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CLERK SUPREME COURT

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IN THE IOWA COURT OF APPEALS

IN RE THE MARRIAGE OF LUANNA F. BROWN AND KEITH W. BROWN

Upon the Petition of)
LUANNA F. BROWN,) Filed May 26, 1981
Petitioner-Appellant,)
And Concerning)
KEITH W. BROWN,) 1-23
3-64962
Respondent-Appellee.)

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

Petitioner wife appeals child custody, child support, and visitation provisions of the parties' dissolution decree. AFFIRMED AND REMANDED.

Patricia M. Hulting of Olvera & Hulting, Muscatine, for petitioner-appellant.

Gregory A. Johnston of Drake & Petersen, Muscatine, for respondent-appellee.

Heard by Donielson, Acting C.J., and Snell, Carter, and Johnson, JJ. Considered en banc.

DONIELSON, J.

Petitioner Luanna Brown appeals provisions of the parties' dissolution decree that award child support and custody of their only child to respondent Keith Brown. She also challenges a restriction placed upon her visitation rights. Both parties request attorney fees for this appeal. We affirm the decree but remand for a more specific determination of petitioner's visitation rights.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4.

I.

The ten-year marriage of the parties was dissolved on April 25, 1980. Custody of the parties' five-year-old son was awarded to the respondent; petitioner has custody of two children, ages eleven and twelve, from a former marriage. The decree awarded the family's rural homestead to the respondent and required him to pay $14,000 to reimburse the petitioner for her equity therein. The trial court also directed the petitioner to pay $35 per week in child support to the respondent and provided that the petitioner should have liberal visitation rights, including overnight visits with the child two times per month.

Respondent, who was 36 at the time of the decree, is an electrician for a grain processing company and grossed over $19,000 in 1979. He works standard daytime hours. Petitioner, who was 30 at the time of the decree, grossed over $21,000 in 1979 from her job as a crane operator. Her work schedule is somewhat irregular, being based on a four-week recurring cycle and alternating between day and night shifts; her days off fall frequently on weekdays rather than weekends.

II.

Our first and governing consideration in determining custody is the best interests of the child 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 respondent father.

Although the trial court noted that either party was fit to have custody, it concluded that the best interests of the child required an award of custody to the respondent father. Our review of the record in light of the Winter criteria reveals no reason to disagree with this conclusion. The trial court's award of custody to the respondent was based on the facts that the child began to exhibit disturbed behavior patterns before the dissolution when he realized that his mother was involved with another man, that the respondent lives in a better neighborhood, and that the respondent has a much more stable work schedule than the petitioner. We would also note that the respondent has made suitable arrangements for child care and that he is interested in the religious development of his child. Moreover, it was the opinion of the trial court that the respondent is a more stable person and better able to place family responsibilities before his own personal desires; while our review is de novo and we are thus not bound by the findings of the trial court, we may give weight to those findings, especially when they involve the trial court's assessment of witness demeanor and credibility. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). Finally, although it is certainly not controlling, evidence of the petitioner's extramarital affair merits serious consideration, particularly when it impacts on the child. In re Marriage of Morton, 244 N.W.2d 819, 821-22 (Iowa 1976). All things considered, we agree with the trial court that an award of custody to the respondent is in the best interests of this child.

III.

The petitioner next contends that the trial court erred in awarding respondent $35 per week in child support because no child support was requested. However, we are mindful that our main concern is the best interests of this child and we will not jeopardize those interests because the child's father did not ask for child support. See In re Marriage of Vrban, 293 N.W.2d 198, 203 (Iowa 1980) (child support award not improper or excessive merely because it exceeded the amount requested); Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973) (agreement injurious to child's best interests will not be upheld); Gerk v. Gerk; 259 Iowa 293, 298, 144 N.W.2d 104, 108 (1966) (father's agreement with mother will not relieve him of duty to support his minor children).

Applying the criteria set forth in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974), we find no abuse of discretion in the trial court's decision to award the respondent $35 per week in child support.

IV.

Petitioner also alleges that the trial court was not acting in the best interests of the parties' son when it restricted her overnight visitations with the child in her home to two per month. We think the restriction is inappropriate and modify the decree to allow two visits per month, each one to consist of two overnight visitations if that can be accomplished without substantial disruption to the parties. We also remand to the trial court for a more specific determination of petitioner's visitation. While we are in agreement with the trial court's conclusion that visitation with the child should be liberal, we note that specific arrangements are required here because the parties have had great difficulty in the past in making satisfactory arrangements on their own.

V.

Finally, petitioner appeals from the trial court's refusal to grant her request for attorney fees. Attorney fees are not recoverable as a matter of right in a dissolution proceeding. In re Locke, 263 N.W.2d 694, 696 (Iowa 1978); In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). The determinative factors are need and ability to pay. Locke, 263 N.W.2d at 696; In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The trial court has considerable discretion in allowing attorney fees. Locke, 263 N.W.2d at 696; In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). From our review of the record, we cannot conclude that the trial court abused its discretion in refusing petitioner's request for attorney fees.

Both petitioner and respondent have requested attorney fees incurred in this appeal. In evaluating such a request, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Erickson, 228 N.W.2d 57, 59 (Iowa 1975); In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). We do not find that the circumstances justify an award of appellate attorney fees to either party.

Costs are assessed equally to the parties.

AFFIRMED AND REMANDED.