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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF WILLIE H. WILLIAMS AND KATHRYN E. WILLIAMS

Upon the Petition of)
WILLIE H. WILLIAMS,) Filed February 26, 1980
Petitioner-Appellee,)
and Concerning)
KATHRYN E. WILLIAMS,) 364
3-63328
Respondent-Appellant.)

Appeal from Boone District Court - *Edward J. Flattery, Judge.*

Respondent appeals real property division and child custody provisions of dissolution decree. - Affirmed with modification.

Lynn B. Clark, of Coppola, Coppola & Clark, Des Moines, for respondent-appellant.

L. W. Courter, of Doran, Doran, Courter & Quinn, Boone, for petitioner-appellee.

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

OXBERGER, C.J.

Respondent appeals provisions of dissolution decree. We affirm as modified.

The eight-year marriage of respondent, Kathryn E. Williams, and petitioner, Willie H. Williams, was dissolved March 30, 1979. On appeal, Kathryn claims the trial court inequitably divided the couple's real property and improperly awarded Willie custody of the parties' two minor children. Our review of her contentions is de novo. Iowa R. App. P. 4, and we limit our review to the record made below. Kathryn also seeks appellate attorney fees.

I. Real Property Division and Cash Settlement.

Kathryn claims the trial court undervalued the real estate of the parties because it did not include property given the couple by Willie's parents. In reviewing property divisions, we are guided by the factors enunciated 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). The key issue for our determination is whether property given to the couple by Willie's family was intended to be a transfer in fee or in an estate of lesser duration. We find it was a transfer of an estate of lesser duration and affirm the property division of the trial court.

The trial court found that while Willie's parents paid for the thirty-five and one-half acre tract on which the couple's home was built, only two and one quarter acres were set aside for the homestead and the remaining area was to be deeded to the parents after the couple discharged mortgage obligations. The court also found Willie's parents deeded a Minnesota resort property to the couple, but concluded a transfer of full title was not intended. Kathryn attacks those findings claiming the lake property was a wedding gift, the entire thirty-five and one-quarter acres were given to the couple, and no agreements were made that divested them of full title in either.

While our review here is de novo, we give weight to the fact findings of the trial court, especially on issues of witness credibility. Iowa R. App. P. 14(f)(7). We accept the trial court finding the gifts were not intended to be in fee; thus, Kathryn cannot claim ownership rights in the parcels affected by the agreements to reconvey. The trial court equally divided the real estate included in the marital assets and we think that division was appropriate in light of the Schantz criteria.

II. Child Custody.

Kathryn appeals the child custody award of the trial court. In our review, we apply the criteria of In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Under those criteria, we conclude Kathryn is better suited to meet the best interests of the children. She primarily was responsible for the care of the children during the marriage. Willie only had time for the children on weekends and even then did not give them attention they needed. He admitted Kathryn was a good mother; he went as far as to say he would not contest the awarding her of custody if she would be as good a mother as she was prior to the marital difficulties. During the period between the party's separation and dissolution, Kathryn had custody of the children and demonstrated her desire and ability to meet their needs. On the whole, the best interests of the children would be served by awarding her custody of the children. We modify that provision of the decree and remand for determination of appropriate child support and visitation provisions.

III. Attorney fees.

Kathryn seeks an award for attorney fees incurred on appeal. Attorney fees are not recoverable as a matter of right in a dissolution proceeding and such allowance depends on one spouse's financial needs and the other spouse's ability to satisfy them. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). Without determining the amount Kathryn's attorney may charge, we order Willie pay $650 toward her appellate attorney fees. Costs of appeal shall be taxed to Willie. See In re Marriage of Peterson, 227 N.W.2d 139, 143 (Iowa 1975).

The trial court decree is affirmed as modified and the matter remanded for entry of provisions consistent with this opinion.

AFFIRMED AS MODIFIED.

Donielson and Carter, JJ., concur in part and dissent in part.

DONIELSON, J. (concurring in part, dissenting in part)

I dissent from Division II of the majority opinion. The question presented is what parent can minister more effectively to the children's best interests. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). Using the criteria set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), the trial court determined Willie was better suited to care for the children and awarded him custody. The trial court was particularly concerned with Kathryn's lack of stability and emotional maturity.

After carefully reviewing the record, I cannot find that she established a superior claim to custody as being a better parent than Willie. The fact Kathryn cared for the children for eight years and Willie stated she was a good mother are entitled to some weight, but not to the degree apparently given by the majority. Willie also demonstrated his ability to care for the children during Kathryn's frequent absences from the home. The question facing the trial court and this court is what parent currently is better able to serve the future best interests of the children. While during the marriage Willie's job as a plumber required he be away from home during the week, he is seeking to maintain employment near his home so he can be home every evening. Although past events are probative of future conduct, the trial court must give greater credence to the current status of the parties before it. Here, the trial court found Willie better able to serve the children's future best interests. There is certainly not enough evidence to justify reversal of the trial court's judgment. Under such circumstances, the scales should be tipped in favor of Willie by our rule giving weight to the trial court's findings concerning the children's best interests. McDowell, 244 N.W.2d at 239. I would not disturb the trial court's custody decree.

Carter, J., joins in this dissent.