FILED
FEB 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DEBORAH K. WIEDNER AND ROBERT A. WIEDNER

Upon the Petition of)
DEBORAH K. WIEDNER,)
Petitioner-Appellee,)
And Concerning)
ROBERT A. WIEDNER,)
Respondent-Appellant.)

Filed February 24, 1981

0-423
3-65146

Appeal from Clayton District Court- -L. John Degnan, Judge.

Respondent-father appeals the child custody, visitation, child support and property division provisions of the parties' dissolution decree asserting 1) that the best interests of the parties' two minor children require awarding custody to him or, alternatively, that he should be granted expanded and specific visitation, and 2) that the child support and property division provisions are unjust and inequitable. AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.

James Burns of Miller, Pearson, Gloe, Burns & Betty, P.C., Decorah, Iowa, for respondent-appellant.

Stephen D. Saunders of Clefisch & Saunders, Elkader, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent-father appeals the child custody, visitation, child support, and property division provisions of the parties' dissolution decree. He asserts: 1) that the best interests of the parties' two minor children require awarding custody to him or, alternatively, that he should be granted expanded and specific visitation, and 2) that the child support and property division provisions are unjust and inequitable. We affirm trial court's decree in part; modify in part; and remand.

The parties' marriage of nearly three years was terminated by a decree of dissolution granted March 8, 1980. At the time of the final hearing, petitioner, age 22, had been recently employed at a local pharmacy, earning approximately $306.90 per month for a 26-30 hour work week. She also received some A.D.C. assistance. Respondent, age 25, had been employed on the Clayton County road crew for three years and earned approximately $13,368.67. He occasionally worked at part-time odd jobs. Both parties were in good health.

In the dissolution decree, petitioner was awarded custody of the parties' two children, Hollie, age three and one-half, and Joshua, age one. Broad and liberal visitation rights were granted without further specification. Respondent was ordered to pay child support of $200 per month. Each party was given the dependency exemption for one of the children for income tax purposes. The parties' principle asset was their home, valued at $22,000-$23,000 with an indebtedness of $17,000. The court awarded an undivided one-half interest to each party but ordered respondent to make the home mortgage payments, to pay the real estate tax and insurance payments, and to participate with petitioner in the maintainance of the home.

Following entry of the decree, trial court overruled respondent's motion to amend or enlarge findings or conclusions pursuant to Iowa R. Civ. P. 179(b). Respondent's appeal followed.

I. Scope of Review. Our review of dissolution proceedings is de novo. Iowa R. App. P. 4. We will examine the whole record and determine anew rights on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to 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 and/or Visitation Rights. Respondent contends that trial court erred in awarding custody of the parties' two minor children to the mother, arguing that their best interests would be served by placing custody with him. We disagree.

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In assessing child custody provisions, the best interests of the minor children are our first and governing concerns. Iowa R. App. P. 14(s)(15); In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1979). ". . . [C]hild custody cases are to be decided 'upon what the evidence actually reveals in each case, . . .'." In re Marriage of Tresnak, 297 N.W.2d 109, 112 (Iowa 1980) (quoting In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974)). Neither party is given initial preference in our determination. In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978). We base our conclusion on the factors set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1978).

Trial court here found that both parties were capable of nurturing and parenting the children, that both appeared to love the children and would continue to be interested in their best interests and welfare, but placed the custody of the children with petitioner upon concluding this would be in the best interest of the children. From our review of the record we find no reason to disturb trial court's finding and we therefore defer to trial court due to that court's superior position in observing both parties. See In re Marriage of Snyder, 241 N.W.2d 733, 734 (Iowa 1976). We thus conclude no error occurred on the custody issue.

Having determined custody should remain with petitioner, as directed by the trial court, we next examine respondent's contention that trial court erred by failing to order broad and scheduled visitations with the children. We note that trial court ordered broad and liberal but unscheduled visitation rights.

The evidence shows considerable animosity between the parties and difficulties in visitations even though both live in the same town. Respondent has demonstrated his child-caring capabilities through his care of Hollie, as at the time she was born, he was unemployed. The evidence shows that respondent willingly helped care for the children. Under these circumstances, we agree with respondent that structured and frequent visitations are warranted.

To maintain a viable parent-child relationship for respondent as the noncustodial parent, we believe he should have the following visitation schedule:

(1) weekends: alternate weekends beginning at 5:00 p.m. Friday until 6:00 p.m. on Sundays.

(2) weekdays: one night per week of respondent's choice, with at least 24-hour's notice to petitioner; said visit to begin at 5:00 p.m. and end at 8:00 p.m.

(3) holidays:

even years: a. New Years: 5:00 p.m. December 31 through 8:00 p.m. January 1

b. Memorial Day: 5:00 p.m. the evening prior through 8:00 p.m. Memorial Day
c. Thanksgiving: 5:00 p.m. the evening prior through 8:00 p.m. the Sunday after Thanksgiving
d. Additional visitation: 3 days of respondent's choice, upon 24-hour notice, between Christmas and New Year's.

odd years: a. Easter Sunday: 9:00 a.m. through 8:00 p.m. (if not an already scheduled weekend visitation)
b. July 4th: 5:00 p.m. the evening prior through 8:00 p.m. July 4th
c. Labor Day: 5:00 p.m. the day prior through 8:00 p.m. Labor Day
d. Christmas: 5:00 p.m. December 24th through 8:00 p.m. December 25th
e. Addition visitation: 3 days of respondent's choice, upon 24-hour notice, between Christmas and New Year's.

(4) summer vacation: three weeks of respondent's choice, upon 7 days' notice of the beginning time and length of the visitation period. A "week" shall mean 5:00 p.m. Sunday until 8:00 p.m. the following Sunday. Any week's visit under this subparagraph shall be in lieu of one of respondent's regular weekend visits under subparagraph (1).

In addition, for the best interests of the children in maintaining their relationship with their father, we strongly encourage additional visitations on a cooperative basis. We also believe the best interests of the children necessitate development of their relationship with their grandparents and encourage the parties in this endeavor. The parties are further advised to heed the court's admonishments in Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972). We therefore modify the visitation provisions of the dissolution decree in accordance with the provisions set forth above.

III. Child Support and Property Division. Respondent also contends that petitioner should make her own house payment, including taxes and insurance, and that he should receive both dependency exemptions for the children for income tax purposes. We agree with respondent.

In dissolution proceedings, the court may make such property divisions as are justified. § 598.21, The Code 1979. Justified property divisions are those considered equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). Trial court's assessment of what constitutes an equitable division is to be given some weight. Iowa R. App. P. 14(f)(7). We are guided by the factors enumerated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972), in reaching an equitable determination of the parties' financial or property rights and obligations.

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During the trial petitioner testified to her plans for remarriage after the dissolution was finalized; she also expressed no difficulty in making rent payments of $160 while living in an apartment. The court awarded each party an undivided, one-half interest in their home. Petitioner was given possession until the youngest child reaches 18 or is otherwise emancipated when the house was to be sold and the proceeds divided equally. We find that the respondent's equity should be fixed at this time and that title should vest in petitioner. We further find that respondent's obligation to make the home mortgage payments, to pay the real estate taxes and insurance premium on the premises, and to participate with petitioner in the maintenance of the home should terminate upon issuance of procedendo in this case. Respondent shall receive as his share of the house equity one-half of the difference between the value of the house, here set at $22,500,[1] and the mortgage balance as of the date of respondent's last house payment. This amount shall be a lien against petitioner's property, due at the time the youngest child reaches 18 or is otherwise emancipated or at the time petitioner sells the house, if earlier. Interest on the lien shall accrue at 12% per annum. Respondent remains liable for any mortgage payment, real estate taxes or insurance premium unsatisfied when procedendo issues. The decree accordingly is so modified.

Considering the $200 per month child support requirement, under the facts of this case wherein no other support is to be awarded to petitioner, we find child support in the amount of $300 per month is warranted. We also find that the decree should include a provision for yearly automatic cost of living adjustments (COLA) to the child support award. We are guided by the supreme court's recent pronouncements in In re Marriage of Stamp, _____ N.W.2d ____ (Iowa 1980). There, the court found the situation to be "... well-suited for imposition of a child support escalation clause based on the consumer price index, limited by the easily ascertainable changes in [respondent-father's] gross salary." Id. at ___. The "... [father's] gross salary from the state, which limits the cost of living increase in child support [under a COLA provision, was] readily obtainable without resort to the returns." Id., at ____. The employment history was "... stable, with gradual increases instead of wide fluctuations." Id. The court held that in these circumstances, trial court was not restrained by In re Marriage of Meeker, 272 N.W.2d 455 (Iowa 1978), from including a COLA provision in its decree. Id.

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[1] Based on average value of $22,000-$23,000.

In this case respondent's gross salary from the county is likewise readily ascertainable and his employment appears to be stable. We thus find the court's holding in Stamp to be applicable and modify trial court's decree to include a COLA provision which uses the lesser of respondent's gross salary increase or the cost of living as the percentage amount upon which the annual increase in child support is to be based.

Further, we agree with respondent that his contributions to the children through the child support payments, the health and medical insurance, plus one-half the medical and dental expenses not covered by insurance, warrant allowing respondent to claim both children as dependents on his income tax returns. We accordingly modify the decree to provide that respondent may claim dependency exemptions for both children as long as his contributions to child support remain current. All provisions of the decree not expressly addressed by this opinion are affirmed. We remand this case to trial court for modification of the decree in conformance with this opinion. Costs of this appeal are assessed equally to both parties.

AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.