FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-381 / 89-396

**IN RE THE MARRIAGE OF JOSEPH CLARK BANKS AND DENISE RENEE BANKS**

Upon the Petition of

**JOSEPH CLARK BANKS,**

Appellant,

And Concerning

**DENISE RENEE BANKS,**

Appellee.

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Appeal from the Iowa District Court for Appanoose County, James D. Jenkins, Judge.

Petitioner appeals certain provisions of the decree of dissolution entered for the parties in district court. **AFFIRMED.**

Sidney E. Drake of Drake, Wilson & Jay, Centerville, for appellant.

Sheila D. Sidles of Centerville for appellee.

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

**OXBERGER, C.J.**

Joseph Banks (Joseph) has appealed from a dissoluti decree challenging the child custody award, alimony, a the award of attorney fees. Denise Banks (Denise) asks f attorney fees for this appeal. We affirm.

Our review in this matter is de novo. In re Marria of Bowen, 219 N.W.2d 683, 687 (Iowa 1974); Iowa R. Ap P. 14(f)(15). We give weight to the fact findings of t trial court, especially when considering the credibility witnesses. Iowa R. App. P. 14(f)(7). We are not bound these determinations, however. Id.

Joseph and Denise Banks were married on February 1 1983. They have one child, Taylor Banks (Taylor), bo November 27, 1983. The dissolution decree awarded t parties joint legal custody and placed physical care Taylor with Denise. Joseph was 24 years old at the time trial. He is a staff sergeant in the Air Force and stationed near Kansas City, Missouri. Joseph had tempora custody of Taylor for about two years before the trial. lives with his fiance, Lori Pritchard, who is also sergeant in the Air Force. Joseph earns $1,200 per mon and has an additional allowance of $500 per month. Deni was 22 years old at the time of trial. She works in credit union and has net pay of $575 per month. Deni lives with a female roommate in a mobile home near the A Force Base.

## I. Custody

Joseph first contends that the trial court erred in placing physical custody of Taylor with Denise. He contends that physical care should be placed with him. He states that he was always involved in the physical care of the child. A clinical psychologist examined Joseph, Taylor, and Lori and recommended that physical care of Taylor be placed with Joseph. The psychologist testified that a change in custody would be traumatic for Taylor. Joseph points out that he has had physical care of Taylor for the last two years and she has done very well with him. He asserts that Denise has not exercised all of her visitation rights. He believes that Denise would sometimes rather go dancing. Joseph feels the court erred in finding Denise was more credible.

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child 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).

The district court found that Denise had been the primary care provider until the dissolution was filed. The court noted that both parents love Taylor and are interested in her well-being. The court found Denise's testimony to more credible than Joseph's. Additionally, the court found that Joseph acted as an immature authoritarian. The court stated:

> While . . . [Joseph] claims to love Taylor and says that he puts her welfare above his own, his actions have spoken far louder than his words. He has used Taylor's custody as a weapon to attempt to conform . . . [Denise's] behavior to his demands. He has put his own libidinous desires ahead of his daughter's welfare, and lived in open adultery with two different women during the past two years, and in Taylor's presence. He has twisted the legal system to bring the maximum pressure possible on his wife. He has withheld financial support from . . . [Denise] in an effort to bring economic pressure to bear on her.
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> [Joseph's] . . . acts of legal and economic pressure brought against the mother of the child he professes to love, coupled with his amoral behavior, have not been those of a loving father. He has not acted as a father whose sole concern is the welfare of his child. Instead, his acts have been the acts of an immature authoritarian, determined that his will should prevail regardless of the consequences on Taylor, or her mother. Sadly, this Court finds that . . . [Joseph's] interest in Taylor is not solely for Taylor herself. Instead, he is callously using Taylor as a weapon with which to continue fighting the marriage's battles.

Although the psychologist testified that a change in custody from Joseph to Denise would be traumatic for Taylor, this change will not be overly traumatic. As the court noted, Denise has "exercised extensive visitation in the home to which she will now take Taylor." It appears that there will be little change in Taylor's daily life.

We agree with the district court that the long-range best interests of Taylor will be served by awarding Denise her physical care and joint custody to both Denise and Joseph, and with Joseph having visitation rights.

**II. Alimony**

Joseph contends that the district court erred in awarding Denise alimony. He was ordered to pay Denise $50 per week in rehabilitative alimony if she attends school taking a minimum of five scholastic hours per term. Support will begin when she has enrolled and continue until she obtains two years of education. In no event shall alimony continue beyond July 1, 1993. He asserts that Denise does not need rehabilitative alimony since she has a stable job and was offered a chance for advancement.

As previously noted, Joseph is a staff sergeant in Air Force earning $1,200 per month and has an additional allowance of $500 per month. He lives with his fiance, who is also a sergeant in the Air Force, and shares their living expenses. Denise is a teller for a credit union and has net pay of $575 per month. She currently attends school and would like to become a teacher, so she would like a college degree. The court gave her four years to obtain two years of college education. Joseph states that he may end up paying $10,400 in rehabilitative alimony, and he feels this is excessive.

Alimony is not an absolute right. When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981). We determine the alimony provision made by the trial court to be appropriate.

**III. Attorney Fees**

The district court ordered Joseph to pay $1,000 of Denise's attorney fees. There was no testimony or evidence to show the amount of work done by Denise's attorney. Joseph claims that there was no evidence upon which the award of attorney fees could be based. After noting the absence of such evidence, the court concluded that counsel had actively represented Denise and engaged in two days of trial.

Iowa trial courts are experts as to what are reasonable attorney fees, Parrish v. Denato, 262 N.W.2d 281, 285 (Iowa 1978), and have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250

N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa 1982). We affirm the attorney fee award.

Denise also requests $850 in attorney fees for this appeal. We award Denise an additional $500 in attorney fees on appeal.

In summary, the decision of the district court awarding physical care of Taylor to Denise is affirmed. The decision of the district court with regard to alimony is affirmed. Additionally, the court's decision with regard to attorney fees is affirmed.

**AFFIRMED.**