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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARTIN LIEPA AND ANDA LIEPA

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UPON THE PETITION OF MARTIN LIEPA,	)	Filed June 29, 1982
Petitioner-Appellant,	)	
AND CONCERNING ANDA LIEPA,	)	2-168 3-67134
Respondent-Appellee.	)	

Appeal from Polk District Court, Gene L. Needles, Judge.

The husband appeals from the trial court's dissolution decree. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Michael F. Lacey, Jr., of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for petitioenr-appellant.

Bernard J. O'Malley of Connolly, O'Malley, Lillis & Hansen, Des Moines, for respondent-appellee.

Heard en banc.

The husband appeals from the trial court's dissolution decree. We affirm in part, reverse in part, and remand.

The parties were married August 14, 1966. There are five minor children affected by this proceeding. The major asset of the parties is the home which they have been building during most of the marriage. During the marriage, both parties worked extremely hard building their home. The contribution to the construction of the home by the husband and the wife was equal. The house has a value of approximately $50,000, with no encumbrances.

The husband is an engineering draftsman. The wife is a teacher. She taught for several years after the parties were married and then held various jobs, both in-home and outside of the home. For most of the marriage, the wife had primary responsibility for the raising of the children.

In 1977, the wife underwent brain surgery. At approximately that time, the husband began taking more responsibility for the children. On February 29, 1980, the wife moved out of the home with no notice to either the husband or the children. She testified she was extremely depressed at the time. She is currently living in an apartment near the family home.

Trial was held beginning February 11, 1981. In its decree, the trial court gave joint legal custody of the children, with physical custody alternating every four months. The parties were to move in and out of the home, with the children staying in the home. The wife was ordered to pay no child support while the husband had physical custody, and the husband was ordered to pay $25 per week per child when the wife had physical custody. When the youngest child reached age eighteen, the home and furniture was to be sold and the proceeds divided equally. The wife was awarded her inheritance. The wife was awarded a judgment for $3835.77, representing one-half of the husband's equity in a retirement plan.

The husband appeals, asserting that (1) he should be awarded custody of the children; (2) the wife should be required to pay child support; (3) he should be awarded the family home, subject to a lien for "reasonable equity" in favor of the wife; (4) the trial court erred in awarding the wife one-half of the husband's equity in a retirement plan; and (5) the wife's inheritance should be included in the property division.

I. Custody

We agree with the husband that a joint custody arrangement in this case would be unworkable. Two of the tests for joint custody discussed in In re Marriage of Burham, 283 N.W.2d 269 (Iowa 1979), are (1) "Do the parents agree to joint custody, or is one or both opposed?" and (2) "Have the parents demonstrated that they are able to communicate and give priority to the child's welfare such that they are capable of reaching shared decisions in the child's best interests?" Id. at 274. In this case, the father is opposed to joint custody. In addition, it appears that the parties are not able to put aside their differences when making decisions regarding the children. The parties are not yet able to reach shared decisions on any subject. The court in Burham stated it would not oppose joint custody if the arrangement substantially met the required tests. Id. at 275. We do not think this is true in this case. Therefore, the trial court erred in requiring joint custody.

We must now decide "which parent can minister more effectively to the long-range best interests of the children." In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). The three oldest children expressed two preferences: to first remain together and, second, to live with their father. Such preference is entitled to consideration although it is not controlling. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). We do not feel there are good and compelling

reasons to separate the children. Therefore, we will not do so. Burham, supra at 276.

The mother left home without telling the father and children. She appears to be very depressed at times, to the point of threatening suicide. She had minimal visitation with her children after she moved out. She did not contribute any child support. Although she had primary care of the children for most of the marriage, it appears that the father has had an increasingly important role in the raising of the children since 1977. Since February 29, 1980, he has taken care of the children by himself, with the mother having some weekend visitation.

Therefore, we think it is in the children's best interest for the father to have custody. The mother should be granted visitation on alternating holidays and birthdays, every other weekend, and four weeks in the summer. Both parties are encouraged to provide for additional visitation when appropriate.

II. Child Support

The husband argues that the wife should have been ordered to pay child support. The husband's net income is $1149.40 per month. The wife's net income is $812.50 per month. At the time of trial, the wife had been notified that she was to be laid off after that teaching year was over. The husband must provide for five children. The husband has no house payment. The wife must pay $330 per month rent. The duty to support children is imposed according to each parent's ability to provide it. Burham, supra at 277. Therefore, the wife should be required to pay $100 per month child support.

III. The Parties' Home

Since the husband will have physical custody of the children, he should be able to occupy the family home with them. Therefore, he should occupy and maintain the home until the youngest child reaches age nineteen. When the youngest child reaches nineteen, the home should be sold and, after deducting

costs of sale, the net proceeds should be divided evenly between the parties. Any delinquent taxes or insurance premiums should be charged against the husband's share. At that time, the furniture and appliances should also be divided or sold and the proceeds divided equally.

IV. The Retirement Plan

The husband argues that the trial court erred by awarding the wife a judgment against the husband for $3835.77, plus interest, which represents one-half of the equity in his retirement plan. We disagree. A lump sum award in such a situation is appropriate. See In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981). That part of the trial court decree is affirmed. No contributions to such a plan for the wife were made during the marriage. Therefore, the husband cannot be awarded any comparable payment.

V. The Inheritance

The wife inherited a house from her parents worth $20,000 on November 14, 1980. We disagree with the husband's assertion that the wife's inheritance should be divided. Section 598.21(2), The Code 1981, provides that inherited property is not to be divided unless it would be inequitable not to do so. Refusal to divide the inherited property is not inequitable in this case. Therefore, that part of the decree is affirmed.

All parts of the decree not specifically reversed by this opinion are affirmed. This case is remanded to the trial court to enter a decree in conformity with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All judges concur except Oxberger, C.J., and Johnson, J., who concur specially.

JOHNSON, J. (specially concurring)

While trial court's rotation of the parents into and out of the family home has appeal, I do not believe it is a feasible alternative. However, I think joint legal custody, as defined by section 598.1, The Code 1981, as amended by H.F. 2442, Acts of the 69th G.A., is appropriate in this case, although physical care should be with the father as determined by the majority. In order to increase their ability to communicate concerning the children's needs and to facilitate joint decision making, the parties should be required to participate in professional custody mediation counselling directed towards this goal.

Oxberger, C.J., joins in this special concurrence.