

FILED

NOV 24 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JANET F. WINTER AND LYLE E. WINTER

UPON THE PETITION OF)

JANET F. WINTER,)

Petitioner-Appellant,)

Filed November 24, 1981

AND CONCERNING)

1-322

3-66400

LYLE E. WINTER,)

Respondent-Appellee.)

Appeal from Muscatine District Court, Margaret S. Briles, Judge.

The petitioner-wife appeals from the dissolution decree, alleging that the trial court erred (1) by not granting her custody of the parties' minor son, Justin; (2) in its division of property, and, (3) in failing to award her attorney fees at trial. REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

Mark R. Gillet of Allbee, Gillett, Wilson, Conway & Allison, Muscatine, for petitioner-appellant.

Thomas M. Kelly, Davenport, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Carter, Snell, and Johnson, JJ.

The petitioner-wife appeals from the dissolution decree, alleging that the trial court erred (1) by not granting her custody of the parties' minor son, Justin; (2) in its division of property, and, (3) in failing to award her attorney fees at trial. We reverse in part, affirm in part, and remand.

The parties were married on February 10, 1973, when the wife was 19 and the husband was 24. The parties had one son born March 12, 1974. This was the wife's second marriage. The wife has a 10-year-old daughter by this prior marriage, but receives no support from her first husband. Both parties have high school educations. The wife brought no property into the marriage. The husband had a \$5000 investment in a house and a 4-year-old Corvette. During the marriage, the parties purchased an auto salvage yard—Muscatine Used Parts, Inc.,—which the husband continues to operate. Each party owns one-half of the stock in the corporation.

The parties acquired a substantial amount of property during the marriage, partly due to their spartan life-style. The wife worked outside the home during most of the marriage, some of the time at the auto salvage yard. However, she always had primary responsibility for care of the home and children. The parties purchased an acreage and built a home on it, where they lived until August 1979, when the husband moved out. The wife and two children continue to live in the home. The wife was awarded temporary custody and child support of \$500 per month. Although the testimony was conflicting as to the amount, the husband was not current in his child support payments as of the trial date. On February 15, 1980, the wife obtained a restraining order against the husband because he had beaten her in front of the children and fired several shotgun blasts at a car parked outside the home.

The trial court filed a decree granting custody of Justin to the husband, awarded the business to the husband and ordered him to pay \$49,500 to the wife for her share, awarded the home to the wife, and divided the other property of the parties. The court ordered each to pay his or her own attorney fees. The wife appealed.

I. Custody of Justin.

The trial court, in granting custody of Justin to the father, placed great emphasis on the fact that the wife's boyfriend, whom she stated she intended to marry after the dissolution, was living in the home with the children. The court held the best interest of

the child would be better served by awarding the husband custody. This was error. There was no evidence, other than the live-in boyfriend, which showed the husband should have custody. On the contrary, when considering the criteria set forth in In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974), the evidence showed that Justin should remain with his mother. Justin and his half-sister have a close sibling relationship, and siblings should not be separated without good and compelling reasons. Winter at 168. Both children have adjusted well to the divorce, and they should not have to suffer any more turmoil. During the marriage, the wife was responsible for child care. The wife has adjusted her work schedule so that she may be home when the children come home from school. The husband agreed to give temporary custody to the wife. The wife's relationship with her boyfriend is stable, and they intend to get married, while the husband is seeing several women and has no plans for marriage. Both children get along well with the wife's boyfriend. The husband is not current in his child support payments. After the parties separated, the husband returned to the home and fired a shotgun at the wife's car while the wife and children were at home. The record clearly shows that Justin's best interests would be served by leaving him with his mother. We therefore reverse the trial court as to this aspect of the decree.

The wife requested \$500 per month child support. The husband's gross salary from his closely held corporation is approximately \$1200 per month. In addition, he receives approximately \$600 per month net on a real estate contract. The husband could grant himself a larger salary instead of building up the capital in the company. The wife's gross salary is approximately \$500 per month. The wife's living expenses for herself and two children as listed on her financial statement are \$1057. The wife is granted child support for Justin in the amount of \$500 per month.

II. Property Settlement.

The wife argues that the trial court's division of property was inequitable because it awarded her only 38 percent of the parties' assets. We disagree.

We consider the criteria set forth in Section 598.21, The Code 1981. The wife argues that the trial court erred by undervaluing the parties' business. The wife's expert testified at trial that the value of the business was between \$180,000 and \$255,000. This testimony was uncontroverted by the husband. Both parties agreed that the wife's half ownership had been earned by her. However, the trial court ordered the husband to pay

only \$19,500 for her share. The trial court then awarded the parties home, worth \$92,000, with a mortgage of \$68,000, to the wife. Admittedly, the parties did not receive assets of equal value. However, an exactly equal division is not always required. The husband will be required to pay \$400 per month child support, in addition to the payment for the wife's share of the business. The trial court's property division was equitable.

III. Attorney Fees.

The wife argues the trial court erred in not awarding her attorney fees and expenses at trial, and she requests attorney fees on appeal. Considering the income of each party and the above property settlement made, the husband should be required to pay the wife's attorney fees. We note the only testimony as to the value of the parties' business was prepared at the wife's expense. Therefore, the wife is awarded \$3096 attorney fees for the trial, \$1834 for expenses at trial, and \$1500 for attorney fees and expenses on appeal. The case is remanded to the trial court to enter a decree in conformity with these results. Costs taxed to respondent.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

All judges concur except Danielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent.

It is frequently stated that while we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). The trial court heard the testimony of both parties and determined that while either parent would be a good custodial parent for Justin, the best interests of Justin would be served by awarding custody to respondent. I am not prepared to believe that the trial court was overwhelmed by the petitioner's live-in boyfriend and am more concerned about the trial court's judgment that the petitioner was more concerned about her own needs than the children's. I would give more weight to the findings of the trial court and affirm.