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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF YADORA L. THORNTON AND CHARLES E. THORNTON

Upon the Petition of)
YADORA L. THORNTON,)
Petitioner-Appellant,)
And Concerning)
CHARLES E. THORNTON,)
Respondent-Appellee.)

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Filed March 23, 1988

7-371
87-516

Appeal from the Iowa District Court for Clinton County (No. CD 11051), C.H. Pelton, Judge.

Petitioner wife appeals the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Edward J. Kross of Shaff & Farwell, Clinton, for appellant.

A. John Frey, Jr., of Jurgemeyer, Frey & Haufe, Clinton, for appellee.

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

DONIELSON, P.J.

The petitioner wife appeals the decree dissolving the parties' marriage. She asserts that: (1) the trial court should have given her rather than the respondent husband physical care of the parties' children in the joint custody arrangement; (2) the trial court erred in setting the amount of child support payable by the mother; (3) the trial court erred in the amount of alimony awarded and in failing to award permanent alimony; (4) the division of property and debts ordered by the trial court was inequitable; and (5) the trial court erred in failing to award sufficient attorney fees. The petitioner also requests attorney fees on appeal. We affirm as modified.

I. Background. The petitioner, Yadora L. Thornton, and the respondent, Charles E. Thornton, were married in 1974. They have three children: Stephanie, born in 1975; Sabrina, born in 1977; and Shauna, born in 1980. Yadora did not work outside the home until the youngest child was one and one-half years old, when she took a part-time job. She is now working in a supermarket approximately fifteen hours per week at a wage of $3.56 per hour. Charles works for his family's baking business, earning approximately $26,000-$27,000 per year.

In its dissolution decree, the trial court set up a joint custody arrangement, with Charles having physical care of the children. The trial court noted that Yadora could not support herself on her current earnings, but that it was reasonable to anticipate that she could secure full-time employment paying $150 per week within six months. The court therefore ordered her to pay child support of $1 per week for six months or until she secured the anticipated employment, whichever was sooner, and $30 per week thereafter. The trial court also directed Charles to pay Yadora alimony of $50 per week for six months. The trial court approved the parties' division of their personal property. It made the parties joint owners of their house and gave them joint responsibility for their debts.

The court stated that if the parties' intended sale of the house was completed, the net proceeds were to be used to pay the debts and any remainder equally divided. The trial court directed each party to pay any remaining fees due his or her own attorney and court costs were assessed against Charles. Yadora has appealed the dissolution decree. Our scope of review is de novo. Iowa R. App. P. 4.

II. Custody. Yadora claims that the trial court should have awarded her physical custody of the minor children. Our pivotal consideration in resolving questions of child custody is the best interests of the children involved. Iowa R. App. P. 14(f)(15). The factors upon which this determination is predicated are set forth in section 598.41(3) of the Iowa Code and in In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). After examining the record in light of these principles, we conclude that the children's best interests will be most adequately served if Charles remains the physical custodian. We agree with the trial court that both parents are capable of providing adequate physical care to the children. We believe, however, that Charles is the parent best able to minister to the everyday needs and cares of these three girls. A great deal of testimony was presented regarding the recreational and social activities that Charles has participated in with the children. These aspects of parenting are beneficial and do not go unnoticed by this court when considering the children's best interests. Through these activities, Charles has demonstrated his ability to nurture the children's recreational and social interests. It is our opinion that Charles can more adequately minister to the girls' emotional and social needs as they grow up. The trial court observed the parties. We give weight to the trial court's findings in assessing the parties' credibility and therefore affirm the trial court in awarding custody of the children to Charles. Furthermore, we see no other factors that would compel a decision to overturn the

trial court's ruling. Additionally, we agree with the trial court that it would be in the children's best interests if both parties would cooperate in effecting extensive visitation, and we adopt the visitation guidelines noted in the trial court's decree.

III. Child Support. Yadora asserts that the trial court erred in setting the amount of child support payable by the mother. The trial court set child support at the rate of $1 per week, to increase to $30 per week in six months or when Yadora secures employment, whichever occurs first. The trial court felt that Yadora was capable of earning $150 per week.

We examine the child support award in accordance with the dictates of Iowa Code section 598.21(4). In re Marriage of Hoak, 364 N.W.2d 185, 189 (Iowa 1985). Both parties have an obligation to support their children, not necessarily equally, but in accordance with their ability to pay. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984).

We find the trial court's award of child support to be equitable. The trial court also provided that "[i]n the event Yadora's earnings are not as anticipated, other agreed-upon terms or modification will be appropriate." The record reveals that Yadora is capable of employment. If she does attain a job earning $150 per week, child support of $30 per week is not excessive; if she does not attain such employment, the trial court provided for other appropriate relief. Accordingly, we affirm the child support award.

IV. Alimony. Yadora asserts that the trial court erred in the amount of alimony awarded and in failing to award permanent alimony. The trial court awarded Yadora $50 per week for a period of six months. The factors governing an award of alimony are set forth in Iowa Code section 598.21(3). Yadora is relatively young, healthy, and able to secure employment. Her part-time employment at the time of trial did not yield a very high income. We believe,

however, that she is capable of seeking out and obtaining employment with a greater earning potential. Accordingly, we affirm the trial court's grant of $50 per week for six months as sufficient to support Yadora while she seeks employment with greater income.

V. Property and Debt Division. Yadora also contends that the trial court's division of the parties' property and debts was inequitable. The governing principle for division of property is that it be equitable. See In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981). Factors to be considered are set forth in Iowa Code section 598.21(1). The parties agreed to a nearly equal division of their personal property. The trial court ruled that both parties should be equally responsible for the marital debts. In light of the fact that Charles' income is ten times what Yadora earns, we believe that it would be more equitable for Charles to pay ninety percent of the joint debts, except for the mortgage on the parties' house, which should be split equally between the parties. Finally, an equitable division of the property would be to divide the equity in the parties' real estate equally.

VI. Attorney's Fees. At trial, Charles had been obligated to pay $200 in temporary fees. At the close of trial, Yadora sought the court to order Charles to pay her remaining attorney's fees of $488. Yadora also requests an award of reasonable attorney's fees and costs associated with this appeal. An award of attorney fees is generally based on the parties' respective abilities to pay. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). We order Charles to pay Yadora $440 in trial attorney fees and $750 toward her appellate attorney fees. Finally, we affirm the trial court's order that Charles pay court costs, and we order Charles to pay the costs on appeal.

AFFIRMED AS MODIFIED.

Hayden, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I concur with all of the majority opinion, except upon the issue of physical custody of the three female children of the parties.

The trial court obviously had the opportunity to observe the witnesses. However, there is no indication that it relied upon its view of the witnesses to test their credibility. There is little dispute in the evidence, with both parents being characterized by the other as good parents.

Yadora has been the primary provider for her daughters during their growing years. Charles has been a good father in giving the girls opportunities for outdoor and extracurricular activities. Because of his early morning work hours, it will be necessary for him to employ a baby sitter to attend to getting the children started every weekday. With Yadora, there is no such requirement. In time, of course, Charles will likely be able to rely upon the oldest child for these duties, but the lives of these girls would be more normal in the custody of their mother.

It is difficult for me to find that it will be better for girls approaching adolescence to be in the physical custody of their father. This is not to say that Charles will be unable to cope with the problems associated with that stage of their lives, but with a mother who is a proper custodian available, the choice of the father as the custodian seems particularly strained.

I would place the physical custody of the three girls in the custody of Yadora. Wherever the children are placed, there should be very liberal visitation. The parents in this case seem particularly able to cooperate in matters concerning the children. They are to be commended for this.