

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Upon the Petition of)

FLORENCE V. MANKOWSKI,)

Petitioner/Appellee/Cross-Appellant,)

and Concerning)

JAMES R. MANKOWSKI,)

Respondent/Appellant/Cross-Appellee.)

Filed November 30, 1983

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Appeal from Clinton District Court - Margaret S. Briles, Judge.

Respondent appeals from the alimony provisions and the petitioner cross-appeals from the joint custody provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Steven E. Mayer of Mayer, Mayer, and Mayer, Clinton, Iowa, for respondent/appellant/cross-appellee.

Seymour M. Raben, Davenport, Iowa, for petitioner/appellee/cross-appellant.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The respondent, James R. Mankowski, appeals from the alimony provisions and the petitioner, Florence V. Mankowski, cross-appeals from the joint custody provisions of the parties' dissolution decree. James asserts that the award of \$1,000 per month alimony to Florence until the death of either party, or remarriage of Florence, is excessive in amount and duration. Florence asserts on cross-appeal that joint custody of the parties' fourteen-year-old son is inappropriate under the facts of this case and that the best interests of the parties' child require that sole legal custody be awarded to her. Florence also requests attorney fees for this appeal. We affirm as modified.

Our review of this equity action is *de novo*. In re Marriage of Hitchcock, 309 N.W.2d 432, 433 (Iowa 1981). We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Alimony. The payment of alimony is not an absolute right; it must be determined in light of all the circumstances, including the property settlement. In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982). The factors we consider in making a determination of allowance of spousal support are codified in Iowa Code section 598.21(3) (1981). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976).

James contends the amount awarded was excessive and that the duration of the award was inequitable because Florence will be able to become self-supporting in the future at a standard of living comparable to that enjoyed during the marriage. We disagree. We recognize that in some situations it is more appropriate for a spouse to receive rehabilitative alimony rather than permanent alimony. See In re Marriage of Bevers, 326 N.W.2d at 900. However, we conclude after examining the record in light of the factors enumerated in Iowa Code section 598.21(3), that the award of \$1,000 per month support until the death of

either party or until the petitioner's remarriage is appropriate in this case. Although Florence may, after several years, regain her position in the work world, in light of her age, health, and educational level, she will have a difficult time achieving a standard of living comparable to that enjoyed during the marriage. Moreover, considering James's present level of income and demonstrated ability to maintain or increase his earning capacity, the award of \$1,000 per month was not excessive. We agree with the trial court's award of alimony.

II. Joint Custody. Florence, on cross-appeal, asserts that the grant of joint custody over the parties' fourteen-year-old son was improper. Joint custody was requested by James. Florence argues that her failure to agree to joint custody, the inability of the parents to communicate concerning the parties' child, and the lack of geographical proximity makes the award of joint custody impractical. As always, our first and foremost consideration in determining custody is the best interest of the child involved. Iowa R. App. P. 14(f)(15). It is clear that Iowa Code section 598.41 (1983) expresses a preference for joint custody over other custodial arrangements and does not allow one-party vetoes. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). Moreover, geographic proximity and tension between the parents are not always sufficient to demonstrate joint custody will not work. In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983). Rather, each of the factors listed in section 598.41(3) are to be weighed. There is no magic number of factors which, when satisfied, will mandate a decision for or against joint custody. In re Marriage of Weidner, 338 N.W.2d at 358.

Normally the trial court should consider and express in writing those factors among the eight listed that it considered in its decision. Id. at 358. The trial court here did not specifically state which factors it considered. It based its decision upon a finding that the child's best interests required continued association with both mother and father and that, while both parents were suitable

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parents, each had faults which made an award of sole custody to either parent undesirable. While we encourage trial courts to express their reasoning in terms of the factors enumerated in the statute, we note that the trial court in this case made its decision without the guidance of the supreme court's decision in Weidner. Moreover, upon our *de novo* review of the record, we agree with the trial court's grant of joint custody.

Each parent is a suitable custodian. The child would suffer emotionally if deprived of active contact with both parents. Although the parties are not located in close geographic proximity, the record reveals that James has kept in close contact with the parties' child through frequent, almost daily, telephone calls. Both parents also appear to recognize the need for James, Jr., to maintain a good relationship with the other, and can support that relationship. James, Jr., has, in fact, maintained a close relationship with both parents. While expressing protective feelings for his mother, he has also continued a close relationship with his father. It is true that the parties have been unable to communicate effectively with one another concerning the needs of James, Jr. However, based upon the whole record, that factor alone is not sufficient to prevent an award of joint custody. The parents' lack of communication, while it is less than desirable, has not adversely affected James, Jr. See In re Marriage of Weidner, 338 N.W.2d at 357 (parents' inability to communicate and reach child-raising decisions is considered as it adversely affects the children). We encourage both parents to recognize the needs of James, Jr., and learn to communicate with each other concerning his needs. We note that a court may properly consider a parent's unreasonable or obdurate resistance to joint custody in awarding custody to the other parent. Id. at 358; In re Marriage of Bolin, 336 N.W.2d at 446.

We agree with the trial court that, upon this record, the award of joint custody is appropriate and that the grant of physical care to Florence during the school year and physical care to James during the summer is in the best interests

of the parties' child. The trial court, however, made no provision for visitation by either party while the other has primary physical care, with the exception of Christmas. We affirm the custodial provisions of the trial court's decree in all respects, except we modify the decree to provide as follows:

1. James shall have visitation rights with James, Jr., at reasonable times and places in Iowa (or anywhere else Florence may move) and during visits by James, Jr., to Arkansas.
2. In addition, Florence shall have visitation rights with James, Jr., at reasonable times and places in Arkansas (or anywhere else James may move), and during visits by James, Jr., to Iowa.

We believe these provisions more accurately reflect both parents' rights and responsibilities to maintain continuing contact with James, Jr. See In re Marriage of Bolin, 336 N.W.2d at 447.

III. Attorney's Fees on Appeal. Florence requests attorney's fees of \$1,050 for this appeal and cross-appeal. Without deciding the fee that her attorney may reasonably charge her, we direct that James pay \$500 of Florence's attorney's fees on appeal.

We affirm the award of alimony and the award of joint custody. We modify the decree to include visitation provisions.

AFFIRMED AS MODIFIED.