

IN THE COURT OF APPEALS OF IOWA

No. 0-663 / 90-584

**FILED**

**APR 23 1991**

**CLERK SUPREME COURT**

**IN RE THE MARRIAGE OF NANCY S. GRAVES AND WILLIAM A. GRAVES**

Upon the Petition of

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**NANCY S. GRAVES,**

Appellee/Cross-Appellant,

And Concerning

**WILLIAM A. GRAVES,**

Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Wapello County,  
James Reilly, Judge.

Husband appeals the alimony and attorney fees provisions of the decree of dissolution and wife cross-appeals challenging the provision placing the physical custody of their children with the husband, the insufficiency of her attorney fee award and requesting appellate attorney fees. **AFFIRMED IN PART AND REMANDED.**

Craig S. Shannon of Grefe & Sidney, Des Moines, for appellant.

John N. Moreland of McKay, Moreland & Webber, P.C., Ottumwa, for appellee.

Considered by Oxberger, C.J., and Donielson, Hayden, Sackett, and Habhab, JJ. Schlegel, J., takes no part.

**DONIELSON, J.**

Nancy Graves and William (Bill) Graves were married in July 1977. They are the parents of two children, Craig, born October 23, 1982, and Kathryn, born January 26, 1985.

Bill and Nancy met while attending the University of Wisconsin at Platteville. Bill graduated with a Bachelor of Science Degree in agricultural engineering in December 1976. Upon graduation, Bill became employed as a design engineer with the John Deere Company at the Ottumwa, Iowa, facility.

Although she did not receive a degree, Nancy attended the University of Wisconsin at Platteville from 1972 through 1975. She then transferred to Northeast Wisconsin Technical Institute at Green Bay where she became certified as a dental hygienist.

After the parties' marriage in 1977, Nancy commenced working as a dental hygienist. Nancy has continued to work throughout the marriage except for short periods at the births of the children and for four months when the family lived in Dixon, Illinois.

In September 1987, Bill attempted to change careers. He left his position at John Deere in which he was making an annual salary of approximately \$55,000 and took a position with Edward D. Jones and Company in Green Bay, Wisconsin, as an investment representative. Nancy supported Bill in his decision to change careers.

From January through November 1988, Bill earned approximately \$18,000 from his employment with Edward D. Jones and Company. Bill felt his employment as an investment representative was not working out and he left that employment at the end of November 1988. Within two weeks after leaving his job as an investment representative, Bill obtained employment as an engineer in Dixon, Illinois, and the family moved to Dixon. After four months, Bill secured a position at the John Deere facility in Ottumwa at an annual salary of \$57,000 and the family returned to Ottumwa.

In August 1989, Nancy moved from the family home. The children remained in the family home with Bill. Nancy enrolled at the University of Wisconsin in Platteville and in January 1990 she began studies in the engineering program. Nancy currently lives in an apartment in Platteville and attends the University as a full-time student. She works approximately eight hours per week as a dental hygienist, earning \$15 per hour.

The children continue to reside with Bill. The record reflects the children are well-adjusted, healthy and happy.

The district court filed a decree of dissolution for the parties on March 27, 1990. The decree divided the marital property approximately in half and placed the children in the parties' joint legal custody and in Bill's physical care. Additionally, the decree ordered Bill to pay Nancy \$1,500 per month in alimony until October 1993,

when she is expected to have completed her education, and \$600 toward Nancy's attorney fees. Bill appealed and Nancy cross-appealed.

Bill challenges Nancy's alimony award as being excessive. Bill appears to feel that because Nancy completed three years of college before the marriage he should only pay for her to complete a degree in her original field of study. He asserts Nancy does not need rehabilitative alimony because she has the earning capacity to support herself at the present time.

Bill also claims the court erred in requiring him to pay \$600 of Nancy's attorney fees. He argues Nancy is financially capable of paying her own attorney fees.

In her cross-appeal, Nancy contends she should have been awarded physical care of the children because she was the primary caretaker of the children throughout most of the marriage. Nancy also contends the court erred in awarding her only \$600 in attorney fees considering the relative incomes of the parties. Nancy seeks attorney fees for this appeal.

**Scope of Review.** In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering

the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Custody of the Children. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Both parties appear to love their children and both seem capable of providing adequately for the children's needs. The trial court found in May 1989 Nancy was physically and emotionally exhausted. She could not cope with her relationship with Bill, or with the children. During May through August of 1989, Nancy stayed at home and rested. In August 1989, she told Bill she felt she should separate herself from the family for a period of time. She

moved alone into an apartment. In the late fall of 1989, Nancy decided she should return to college.

Since August 1989, Bill has been the primary care giver for the children. The children are well-adjusted, healthy and doing well. We find no reason to disturb the decision Nancy and the trial court made.

Alimony. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

Rehabilitative alimony assists an economically dependent spouse through the limited period of re-education or retraining following divorce. In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989)(authorities omitted). "Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouse." Id. at 64 (citation omitted).

Nancy's highest yearly income during the marriage came in 1989 and was approximately \$12,670. Bill's highest yearly income was also in 1989 and was approximately \$62,700. Nancy introduced some testimony that she

eventually may be unable to continue working full-time as a dental hygienist because of some medical problems existing in her hands and hip.

Bill admits Nancy spoke about her desire to return to college and receive a degree throughout the marriage, but argues he should not be responsible for Nancy's educational expenses with respect to any dramatic career changes. We disagree, especially in light of the fact Nancy supported and encouraged Bill in his attempt to change careers. We also give consideration to the statement of Dr. C. L. Steidinger that Nancy should give serious consideration to an occupational change due to the orthopedic problem with her right arm. Although Nancy currently has the ability to earn money as a dental hygienist, it appears she will be capable of earning considerably more money as an engineer thereby leading to her increased financial security. Therefore, we affirm the award of alimony in the amount of \$1,500 per month.

However, we conclude the trial court inappropriately concluded Nancy need not contribute to the support of her children while she pursues her engineering degree. We therefore remand to the district court for a determination of Nancy's child support obligation pursuant to the September 1989 child support guidelines -- as applied to her total income, including alimony. Nancy's child support obligation will also be subject to reconsideration at a later date when her income has stabilized.

**Attorney Fees.** An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974). We find the trial court's award to Nancy of attorney fees appropriate and we refuse to alter it. Further, the trial court did not abuse its discretion by ordering Bill to pay all court costs.

When a party requests appellate attorney fees, 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We do not award Nancy appellate attorney fees.

Costs of this appeal are taxed one-half to each party.

**AFFIRMED IN PART AND REMANDED.**

All judges concur except Oxberger, C.J., who dissents.

**OXBERGER, C.J.** (dissenting)

I respectfully dissent.

I would affirm the trial court.