



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF THOMAS LEE DeVORE AND TERRY L. DeVORE

UPON THE PETITION OF
THOMAS LEE DeVORE,

Petitioner-Appellant,

AND CONCERNING
TERRY L. DeVORE,

Respondent-Appellee.

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Filed June 28, 1983

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3-68914

Appeal from Appanoose District Court, Phillip R. Collett, Judge.

Petitioner-husband appeals from the decree dissolving the parties' marriage. On appeal petitioner argues that the trial court should not have awarded custody of the parties' two children to respondent, that the property division and the child support and alimony awards are inequitable, and that the trial court should have granted petitioner's request for a new trial. AFFIRMED AND MODIFIED.

Thomas P. Hyland and Thomas P. Schlapkonl of Hyland, Laden & Pearson, Des Moines, for petitioner-appellant.

Harland M. Hockett of Flagg, Hockett, Benhart & Bittner and Thomas L. Anders, Des Moines, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Petitioner-husband appeals from the decree dissolving the parties' marriage. On appeal petitioner argues that the trial court should not have awarded custody of the parties' two children to respondent, that the property division and the child support and alimony awards are inequitable, and that the trial court should have granted petitioner's request for a new trial. Respondent-wife requests attorney fees on appeal. We affirm the decree's provisions concerning custody and child support and modify the provisions concerning the property settlement and alimony award.

Petitioner Thomas L. DeVore and respondent Terry L. DeVore were married in October 1970. They have two children: Lisa, born in 1971, and Aime, born in 1975. Thomas works at his father's car dealership; he earns \$1,655 per month. Terry is trained as a secretary but was not working at the time of the trial.

The trial court found that either party would be a suitable custodial parent. It awarded custody to Terry and directed Thomas to pay \$100 a week child support, \$300 per month alimony for five years after the decree, and \$3,000 toward Terry's attorney fees.

The trial court awarded Terry the parties' Mazda, all their household goods, and half their federal and state income tax refunds. It directed her to pay debts of \$2,472. The trial court awarded Thomas the cash value of the parties' life insurance policies, his checking account, his retirement fund, and half the parties' federal and state income tax refunds. It directed him to pay debts of \$16,816.

The trial court awarded Terry possession of the parties' house until the parties' children were grown. Terry was to make the mortgage payments and pay the taxes while she occupied the house. When the parties' children were grown,

the house was to be sold and the net proceeds equally divided.

After the findings and conclusions were entered, Thomas filed a motion for new trial, asserting that the trial court's findings on custody, child support, alimony and the division of property were not supported by the record, and that remarks by the judge in chambers during the pretrial conference and after the first day of trial indicated a negative attitude toward dissolution of marriage cases, a preconceived notion of custody, and a feeling that the case was taking too much time. After a hearing, the trial court denied the motion and entered the dissolution decree.

I. Scope of Review

Our scope of review in dissolution cases is de novo. Iowa R. App. P. 4; Iowa Code § 598.3. We review the entire record and adjudicate the rights of the parties anew on issues properly presented. While we accord weight to the findings of the trial court, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974).

II. Custody

The sole concern of this court in making child custody determinations is the long-term best interests of the children. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). We are not guided by any predisposition that minor children should be awarded to one parent or the other, nor do we utilize custody decisions to penalize either party for prior moral indiscretions. Each party's past incidents of indiscretion interest us only to the extent that they bear on that party's respective fitness to provide for the children's needs.

The factors bearing on the determination as to which parent will better provide for the children's needs are enumerated in In re the Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). They need not be reiterated here.

Petitioner argues that the trial court's award of custody to respondent defies the sheer weight of the evidence. We do not agree. Certainly the record is replete with accusations and insinuations of sexual indiscretion and alcohol abuse on the part of respondent. However, petitioner's record in these matters does not appear to be any more enviable.

We do not accord a great deal of weight to the recommendation of Dr. Patrick Sullivan, a psychologist who, on the basis of a psychological evaluation of both parties, gave the "nod" to petitioner. Dr. Sullivan's recommendation was based upon a handful of relatively brief conversations with the parties which took place in his office, and upon the scores of the parties' MMPI tests (which, in fact, demonstrated remarkably similar psychological profiles). More important, Dr. Sullivan's recommendation was qualified by his testimony that the decision as to which party should be granted custody was a close one.

Our review of the record indicates that the decision is indeed a close one. While both parties have their failings, we are convinced that each is capable of effectively ministering to the long-term best interests of the children. The children are currently in respondent's custody. The record indicates that they are normal, healthy and well adjusted, and are being well cared for. "[W]hen it appears children are happy, well adjusted, adequately disciplined, and receiving proper care in a suitable home they should not be removed therefrom other than for the most persuasive causes." Schoonover, at 34. Under the circumstances, the best interests of these children would not be served by uprooting them from their present home.

III. Division of Property

The division of property pursuant to a dissolution of marriage is governed by Iowa Code § 598.21(1). That section provides that all property, except inherited property or gifts received by one party, should be divided equitably in light of

certain factors, including the length of the parties' marriage, their ages, their respective earning capacities, and the property brought into the marriage by each party. Petitioner argues that the division of property effectuated by the trial court was inequitable. We agree.

Petitioner and respondent were married for eleven years. They are each in their early thirties and in good health. Neither party owned any substantial property at the time they were married. At the time of dissolution, their net worth was \$22,117.

The trial court distributed the parties' assets and debts in the following manner:

To petitioner:		
<u>Assets</u>		
1/2 equity in home	11,052	
Life insurance cash value	2,899	
Checking account	200	
Retirement program	5,665	
1/2 tax refund	1,069	
	<u>20,885</u>	
		20,885
<u>Liabilities</u>		
Iowa Trust note	3,125	
Real estate taxes	1,588	
Mastercard (his)	800	
Doctor's bill	50	
Student loan (hers)	4,500	
Note to petitioner's mother	4,550	
Loans on policies	2,203	
	<u>16,816</u>	
Net award		<u>4,069</u>

To respondent:

Assets

1/2 equity in home	11,052	
All household furnishings	6,000	
1/2 tax refund	1,068	
Automobile	2,400	
	<u>20,520</u>	20,520

Liabilities

Note on auto	1,900	
Penneys charge	100	
Mastercard	300	
Loan from mother	172	
	<u>2,472</u>	2,472
Net award		<u>18,048</u>

Respondent argues that these figures do not include \$17,700 in proceeds from the Iowa Trust note, the note to petitioner's mother, the loans on insurance policies, and the sale of petitioner's boat. It is respondent's position that these proceeds should be included among the assets petitioner received. The problem with respondent's argument is that, at the time the property division was effected, the funds in question had long since been depleted to satisfy some of petitioner's other obligations. These funds therefore cannot be given marital asset character.

The property division ordered by the trial court resulted in petitioner receiving only 18.4 percent of the net marital property. We are of the opinion that a more equal division is required. we therefore modify the trial court's property division in the following manner: Petitioner shall receive, in addition to what the trial court awarded him, the other half of the income tax refund (\$1,068). Respondent shall assume, in addition to the liabilities imposed on her by the trial court, the obligation to repay her student loan (\$4,500) and the obligation to pay the real estate taxes (\$1,588). As a result of this modification, petitioner's net share is now \$11,225, and respondent's net share is \$10,892.

IV. Child Support and Alimony

Petitioner argues that the child support and alimony awards are inequitable because he cannot afford to pay what the decree orders. He asks us to reduce either his alimony or his child support obligation.

Provisions for granting child support and alimony are contained in Iowa Code Code § 598.21. § 598.21(4) requires the trial court to make such orders concerning child support as is justified in each particular instance. While the primary concerns in support determinations are the needs of the children, the court must consider the financial resources of each parent. As a rule, parents bear equal responsibility for the support of their children, and any disparity in the amount of their respective support obligations must be attributable to a disparity in their respective ability to contribute. In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1976).

There is no absolute right to the payment of alimony. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Rather, an award of alimony depends upon the obligor's ability to pay and the recipient's earning capacity, among other things. See Iowa Code § 598.21(3).

In the present case, petitioner was ordered to pay \$50 per week per child as support, and \$300 per month as alimony. Petitioner has a fixed net monthly income of \$1,145. His living expenses total about \$650 per month, leaving him with approximately \$500 with which to meet his obligations under the decree. It takes no great mathematical exercise to figure that petitioner does not have the financial resources to meet both his support and alimony obligations. We note that respondent has demonstrated the ability to earn about \$800 per month and, although she is contemplating going back to school, she can still work on a part-time basis. We therefore order that petitioner's alimony obligation be reduced to \$100 per month. The child support order in the trial court's decree is affirmed.

V. New Trial

Petitioner contends that the trial court erred in failing to grant his motion for a new trial. Petitioner claims that comments made by the trial court off the record indicated that the court was biased, and allowed preconceived notions to affect its judgment. Petitioner has failed to file a bill of particulars, as required by Iowa R. Civ. P. 241, which would have made his allegations concerning the court's alleged statements a part of the record. Without such a bill of particulars, we do not have a sufficient record upon which to determine this issue. We do note that the trial court responded to the allegations of bias by denial in open court to petitioner and his counsel, and by characterizing his comments as banter. In any event, we have decided this case by de novo review.

VI. Fees and Costs

Respondent has requested that we award her attorney fees and costs on appeal. In support of her request, she has given us an itemized statement detailing those fees and costs. Such an award may be granted depending upon the parties' respective abilities to pay. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). Considering the respective financial condition of both parties, we hereby order petitioner to pay respondent the sum of \$2000 toward her attorney fees. Costs are assessed to each respective party.

AFFIRMED AS MODIFIED.