

IN THE COURT OF APPEALS OF IOWA

No. 5-453 / 95-378

**IN RE THE MARRIAGE OF NANCY SOLBERG
AND SCOTT G. SOLBERG**

Upon the Petition of

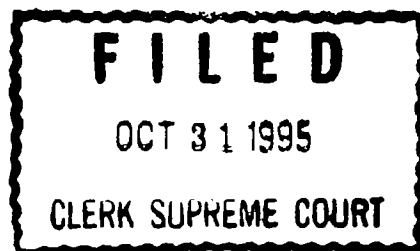
NANCY SOLBERG,

Petitioner-Appellee.

And Concerning

SCOTT G. SOLBERG,

Respondent-Appellant.



Appeal from the Iowa District Court for Clinton County, James E. Kelley,
Judge.

Scott Solberg appeals from various provisions of the parties' dissolution decree.

MODIFIED IN PART AND AFFIRMED IN PART.

James D. Bruhn and Christopher L. Farwell of Farwell & Bruhn, Clinton, for
appellant.

Paul E. Pfeffer of Paul E. Pfeffer Law Office, Clinton, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

SACKETT, P.J.

Respondent-appellant Scott G. Solberg appeals the custody and economic provisions of his decree dissolving his nine-year marriage to petitioner-appellee Nancy Solberg. Scott contends the trial court (1) considered impermissible factors and incorrectly awarded Nancy sole custody of the children; (2) incorrectly awarded Nancy \$200 per month rehabilitative alimony; and (3) did not correctly compute child support. We modify in part and affirm in part.

Nancy and Scott were married in 1984. At that time, Scott had ended a childless marriage. Nancy, who had been married earlier, had three children by her first marriage who now live with their father, and a child, David, born in 1981, who lives with Nancy. Nancy and David's father were never married. Two children were born to this marriage, Heather, born in 1985, and Lyndsi, born in 1986.

At the time Nancy and Scott met, they were students attending an area college where Nancy completed her GED and was attempting to finish training as a nurse. Nancy was successful in the former, but not the latter. Scott went from the area college to Iowa State University where, in 1991, he was awarded a Doctor of Veterinary degree and accumulated substantial debt in doing so. Until the separation, Nancy's son, David, lived with the parties. Nancy's two sons and daughter, Julie, from her first marriage have moved back and forth between Nancy and their father. At the time Scott and Nancy separated, Julie, then fourteen, was having a sexual relationship with the son of Nancy's boyfriend and Julie tried to commit suicide.

David has serious behavioral problems and was committed to the psychiatric unit at a hospital in Clinton, Iowa, until it was found institutional care was not required, but he needed extensive in-home services.

After Scott's graduation, he went to work for his father, a veterinarian in Clinton, Iowa, and Nancy worked in the office. Scott and Nancy and the children moved in a home belonging to Scott's mother. The rental for the house of \$400 per month was deducted from Scott's wages.

The parties separated after an incident when Scott accused Nancy of inappropriate conduct at a dance. Nancy contends following the incident Scott put a staple gun to her head. Scott denied this. Nancy requested and obtained a domestic abuse order. Scott was ordered from the house and ordered to assure the residence remained available to Nancy until the time of the dissolution. The home was owned by Scott's mother who, prior to the dissolution, evicted Nancy from the home.

Scott first contends the trial court failed to follow the law when it did not award joint legal custody. The Iowa statutes express a preference for joint legal custody. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

If the court does not award joint legal custody, it must find clear and convincing evidence joint legal custody is unreasonable and not in the best interest of the children. *See* Iowa Code § 598.41(2) (1995). The trial court's decree did not include findings of clear and convincing evidence joint legal custody is not in the

children's best interest. The trial court did not make such findings even after Scott filed a 179(b) motion.

The children have spent substantial time with both parents, and both parents have been involved in their lives. Scott and Nancy both are adequate parents. There has been some conflict, but not the type which would support a denial of joint legal custody. On our de novo review of the record, we do not find clear and convincing evidence such as would justify denying joint legal custody. We modify to award joint custody.

Scott's next contention is he should be named the physical custodian and the trial court should not have considered the fact his mother terminated the lease and Nancy and the children had to vacate her rental house in arriving at a custody determination.

We agree with Scott the trial court impermissibly considered the fact Scott's mother caused Nancy and the children to vacate her rental house as a factor in assessing custody. The trial judge had been the judge at the time of the hearing on the domestic abuse order and he provided Scott be required to see the lease was maintained until the time of the dissolution. Scott's mother owned the house and controlled the leasing. Scott's mother was not a party to the order requiring the lease be continued.

The children and family have been assisted in a number of ways by Scott's parents. This couple accumulated minimal assets and substantial debt during the

course of Scott's schooling. The law does not impose an obligation on Scott's parents to assist the family further, and we do not consider their ability to do so as a factor in assessing the issue in this dissolution.

The fact the lessor was Scott's mother is not relevant and the order created a requirement for Scott which he was not able to fulfill. Scott's failure to do so is not a factor we consider in assessing the custody issue.

Nancy assumed the greater part of the children's care while Scott was in school and working outside the home. Nancy's contributions to family finances were through babysitting and computer work at home for others.

Since Scott finished school, they both have been employed outside the home and both have been involved in child care. Scott finished his education; Nancy did not.

There is evidence Scott was abusive to Nancy on at least one occasion. This negates against Scott's claim for physical care. There is no evidence either Scott or Nancy were abusive to the children. There is evidence Scott had a collection of pornographic material which Nancy knew of but did not participate in obtaining. There is no evidence these materials were ever made available to the children.

Of concern in Nancy's custody claim is her track record with her other children, which is not good. Furthermore, David, who has serious behavioral problems, will be residing in Nancy's home. Nancy has established a new relationship with the man whose son had a sexual relationship with Julie.

Scott and the children have a good relationship with his extended family. Scott introduced witnesses who testified to his good relationship with the children.

Our review of this matter is de novo. Iowa R. App. P. 4. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in *Weidner*, 338 N.W.2d at 355-56, and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). See *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue 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). Reviewing the evidence de novo and applying the applicable factors, we modify to award Scott physical care.

Scott contends the trial court had not properly computed his income. The trial court found Scott was paid \$1250 twice each month and, in addition, received \$400 per month for rent and an additional \$150 to cover utilities, for an income before tax deductions of \$3050.¹ At the time of the dissolution, Scott was living above the animal hospital and not paying rent. We find no valid reason to modify the trial court's computation of Scott's net monthly income for child support purposes. We impute Nancy's net income, based on a forty-hour week, to be \$500 per month plus

¹ The child support guidelines do not contemplate or consider interest and principal due on student loans. Scott has over \$135,000 in student loans. While in some cases obligations on student loans may justify a discretionary departure from the child support guidelines, they do not here.

\$200 per month alimony she receives, for a net monthly income of \$700. After subtracting \$90 for a qualified additional dependent deduction from Nancy's net income and applying the child support guidelines, we find Nancy's child support obligation is \$106.14 per month for the two children in Scott's care.

Scott contends Nancy should not have been awarded alimony. At the time of trial, due to student loans, the family had a negative net worth of over \$135,000. About \$15,000 of the loans were Nancy's; the balance were Scott's. The trial court found Nancy had not been able to continue her education because of child care and ordered she have rehabilitative alimony of \$200 per month for four years. We find the child care responsibilities limited Nancy's ability to obtain an education. Scott has been educated as a veterinarian but carries a substantial debt to pay for it. In assessing all factors, we find the alimony equitable.

Court costs are taxed one-half to each party. We award no attorney fees.

MODIFIED IN PART AND AFFIRMED IN PART.