

IN THE COURT OF APPEALS OF IOWA

No. 9-565 / 89-802

FILED

DEC 21 1989

CLERK SUPREME COURT

IN RE THE MARRIAGE OF RICHARD A. ALLBEE AND CHERYL A. ALLBEE

Upon the Petition of

RICHARD A. ALLBEE,

Appellant,

And Concerning

CHERYL A. ALLBEE,

Appellee.

Appeal from the Iowa District Court for Franklin
County, Mark S. Cady, Judge.

Appeal from the child visitation and property division
provisions of a dissolution of marriage decree. **AFFIRMED.**

John L. Butler of Lundy, Butler & Lundy, P.C., Eldora,
for appellant.

Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl,
Des Moines, for appellee.

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

PER CURIAM

This is an appeal from a decree of dissolution of marriage entered between Richard Allbee and Cheryl Allbee. Richard has filed this appeal, challenging the child visitation and property division provisions of the decree.

Richard and Cheryl were married on December 23, 1973. Two children were born of the marriage: Jessica, in November 1979 and Morgan, in July 1981.

Richard, forty-four, is a practicing attorney in Hampton. He also is employed with a corporation called ABCM and has a combined annual income of approximately \$291,500. Cheryl, also forty-four, has been a homemaker during the majority of the parties' marriage. She has an eleventh grade education and several health problems.

The parties separated in April 1987. At that time, Cheryl continued to reside in the parties' residence. In October 1988, Cheryl and the children moved to Denver, Colorado. Richard returned to the parties' residence in Hampton.

Shortly after arriving in Denver, a fire destroyed most of the items in Cheryl's townhouse. Cheryl has received approximately \$40,000 in insurance proceeds but may have failed to make a proper claim for the remaining items. While in Denver, Cheryl has enrolled the children in a track school system which operates year round on a nine weeks in school, four weeks off arrangement.

Prior to trial, the parties stipulated that the issues to be determined concerned the prenuptial agreement, division of property, child support, visitation, and attorney fees. Following trial, the district court determined inter alia that Cheryl was entitled to the entirety of the fire insurance proceeds, that Cheryl was to have primary, physical care of the children with Richard entitled to reasonable visitation, that Richard was responsible for the transportation of the children for purposes of visitation, and that Richard's child support obligation would not cease during the time he exercised his visitation rights. Richard has filed this appeal.

I. Scope of Review.

To resolve the issues presented by the parties we turn to well-established principles. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. The Property Award.

1

In reviewing a trial court's division of marital property, we are guided by the criteria set out in Iowa Code section 589.21(1) (1989). The determination as to what constitutes an equitable property division cannot be reduced to precise mathematical formulas. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). The courts strive to make a just and equitable award under the unique circumstances of each case. Among the factors to be considered are the parties' respective incomes, educations, and earning capacities; the length of the marriage; the contributions and sacrifices made by each toward the acquisition of the property during the marriage; the sources of the property; the respective parties' needs; their social position and living standards both before and during the marriage; their physical and mental health and life expectancies; the tax consequences to each party; and such other factors as may reasonably enter into any division. See In re Marriage of Wallace, 315 N.W.2d 827, 830 (Iowa App. 1981).

Richard requests us to split the fire insurance proceeds. We have reviewed the property award in its totality and find the trial court made an equitable award which we will not disturb.

III. Visitation.

5

In cases involving visitation, the paramount consideration of the courts is the best interests of the child. Iowa R. App. P. 14(f)(15). Children of a dissolution have a need to maintain meaningful relationships with both parents. In re Marriage of Fortelka, 425 N.W.2d 671, 672 (Iowa App. 1988). Liberal visitation that will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents is to be awarded if appropriate. Iowa Code § 598.41(1); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987).

Assuming that Richard has preserved the issue, we deny his request: "Visitation of his children should be for one-half a year." Divided custody has been repeatedly rejected by the supreme court.

In In re Marriage of Burham, 283 N.W.2d 269, 272 (Iowa 1979), the court listed many cases where it had rejected divided custody. The court said its reasons were:

1. It is destructive of discipline.
2. It lends to induce a feeling of not belonging to either parent.
3. In some instances it permits one parent to sow seeds of discontent concerning the other, which can result in a spirit of dissatisfaction in the children and thus rebellion against authority.
4. Change and discontinuity threaten the child's emotional well-being.
5. It requires the "shuttling back and forth" of children leading to lack of stability in home environment.

6. Children may become prey to severe and crippling loyalty conflicts.

In In re Marriage of Bolin, 336 N.W.2d 441 (Iowa 1983), the court distinguished the terms divided custody and joint custody. It concluded that the recently enacted statute regarding joint custody does not deal with the problem where the child is to live. Joint custody only involves issues of sharing of the legal rights and responsibilities among parents.

The courts remain opposed in general to the dividing up of a child's home. The child's best interest is best served by granting physical care responsibility to one parent and maintaining maximum contacts between the children and the noncustodial parent.

The trial court's decree meets the above test. We affirm the trial court's order regarding visitation.

Richard requests that support payments should be abated during visitation. Cheryl's expenses to provide a home for the children are an ongoing expense, little reduced by their temporary absences to visit Richard. We affirm the trial court on this issue.

Richard requests that the transportation expense should be divided between the parties. We reject his request. The vast disparity between the incomes of the parties would make any other decision than that made by the trial court inequitable.

V. Attorney Fees.

7

Cheryl requests attorney fees for defending 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). Guided by these general legal principles, we order Richard to pay attorney fees in the amount of \$1,000.

AFFIRMED.