

IN THE COURT OF APPEALS OF IOWA

No. 3-418 / 92-1444

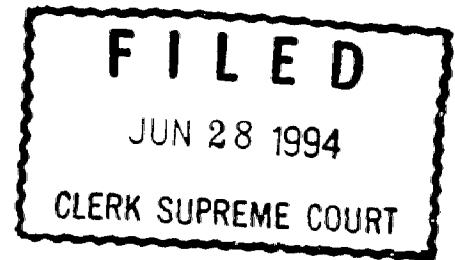
IN RE THE MARRIAGE OF WILLIAM L. YETTER AND
SHARI A. YETTER

Upon the Petition of
WILLIAM L. YETTER,

Appellee,

And Concerning
SHARI A. YETTER,

Appellant.



Appeal from the Iowa District Court for Linn County,
August F. Honsell, Judge.

Shari A. Yetter appeals from the economic and
visitation provisions of the parties' dissolution decree.
AFFIRMED IN PART, REMANDED IN PART.

Karen A. Volz of Ackley, Kopecky & Kingery,
Cedar Rapids, for appellant.

Stephen C. Gerard II of Gerard & Becker, Coralville,
for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

William and Shari Yetter were married in 1973. They have two children: Sara, born on August 5, 1980; and Leslie, born on October 18, 1982.

William practices law in Coralville, Iowa. In 1990, his gross income from his legal practice was \$15,600. He also has a substantial amount of investment income. William was born in 1946 and enjoys good health.

Shari is employed by Slager Appliance, where she earns about \$14,400. She has a college education. Shari was born in 1949 and also has good health.

William filed a petition for dissolution of marriage on August 21, 1989. The parties subsequently entered into a pretrial stipulation giving Shari temporary physical care of the children. The stipulation also set forth William's child support obligation and a visitation schedule. The visitation provision was modified by court order on January 7, 1991. The court ordered William's visitation with Sara to be supervised by Life Skills, Inc., for eight visits. It was contemplated that unsupervised visits would follow.

The trial commenced on January 14, 1991. It was suspended the following day to allow the parties to pursue court supervised settlement negotiations. On January 17, 1991 the parties reached a stipulation, which was read into the court record. The court approved the stipulation. The parties' marriage was dissolved. No written decree, however, was entered.

Under the stipulation, the parties agreed to a division of their property, with Shari to receive assets worth \$148,912 and William to receive assets worth \$104,392. Assets worth \$126,720, which William had brought to the marriage, were set aside to him. The parties recognized William expected to inherit \$500,000 from his mother's estate in the near future.

The parties also agreed to joint legal custody of the children, with Shari having primary physical care. In addition, the parties agreed William would fund a trust with \$135,000. The net monthly income from the trust, which was contemplated to be around \$900, would be paid to Shari as support for the children. William would receive the trust corpus after his child support obligation was completed. Shari agreed to maintain health insurance for the children, and the parties agreed to share equally all medical expenses not covered by insurance. The stipulation included a visitation schedule, and the parties were to submit a supplemental schedule within 90 days.

Shari subsequently challenged the enforceability of the stipulation. On August 2, 1991, the district court entered an order finding the stipulation was enforceable, and that it should be implemented. On January 8, 1992, however, the district court ruled that the child support stipulation could not be accomplished, and directed a hearing be scheduled to receive evidence on the child support and visitation provisions of the stipulation.

The evidentiary hearing was held on April 23, 1992. William had not had any visitation with the children since October 1991. At the hearing, Shari testified the children did not want to continue visitation with William. Barbara Christensen, a family therapist, testified she believed visitation should terminate for a period of time in order to give the children more control over the visitation situation. The court ordered the parties to comply with the supervised visitation provisions of the January 7, 1991 order. Once William completed the series of eight supervised visitations, he was allowed unsupervised visitation.

The district court also placed the burden upon William to implement the trust agreement funded with \$135,000. William executed a trust agreement on August 19, 1992. His attorney, Stephen C. Gerard II, was named as trustee.

Shari appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Shari contends the district court should not have enforced the parties' stipulation relating to the trust agreement for child support. She points out there was no discussion of the child support guidelines and whether the

payments of interest from the trust come within the amount of support required by the guidelines. William argues Shari is precluded from challenging the amount of child support since it was the subject of a prior stipulation and agreement.

It is clear Shari previously agreed to resolve the issue of child support through the creation of a trust funded by William with \$135,000. The details of the trust, however, were left to further negotiations. It was contemplated at the time of the stipulation that the trust would produce an adequate amount of monthly child support. The months that followed the settlement, however, failed to perfect a final agreement on the essential details of the trust. The court eventually confirmed the parties inability to achieve a trust agreement, and directed the evidentiary hearing from which Shari now appeals. Part of the problem in establishing the details of the trust following the stipulation was the discovery that administrative fees and changing market conditions reduced the expected monthly payout.

Shari may be bound to allow William to satisfy his support obligation through a trust agreement, but there was no accord in the manner the trust would be arranged to accomplish the goal of providing a sufficient amount of monthly child support. Moreover, the trial court never approved the final trust agreement until the final hearing. We find the issue of child support is properly before us.

A stipulation concerning child support will be enforced only to the extent it is in the best interests of the child. In re Marriage of Bonnette, 492 N.W.2d 717, 721 (Iowa App. 1992). The court is not bound by the parties' stipulation and may disregard the stipulation entirely. In re Marriage of Van Zee, 488 N.W.2d 721, 725 (Iowa App. 1992). The binding force of a stipulation as to child support depends on the approval of the court. Id.

The child support guidelines provide:

A stipulation of the parties establishing child support and medical support shall be reviewed by the court to determine if the amount stipulated and the medical support provisions are in substantial compliance with the guidelines, and if a variance is proposed, whether it is justified and appropriate. A proposed order to incorporate the stipulation shall be reviewed by the court to determine its compliance with these guidelines.

Iowa Child Support Guidelines (1990).

Here, the district court never determined the parties' net monthly incomes or the amount William would be required to pay under the guidelines. There was no finding the amount paid for support from the income of the trust funds substantially complied with the guidelines. There is insufficient evidence in the record for us to make these findings in our de novo review.

We remand this case to the district court to make such findings and to determine whether the parties' stipulation substantially complies with the guidelines. If the district court determines the income received by Shari from the trust fund is less than the amount William would be

required to pay under the guidelines, the court should order William to pay the difference as child support each month. We also direct the trial court to review the wisdom of having counsel for petitioner serve as trustee, together with any need to bond the trustee.

III. Shari contends the visitation ordered by the court is inconsistent with the stipulation and does not serve the best interests of the children. She asks us to have Barbara Christensen supervise visitation and for visitation to occur only upon her recommendation. Shari believes William should be required to have counseling before visitation should continue.

A noncustodial parent should be awarded liberal visitation in order to afford the children the opportunity to maximize continuing physical and emotional contact with both parents. In re Marriage of Farrell, 481 N.W.2d 528, 531 (Iowa App. 1991). Under Iowa Code section 598.41(1), a court should order visitation unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact. In re Marriage of Gilliland, 487 N.W.2d 363, 366 (Iowa App. 1992). As always, the governing considerations are the best interests of the children. Farrell, 481 N.W.2d at 531.

We find no evidence in the record to show visitation with William will cause direct physical harm or significant emotional harm to the children. However, we recognize the

children are reluctant to participate in visitation and agree with the district court that visitation should be initially supervised and implemented in stages in order for William and the children to build a relationship. In the stipulation, which was incorporated in the dissolution decree, the parties agreed to engage in individual and family counseling, including the minor children, with Dr. John N. Hartson and Dr. Frank S. Gersh, and to utilize the services of Life Skills, Inc. as necessary to implement the visitation schedule.

We believe the visitation would benefit from a more neutral supervisor than Christensen. We agree with the district court's order to have Life Skills supervise the visitations. We urge the parties to implement their agreement to participate in individual and family counseling on the issue of visitation. We affirm the district court's decision concerning visitation.

IV. Finally, Shari claims the final decree does not resolve the issues of responsibility for medical expenses, attorney fees, and payment of property taxes. These issues were addressed in the parties' stipulation, which was approved by the district court on January 17, 1991, and determined to be enforceable on August 2, 1991. These issues are not subject to further resolution.

On remand, however, we direct the district court to enter a new decree incorporating all necessary terms of the parties' dissolution.

V. Each party seeks to have the other party pay his or her attorney fees for 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine each party should pay his or her own attorney fees for the appeal.

In summary, we affirm the district court on the issue of visitation. We remand for calculation of William's child support obligation under the child support guidelines and for a determination of whether the parties' stipulation substantially complies with the guidelines. On remand, all necessary elements of the parties' dissolution should be incorporated in one decree. We do not retain jurisdiction. Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART, REMANDED IN PART.