

IN THE COURT OF APPEALS OF IOWA

No. 8-052 / 97-1487

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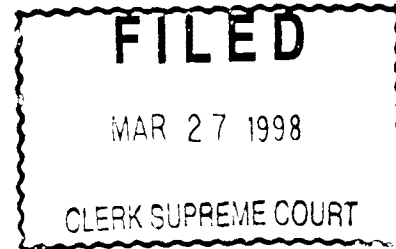
**IN RE THE MARRIAGE OF CYNTHIA J. BEYER
AND THOMAS J. BEYER**

**Upon the Petition of
CYNTHIA J. BEYER,**

Petitioner-Appellee,

**And Concerning
THOMAS J. BEYER,**

Respondent-Appellant.



Appeal from the Iowa District Court for Mitchell County, Paul W. Riffel,
Judge.

Thomas Beyer appeals from provisions of the district court decree dissolving
the parties' marriage. **AFFIRMED.**

DeDra Schroeder-McCarty of Schroeder Law Office, Charles City, for
appellant.

Mark L. Walk of Dunkelberg, McKinley, Folkers & Walk, Osage, for appellee.

Heard by Cady, C.J., and Sackett and Mahan, JJ.

MAHAN, J.

Thomas Beyer appeals the provisions of the parties' decree of dissolution and Cynthia Beyer cross-appeals. Thomas contends the trial court erred in: (1) awarding Cynthia primary physical care of the parties' minor children; (2) dividing the marital assets; (3) awarding Cynthia alimony; and (4) awarding attorney fees. Cynthia alleges the trial court erred in determining Thomas's child support obligation. She also requests increased alimony, an increase in attorney fees, and appellate attorney fees. We affirm.

Thomas and Cynthia married in June 1977. They have three children, only two of which are minors. Andrew is fourteen and Daniel is twelve. Cynthia is forty and Thomas is forty-one. Thomas is a supervisor at Wallace Computer Services and operates a gun business. Cynthia works part-time as a waitress earning \$4 per hour and is a trained taxidermist and operates a taxidermy business. Cynthia's gross receipts for 1995 and 1996 totaled \$787. Cynthia also has training to be a correctional officer, having worked at a county jail until she was terminated for poor performance.

At the hearing, several witnesses testified for both parties. The major issue at the hearing was which of the two would have primary physical care of the two minor children. The trial court determined Cynthia could better provide for the children's best interests.

I. STANDARD OF REVIEW. Our review of this equitable proceeding 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. 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).

II. PRIMARY PHYSICAL CARE. Thomas contends the trial court incorrectly determined Cynthia should have primary physical care of the children. He believes she does not demonstrate the appropriate morals to the children. Cynthia admits she signed Thomas's name to a Federal Firearms License without his permission; bought beer one time for John, their oldest son; forged Thomas's name on a cellular phone application; got a key to Thomas's post office box without his permission; enlisted the children's help in sorting through the mail to take certain items out so Thomas would not find them; and used inappropriate language in front of the children. Thomas also alleges Cynthia had affairs. He claims he once found lingerie underneath the seat in Cynthia's van.

Cynthia does not appear to deny the allegations, except for the contention she had an affair. Instead, she notes Thomas was present when John consumed the alcohol. She also claims Thomas had problems with swearing and violence. Cynthia dismisses signing Thomas's name as something that happens in most marriages. She notes John's testimony regarding an incident where Thomas struck Cynthia. She

places strong emphasis on the fact she was the primary caretaker of the children for a majority of the marriage, while Thomas was either at work or out hunting or fishing on weekends. She contends the trial court weighed the credibility of the witnesses and correctly awarded her primary physical care.

The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *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). The issue in determining the best interests of the children 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). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

We have previously recognized domestic abuse as a factor in determining the custodial parent. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997); *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995); *In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa App. 1994); see also Iowa Code § 598.41 (1995).

We note this is a close case. In cases like this, it is important to see the parties and judge their credibility. The determination of which party is telling the truth depends largely upon credibility. The trial court was in a better position to make this determination. We affirm the ruling of the trial court.

III. DIVISION OF MARITAL ASSETS. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997). The courts are not bound to achieve a precisely equal division in awards of marital property. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App. 1997). The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1995). *Id.* We find the values placed on the assets by the trial court to be within the permissible range of evidence and will not disturb them on appeal. See *In re Marriage of McKamey*, 522 N.W.2d 95, 97 (Iowa App. 1994).

IV. ALIMONY. Thomas argues the trial court erred when it awarded Cynthia \$300 per month for three years as rehabilitative alimony. He contends, in light of the unequal property settlement and the fact he and Cynthia have similar educational backgrounds, the trial court should not have awarded Cynthia any alimony. Thomas alleges Cynthia has the capacity to earn more than she currently does, and he should not be penalized for Cynthia's immaturity and irresponsibility.

Cynthia argues she has been out of the job market for several years. She contends the parties agreed Cynthia would be a stay-at-home mom. Thus, she has no job skills and no employment future and is forced to work for minimum wage while Thomas's income continues to rise. Cynthia requests alimony be increased to \$500 per month for five years to allow her to obtain an education and earn a higher income.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Eastman*, 538 N.W.2d 874, 876 (Iowa App. 1995). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994) We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996). The court may consider the amount of child support ordered under the decree when determining if spousal support is to be awarded and, if so, the appropriate amount of the award. *Will*, 489 N.W.2d at 400.

We find the trial court's award of \$300 per month for three years to be equitable under the circumstances.

V. ATTORNEY FEES. Iowa trial courts have considerable discretion in awarding attorney fees. *Gonzalez*, 561 N.W.2d at 99. To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We find the trial court did not abuse its discretion. The attorney fees awarded by the trial court were appropriate.

VI. CHILD SUPPORT. The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 464 (Iowa App. 1995). "In applying the child support guidelines, the court must determine the parents' current monthly income from the most reliable evidence presented." *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). "This often requires the court to carefully consider all of the circumstances relating to parents' income." *Id.* All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). Deduction of alimony payments from monthly income for the purposes of computation of child support is within the discretion of the court. *Id.* at 892. We find the trial court correctly determined Thomas's child support obligation.

VII. APPELLATE ATTORNEY FEES. Cynthia requests \$2180 in appellate attorney fees. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We deny Cynthia's request for appellate attorney fees.

We have reviewed all of the issues and affirm the trial court in its entirety.

AFFIRMED.