FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ELLEN ANN JOHNSTON
AND JAMES THOMAS JOHNSTON

'76

Upon the Petition of	)	
ELLEN ANN JOHNSTON,	)	
Petitioner-Appellee,	)	Filed June 29, 1982
And Concerning	)	
JAMES THOMAS JOHNSTON,	)	2-194 3-67436
Respondent-Appellant.	)	

Appeal from Des Moines District Court - John C. Miller, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage, asserting: (1) that he should have been awarded custody of the parties' three children; (2) that he should have been awarded the parties' house; and (3) that if the trial court properly awarded petitioner wife the house and respondent husband a lien on the house payable when any one of several contingencies occurred, it should have specified as one of the contingencies petitioner's moving out of the house, and it should have provided for 10% compounded rather than 9% simple interest on the lien. Petitioner wife requests attorney fees on appeal. AFFIRMED AS MODIFIED.

Michael C. Dieterich of Pryor, Riley, Jones & Aspelmeier, Burlington, for respondent-appellant.

Steven R. Hahn of Dailey, Ruther, Bauer, Schulte & Hahn, Burlington, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIELSON, J.

Respondent husband appeals from the decree dissolving the parties' marriage, asserting: (1) that he should have been awarded custody of the parties' three children; (2) that he should have been awarded the parties' house; and (3) that if the trial court properly awarded petitioner wife the house and respondent husband a lien on the house payable when any one of several contingencies occurred, it should have specified as one of the contingencies petitioner's moving out of the house, and it should have provided for 10% compounded rather than 9% simple interest on the lien. Petitioner wife requests attorney fees on appeal. We affirm as modified.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend upon the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I.

Petitioner Ellen Ann Johnston and respondent James Thomas Johnston were married in 1971. They have three children: Jennifer, born in 1974; Elizabeth, born in 1977; and Emily, born in 1979. Both parties are trained as teachers. At the time of the trial, James was working as a salesman for a pallet company, and Ellen was unemployed. There was conflicting testimony at trial as to the parenting abilities of each party.

The parties own a house on an acre of land in rural Des Moines County.

James' parents contributed about $15,000 to help finance the building of the house. The land was a gift from Ellen's parents and it is bordered on three sides by their land. At the time of the trial, the house was valued at $69,000 and the parties had about $35,000 equity in it.

The trial court awarded custody of the parties' three daughters to Ellen. James was directed to pay $95 per week child support. The trial court awarded Ellen the parties' house, and James a $22,000 lien on the house, which was to become due only if the house was sold, James' support obligation was terminated, or Ellen remarried, or began living with a man. The lien was to draw 9% simple interest until paid in full. Ellen was to be responsible for making the mortgage payments on the house. The trial court also awarded Ellen personal property valued at about $13,000 and James personal property valued at about $18,000. Each party was awarded the insurance on his or her life, and James was directed to pay $1,000 toward Ellen's attorney fees.

II.

Respondent asserts the trial court erred by awarding permanent custody of the minor children to petitioner.

Our first and governing consideration in determining custody is the best interests of the children involved. Iowa R. App. P. 14(f)(15). With this in mind, we note further that the status of children should be quickly fixed and, thereafter little disturbed. In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974). In deciding the custody issue, we seek neither to punish one parent nor reward the other. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). There is no inference favoring one parent as opposed to the other in deciding which is the more fit custodian except that arising from the particular facts of the case. Bowen, 219 N.W.2d at 688. Factors relevant to the custody determination are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), with the

ultimate question being, based on the entire record, which of the parents can minister more effectively to the long-range best interests of the children. Id.; Iowa R. App. P. 14(f)(15). We conclude in the instant case that that parent is the petitioner mother.

We agree with the trial court's finding that "neither party would appear in any sense unfit as a custodial parent for the parties' three minor children." The record indicates both parties are concerned and loving parents. It appears that while the child rearing duties were to some extent shared during the marriage, it would not be unfair to say the petitioner shouldered the bulk of the responsibility for day-to-day care of the home and children. The only arguably negative evidence as to petitioner's suitability as the custodial parent is her behavior in attempting to prevent respondent from exercising his court ordered custody and visitation rights while the dissolution was pending. This behavior was reprehensible, however, we believe it was temporary and will not prevent petitioner from being an adequate custodial parent. We, therefore, affirm the trial court's award of custody to the petitioner, but we also caution her that in the future, full compliance with the liberal visitation schedule decreed by the trial court is imperative in order to avoid being in contempt of court. Even more importantly, full compliance is necessary to afford the children an opportunity to continue the good relationship they have with their father.

III.

Respondent's remaining allegations of error all concern the trial court's award of the family home to petitioner and the specific terms of the award. We find the trial court was correct to award the parties' home to petitioner; however, we modify the award in two respects: (1) respondent shall be paid interest at the statutory rate of 10%, see section 535.3, The Code 1981; In re Marriage of Steenhoek, 305 N.W.2d 448, 454 (Iowa 1981); (2) if petitioner vacates the home or

rents it to a third party, the home is to be sold and the proceeds used to pay respondent the full amount of his lien plus accumulated interest. In all other respects the trial court's property division is affirmed.

IV.

Finally, petitioner asks for attorney fees incurred in this appeal. Such an award depends upon the relative financial circumstances of the parties. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). We find an award of attorney fees is unwarranted in this case. In addition, we order that the parties are to be equally responsible for the costs of this appeal.

AFFIRMED AS MODIFIED.