain with Sheila.

II. Child Support and Alimony. The trial court ordered Edward to pay as child support the sum of \$150 per week to be reduced to \$125 per week when

the first child attains the age of 18, dies, or becomes self-supporting. A provision for the continuation of support was made in the event either child continues its education as provided by section 598.1(2), Iowa Code. In addition, the court provided that Edward would pay alimony to Sheila in the amount of \$50 per week for six years. In considering the trial court's award to Sheila, we must also consider the treatment of the Elm Street property because of its effect upon the income available to Edward. That property was awarded to Edward, subject to making it available to Sheila at a rental of \$175 per month. (This property was rented by Edward, for the sum of \$225 per month prior to the decree.)

Child Support. Child support should be fixed on a case-by-case basis and legal precedents are of little help in arriving at the amount to be set. Cooper v. Cooper, 259 Iowa 277, 282, 144 N.W.2d 146, 149 (Iowa 1966). Both parents have an obligation to support their children although not necessarily equally, but proportionately according to their ability and circumstances. See In re Marriage of Byall, 353 N.W.2d 103, 108 (Iowa App. 1984). Determining the level of child support involves the consideration of numerous factors. Those factors are set out in section 598.21(4), Code of Iowa 1985. Important to that determination, is a determination of the ability of the non-custodial parent to pay support.

The record in this case shows that Edward had monthly income of a total of approximately \$1,635, after taxes. An award of \$150 per week as child support represents \$650 per month. Given the income available, Edward has the ability to pay that amount of support. However, considering the other factors resulting from the court's decree, Edward will not have the amount of income indicated. First, the court awarded Sheila the right to rent the house on Elm Street for \$175 per month. That constitutes a reduction in Edward's income of \$50 per month. Next, the court awarded Sheila alimony in the amount of \$50 per week. That reduced the available spendable money by \$217 per month. The income

available to pay child support, therefore, is approximately \$1,368. Deducting \$650 from that leaves \$718 per month for Edward to discharge his other obligations. From that, he must pay the monthly payment on the house rented by Sheila, in the amount of \$187, and pay taxes, insurance and upkeep as a landlord on that property. Edward must rent or purchase a place in which to live, and must provide for his own bare essentials, at least. Deducting the monthly payment on the Elm Street house leaves Edward the sum of \$531 to live on and to pay taxes and upkeep on that house. Clearly, the court's order of \$150 per week for child support is beyond Edward's ability to pay.

We modify the child support order to require the payment by Edward of \$100 per week as child support for the two minor children of the parties. Such support shall be payable until the children shall have reached age 18, married, or have become self-supporting. When the first child shall have attained the age of 18, the child support shall be reduced to \$75 per week. Such support shall continue, in the event either child shall pursue higher education, as set out in section 598.1(2), Code of Iowa, until age 22.

B. Alimony. Sheila has no income, but must rely upon ADC and Food Stamps, the funds already provided by Edward, and those funds later to be provided by him by the terms of the decree of dissolution. It is her desire to resume her education to the end that she shall become employable, and shall have employment skills. She cannot resume her education immediately because of the age of the younger child. In the meantime, she must provide housing, food and the other essentials for herself and the children. We find that the alimony award of \$50 per week for six years is reasonable.

As a further item of support, the court ordered that Edward shall lease the Elm Street property to Sheila for the sum of \$175 per month, until the youngest child is emancipated as contemplated under Iowa Code section 598.1(2), or

until Sheila voluntarily decides to leave the residence. At that time, the residence will be sold and the net proceeds of the sale are to be divided equally between the parties. In the meantime, Edward is entitled to all tax benefits of ownership of the property.

It appears that the Elm Street property is the only asset that provides for the recovery of a lump-sum distribution to either of the parties. The court's decree requires that Edward complete the payments on the purchase of that property, starting with a balance between \$4,000 and \$5,000 as of the time of trial. In addition, it will be his obligation to provide for the payment of taxes and insurance upon the house and to maintain it. On the basis of \$225, the property may provide for those items without added funds from Edward's wages. \$175 per month will not even make the monthly payments to complete the purchase of the house.

Sheila will have the burden of providing housing, food, clothing, and the necessities of life for herself and the children. With the modification of child support heretofore determined, her income from that source will be \$450 per month. Receiving alimony at \$50 per week will result in an additional \$217 per month. We believe that Sheila should pay as rental for the Elm Street property, the sum of \$200 per month for so long as payments are required to complete the payment for that property under the terms of the purchase agreement and that, thereafter, the rental should be reduced to \$150 per month so long as Sheila continues to reside there with a child or children under the age of 18. When the youngest child shall have attained the age of 18 years, or when Sheila shall voluntarily cease using the Elm Street property as her principal home, or in the event Sheila shall remarry, the real estate shall be sold and the proceeds shall be divided equally between Edward and Sheila after paying the costs of sale.

Edward complains that the court erred in requiring the sale of his camera equipment, reloading equipment, and camping equipment. He claims that there

was agreement on the reloading and camera equipment and that the camera equipment was a gift. The testimony is unclear on the condition of the camera equipment and there does not appear to be agreement that he was to receive the reloading equipment. We will not disturb the court's disposition of these items or the other items of personal property.

III. Attorney's Fees. The trial court awarded to Sheila, "The 1984 state and federal income tax refunds, which amounts shall be used towards payment of her attorney fees;", and in addition, ordered Edward to pay an additional \$1,000 toward her attorney's fees. Edward acknowledges that Sheila is limited in her resources to pay her attorney. He claims, however, that he is also limited in his finances. While his financial situation is precarious, he does not point to any means available to Sheila to pay attorney fees. The award of fees at trial was correct. We also approve the reservation of the tax refunds for the payment thereof. Sheila requests attorney fees on this appeal. There is insufficient record upon which to consider such an award. The taxable costs of this appeal taxed to the respondent.

AFFIRMED AS MODIFIED.