FILED
JAN 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-546 / 91-500

IN RE THE MARRIAGE OF CYNTHIA S. HOWE AND DONALD E. HOWE

Upon the Petition of

CYNTHIA S. HOWE,

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Petitioner-Appellee/Cross-Appellant,

And Concerning

DONALD E. HOWE,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Boone County, M.D. Seiser, Judge.

Both parties appeal a dissolution decree. **AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.**

Dorothy L. Dakin, Boone, for appellant/cross-appellee.

David W. Benson of Smith, Nutty, Sharp, Benson & Jahn, Ames, for appellee/cross-appellant.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

PER CURIAM

This is an appeal and cross-appeal challenging the custody and economic provisions of a dissolution. Respondent-appellant Donald Howe contends (1) physical care of the parties' two sons, born in 1984 and 1987, should have been placed with him and not with petitioner-appellee Cynthia Howe, and (2) the trial court overstated his income and misapplied the child support guidelines. Cynthia contends (1) the child support award should be increased, and (2) a cost of living adjustment formula should be incorporated into the child support award. Cynthia also seeks to require Donald pay $1,000 toward her attorney fees.

I.

Donald contends the children's long-range interests would best be served by placing their physical care with him. Our review is de novo. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984).

In determining custody, it is important to place the children with a parent who has shown an ability to cooperate with the other, and who does not try to interfere with the other parent's relationship with the children. In re Marriage of Downing, 432 N.W.2d 692, 694 (Iowa App. 1988). An award of custody should take into consideration which parent is better able to put their personal feelings aside to permit the parties' children to develop a

relationship with the other parent. In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983). The court has a duty to place children where a satisfactory relationship between them and both parents will most likely be accomplished. Downing, 432 N.W.2d at 694. Courts must act to prevent wounds from being inflicted on children and should not wait until injury occurs. In re Marriage of McCreary, 276 N.W.2d 399, 402 (Iowa 1979) (citing Zaerr v. Zaerr, 222 N.W.2d 476, 478 (Iowa 1974)). We give consideration to the trial court's assessment as to credibility of witnesses. See Vrban, 359 N.W.2d at 423.

Cynthia, who was pregnant with the parties' oldest child, was twenty-two and Donald was twenty-three when they were married. Due to economic conditions, the parties lived with both sets of parents during the early years of their marriage. Cynthia was not employed outside the home from the time of the older child's birth until July 1989. By the time they separated both were employed outside the home, they had purchased a home and were no longer dependent on their parents.

Cynthia contended Donald choked her and threatened to kill her about the time of separation. Donald denied any such action.

Both parents function at a normal level and have the ability to adequately care for the children. The pivotal question of which parent is better is not easily answered.

The trial court had the benefit of the opinions of two professed experts on custody issues. One, a PhD and psychologist, interviewed Cynthia, Donald, and the children, and was of the opinion the children should stay with their mother because a move would be stressful. The second expert, the holder of a PhD in Clinical Psychology, reviewed the records and met with Donald and the children, but not with Cynthia. He was of the opinion Donald should be the custodian.

Cynthia's case focused on her position as primary parent and a disputed physical attack on her by Donald near the time of the separation. Cynthia is an only child and maintains an extremely close relationship with her mother. This has been a source of frustration to Donald. Cynthia was the party who wanted out of the marriage and has a derogatory attitude toward Donald, which attitude has been conveyed to the children.

There is a question of Donald having engaged in assaultive behavior on two occasions, but there is no evidence of any such behavior toward the children or in their presence. The children exhibit no fear of their father. Donald has established a relationship with an unmarried, childless woman from a large family. She is supportive and has excellent abilities to coparent the children. The issue is very close. We affirm the trial court.

II.

The second issue is whether the trial court properly computed the parties' net income as defined by the guidelines. Donald contends the trial court's computation included overtime pay and pay from the Army, which is not guaranteed. He also contends the trial court did not consider the tax credit Cynthia will receive for child care and failed to consider state income tax on military pay.

Cynthia does not respond to these arguments except to argue the computation was correct.

We have determined overtime pay should not be considered income for the purpose of the guidelines. See In re Marriage of Close, ___ N.W.2d ___, ___ (Iowa App. 1991). We remand to the trial court to reconsider child support without including overtime pay. We do not retain jurisdiction.

Cynthia contends the dissolution decree should have included a cost of living increase. We disagree.

Cynthia seeks $1,000 for her attorney fees and the costs of this appeal. 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). We consider the needs of the party making the request, the ability to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. In re

Marriage of Williams, 449 N.W.2d 878, 883 (Iowa App. 1989). We deny Cynthia's request.

AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.

Oxberger, C.J., and Schlegel, J., concur; Sackett, J., partially concurs.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm the trial court in all respects. I believe that Donald's overtime pay should be considered in computing child support for the reasons set forth in my dissent in In re Marriage of Close, ___ N.W.2d ___ (Iowa App. 1991).