FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 380

IN RE THE MARRIAGE OF GROVES

Upon the Petition of)
ELAINE A. GROVES,)
Petitioner-Appellee,)
And Concerning)
KENT A. GROVES,)
Respondent-Appellant.)

Filed August 26, 1980

0-137
2-64098

Appeal from Wright District court - Newt Draheim, Judge.

Husband-father appeals from child custody and economic provisions of dissolution decree. AFFIRMED WITH MODIFICATIONS.

Greg Knoploh of Kersten, Opheim, Carlson & Trevino, Fort Dodge, Iowa, for respondent-appellant.

James L. Kramer of Johnson, Erb, Latham & Gibb, Fort Dodge, Iowa, for petitioner-appellee.

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

Respondent, Kent A. Groves, appeals from child custody and economic provisions of trial court's decree dissolving his marriage to petitioner, Elaine A. Groves. He asserts: 1) custody of the parties' minor child should have been awarded to him; 2) if custody with petitioner is affirmed, respondent's visitation rights should be expanded; 3) award of a sixty-acre tract of land to petitioner is inequitable; 4) award of one-half of the profit from the 1979 growing crops to petitioner is inequitable; and 5) child support of $250 per month is excessive. We affirm with modifications.

The parties' twelve and one-half year marriage was dissolved by trial court's decree filed September 28, 1979. Both were thirty-nine years of age and in good health. Custody of the minor child, Kent, Jr., born October 17, 1967, was awarded to petitioner.[1] Petitioner was employed as a teacher throughout the marriage; respondent was engaged in farming. Neither party brought assets to the marriage. The parties' primary assets at the time of hearing were several tracts of farm land; two sixty-acre tracts, owned as tenants-in-common; a forty-acre tract owned by respondent and his brother; and one-third interest in a forty-acre tract inherited by petitioner from her father. There was a $63,000 mortgage against each sixty-acre tract and $56,000 against respondent's one-half interest in the forty-acre tract. Petitioner was sole owner of a $65,000 house purchased on contract subsequent to the parties' separation, for which she used $20,000 ($14,000, plus accumulated interest) inherited from her father as a down-payment. The parties' personal property included: the 1979 growing crops; farm machinery, valued between $23,700 and $67,000;[2] household goods of undetermined value; and two motor vehicles, a 1976 Monte Carlo valued at $3,500, and a 1978 Chevrolet pick-up valued at $8,000. Respondent owned a $9,000 Federal Land Bank Certificate. In addition to the mortgage obligations, respondent also was indebted to two local banks in the total amount of $105,000-$110,000.

Trial court awarded petitioner custody of the minor child, one sixty-acre parcel of land in Dayton Township, Wright County, together with the growing crop thereon, the household goods then in her possession, the 1976 Monte Carlo, her full interest in the

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[1] Custody of petitioner's two teenage daughters by a previous marriage was not an issue since respondent had not adopted them.

[2] Respondent valued the farm machinery at $67,000 for borrowing and for depreciation purposes. In his answers to Interrogatories, he claimed the value was $23,700. Respondent explained the variance by stating his father actually had an ownership interest in the machinery, but allowed respondent to claim full ownership for borrowing and depreciation purposes.

land inherited from her father, her dwelling purchased subsequent to the parties' separation, her life insurance policy, one-half of the growing crops (or the cash equivalent) on one-hundred twenty acres rented for cash by respondent, and $250 per month as child support.

Respondent received visitation rights with the minor child, one sixty-acre tract of land in Woolstock Township, the farm machinery, household goods then in his possession, the 1978 Chevrolet pick-up, and all growing crops not awarded to petitioner.

I. Scope of Review. Our review of trial court's decree in a dissolution proceeding is **de novo.** Iowa R. App. 4; In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980); In re Marriage of Joens, 284 N.W.2d 326, 327 (Iowa 1979). We give weight to trial court's findings of fact, but are not bound by them. Schissel, 292 N.W.2d at 423.

II. Child Custody. Respondent asserts the best interests of the minor child dictate custody should have been awarded to him. Petitioner argues custody was never at issue in the proceedings until this appeal, as respondent's answer admitted custody should be with petitioner and his pre-trial reports stated there was no disagreement regarding custody. Only at trial did respondent testify it was in the child's best interest to be with him. Respondent's trial counsel, by affidavit, alleges he and counsel for petitioner, immediately prior to trial, agreed the issue of custody should be presented and so advised the court. In light of our scope of review, we do not address the parties' procedural arguments. We also are cognizant of respondent's affidavit of February 7, 1980, alleging the minor child has been residing with him since January 5, 1980. However, we must determine the merits of the issue on the record made at trial in light of the principles enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Respondent's primary reason for challenging trial court's award of custody focuses on his belief petitioner will have difficulty controlling the boy and petitioner's potential instability due to stress from rearing her two teenage daughters, one of whom is institutionalized due to a severe mental illness. Respondent, at trial, admitted petitioner has been a good mother. Petitioner, who had custody of the child during the parties' ten-month separation, testified she had difficulties controlling the boy only following visitation with respondent.

Considering petitioner's proven capabilities, the child's adjustment to his new environment, and deference properly accorded to trial court's superior ability to observe and evaluate the credibility of witnesses, we find no reason to disturb trial court's award of custody to petitioner.

III. Visitation. Respondent also challenges the restricted visitation schedule set forth in trial court's decree. The best interests of a child require a continuing association with the noncustodial parent, absent a showing of cogent reasons to the contrary. Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973).

Although petitioner testified to her difficulties with the child following visits with respondent, we do not find the evidence presents a cogent reason for such restricted visitation. Consequently, we modify trial court's decree to provide for respondent's visitation two weekends each month from 9 a.m. Saturday to 6 p.m. Sunday. Trial court's other provisions regarding visitations shall remain as decreed.

IV. Property Division. Respondent alleges his ability to continue his farming operation is jeopardized by trial court's award of the one sixty-acre tract to petitioner. He proposes a lump sum award to her in lieu thereof. He further maintains trial court's equal division of the property is not warranted.

First, addressing respondent's challenge to trial court's equal property division, we conclude the principles of 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), justify trial court's attempts to divide the property equally.

Respondent relies on several cases, including In re Marriage of Anderson, 243 N.W.2d 562 (Iowa 1976), In re Marriage of Kehrli, 241 N.W.2d 923 (Iowa 1978), In re Marriage of Briggs, 225 N.W.2d 911 (Iowa 1975), and Lessenger v. Lessenger, 261 Iowa 1076, 156 N.W.2d 845 (1968), to support his argument the Iowa Supreme Court has repeatedly expressed a strong preference for allowing farmers to keep their farms. See also In re Marriage of Conley, 284 N.W.2d 220 (Iowa 1979); In re Marriage of Ward, 226 N.W.2d 812 (Iowa 1975); In re Novak's Marriage, 220 N.W.2d 592 (Iowa 1974); In re Campbell's Marriage, 204 N.W.2d 638 (Iowa 1973). We agree. However, each case must be decided on its own facts and we believe trial court's division was equitable in this case. The tract awarded to petitioner is a separate and distinct parcel, as opposed to a portion carved from a single tract; respondent owns eighty additional acres and rents another one hundred twenty acres. He further testified there was a strong possibility of renting land from his father if his father retires. In light of these facts, we are not persuaded respondent's ability to continuing his farming operation will be jeopardized. We also have considered respondent's existing debt structure. The existing mortgage on the sixty acre tract was $63,000. The land was valued between $2850 and $3150 per

acre. Assuming an average value of $3,000 per acre, the fair market value of the tract would be $180,000. This would require respondent pay petitioner approximately $117,000 as a lump sum payment. We do not believe this constitutes a realistic option.

Respondent also argues the award of one-half of the growing crops to petitioner was unfair under the circumstances. In light of his borrowings to finance the crops, his efforts to raise and harvest them, and his need for the income to meet his debt obligations, we find trial court's award inequitable and modify the decree to award the growing crops to respondent. See In re Marriage of Conley, 284 N.W.2d at 223.

V. Child Support Obligations. Respondent requests a reduction in his child support obligations from the $250 per month ordered by trial court to "a sum that is reasonable in light of his earnings, responsibilities, and the court's property disposition." Considering respondent's income in prior years, petitioner's documented needs, and respondent's failure to document his living expenses, we find the child support ordered by trial court is fair and reasonable. See In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). However, in accordance with the February 26, 1980 supreme court mandate, we order respondent has no obligation to pay child support so long as the parties' minor child resides with respondent. In the event the child resumes living with petitioner, respondent's obligation to pay support shall resume effective the first day of the month in which the child's change of residence occurs. Any amounts paid as child support after the child's change of residence shall be credited against any permanent support obligation owed by respondent.

VI. Attorney Fees. Petitioner seeks an award of $3,809.16 in attorney fees incurred by this appeal. In evaluating this request, we consider the needs of petitioner, respondent's ability to pay, and the fact petitioner was obligated to defend trial court's award on appeal. In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). Applying these factors to this case, we conclude petitioner should be awarded $1,200 toward her attorney fees on appeal. Costs of this appeal are taxed to respondent.

Judgment of trial court is affirmed with modifications.

AFFIRMED WITH MODIFICATIONS.