FILED
FEB 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-664 / 93-862

**IN RE THE MARRIAGE OF RHONDA LOUISE FUCHS AND JOSEPH T. FUCHS**

Upon the Petition of

**RHONDA LOUISE FUCHS,**

Appellee,

And Concerning

**JOSEPH T. FUCHS,**

Appellant.

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Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Husband appeals the custody provision and certain economic provisions of the parties' dissolution decree. **AFFIRMED.**

Lorraine K. Ingels and Gary L. Robinson of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellant.

Janice McCool of McCool & McCool, P.C., Cedar Rapids, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

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**CRITELLI, S.J.**

Rhonda and Joseph (Joe) became involved while Rhonda was still married to Ray Baxter. Ray is the father of Rhonda's three oldest children. In November 1988, Ray and Rhonda were divorced and Rhonda and Joe were married. Rhonda and Joe had a son together, Joseph Stephen (Steve), born April 18, 1989. Rhonda's three older children lived with her and Joe throughout their marriage. For a time, Joe's daughter from a previous marriage lived with the blended family.

Joe and Rhonda purchased a house after they were married and held it in joint tenancy. The down payment of $13,000 came from a settlement Joe received after being injured in a car accident. The house was sold in July 1992 for net proceeds of $3,287.85.

Rhonda began working at Helzberg Diamonds as a salesperson in 1989. She currently works thirty-two to thirty-five hours per week and is paid $6.85 per hour. Her net monthly income is $1,052.48. She works two nights per week and some weekends. Rhonda has profit sharing and 401K plan benefits through Helzberg Diamonds, but those benefits are not vested.

Joe is currently a sales manager for a car dealer, this being his eighth job since he and Rhonda were together. Joe is a recovering alcoholic and claims one year of sobriety. He works Monday through Friday and

Saturday mornings and has a net monthly income of $3,163.83.

Rhonda and Joe separated and Rhonda filed a petition for dissolution of their marriage in October 1991. Shortly thereafter, Rhonda and Ray resumed their romantic relationship. Rhonda and her four children live in a mobile home purchased by Ray; Ray's monthly payments on the mobile home are deducted from his monthly child support obligation. Ray lives in Illinois during the work week and lives with Rhonda and the children during the weekends.

In 1991, Rhonda insisted that she and Joe file separate income tax returns. Joe claimed Steve as his dependent and one-half the interest of the homestead on his state and federal returns. Joe received a refund of $140, which he kept. Rhonda claimed her other three children as dependents and one-half the interest of the homestead on her state and federal returns. She received $1,300 in refunds, $650 of which was placed in an escrow account.

The fighting issues in Rhonda and Joe's dissolution proceeding were physical custody of Steve and the appropriate division of the proceeds from the sale of the house and tax refunds held in escrow. The district court awarded Rhonda physical custody of Steve because she had been the primary caregiver and because the placement would not separate Steve and his half-siblings. The district court concluded that Joe's settlement proceeds had been converted to marital property and awarded one-half of the

house sale proceeds to each party. It also awarded each party one-half of the $650 in tax refunds held in escrow.

Joe appeals. He contends Rhonda's relationship with Ray represents moral misconduct, which should affect the custody decision. He also contends that Ray was physically abusive toward Rhonda in the past and therefore poses a risk of physical abuse toward Steve. Joe contends he has superior parenting skills and should be awarded physical custody of his "namesake." Joe also contends he should have been awarded all of the $650 in tax refunds held in escrow and all of the house sale proceeds. Rhonda seeks appellate attorney fees.

Appellate review of dissolution actions is de novo because these actions are equitable proceedings. Iowa R. App. P. 4. No hard and fast rules govern the custody and economic issues in dissolution actions. In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974).

In equity cases, especially when considering the credibility of witnesses, the reviewing court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and each case must be decided on the particular circumstances of the parties in each case. In re Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983).

The principles applicable to the custody decisions were summarized nearly twenty years ago in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). However, in child

custody cases, the first and governing consideration of the courts is the best interests of the child. Iowa R. App. P. 14(f)(15).

The issues are ultimately decided by determining under the whole record which party can administer most effectively to the long-range and to the best interests of the child. In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). In a divorce case, the court should not separate siblings, except for good and compelling reasons. In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979); In re Marriage of Blume, 473 N.W.2d 629, 631 (Iowa App. 1991).

The position of the court regarding separation of siblings is that "half brothers and sisters should be separated only when it may promote the long-range best interests of the children." In re Marriage of Orte, 389 N.W.2d 373 (Iowa 1986); In re Marriage of Holcomb, 472 N.W.2d 76 (Iowa App. 1991).

## I.

## THE CHILD CUSTODY ISSUE

The trial court found that the best interests of the child was served by giving Rhonda the physical custody of Steve. The court also gave liberal and quite detailed visitation to Joe. The trial court found, and we agree, that Rhonda had been the principal caregiver to Steve from the time of his birth. The trial court also recognized the

importance of keeping Steve with his three half-siblings, who had lived with these parties and also Steve from the time of his birth.

It is undisputed that after the petition of dissolution was filed by Rhonda, she eventually began to cohabit with the natural father of the three half-siblings and her former husband, Ray Baxter. Joe contends that the continuing and ongoing affair that Rhonda is having with Ray is, in fact, moral misconduct and should weigh against her in the determination of the custody issue. The trial court gave little consideration to this arrangement in determining that Rhonda should have the physical custody of Steve.

It should be noted in that connection that, as indicated above, Rhonda took up cohabitation with Joe some months prior to her divorce from Ray and that cohabitation eventually led to the birth of Steve. Joe is complaining of the misconduct of Rhonda and Ray, which is little different from the conduct of him and Rhonda prior to Rhonda's divorce from Ray and the eventual marriage of Rhonda and Joe. Regardless, the trial court did find the best interests of Steve was in the award of physical custody to Rhonda and the award of liberal visitation rights to Joe. There is ample evidence to support those decisions, and we agree with them and do not change or modify them.

## II.

## DIVISION OF ASSETS AND AWARD OF ATTORNEY FEES

The court has rejected any rule based on a percentage division of assets and recognizes the rule that property settlement must be equitable under the specific facts of each case. In re Marriage of Byall, 353 N.W.2d 103 (Iowa App. 1986).

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). We also note that 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).

The marital home was purchased by the parties after their marriage and was held by them in joint tenancy. The down payment of $13,000 came from a settlement Joe received after being injured in a car accident. The house was sold in July 1992, with net proceeds of only $3,843.85. The trial court divided those net proceeds between the parties in the division of property.

Joe contends that because he contributed a substantial down payment for the property he should receive all the net proceeds. The trial court found that although a premarital asset of Joe was used as a down payment on the marital home, this asset was converted to a marital asset, not kept

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separate, and became the joint property of both parties. It is hard to explain how a home purchased with a $13,000 down payment only netted less than $4,000 on its sale, unless the purchase price of the home on contract was greatly exaggerated or there was substantial damage done to the property during the marriage or a combination of both.

In any event, we find that the division of the net proceeds of the marital home is reasonable. We will not disturb that division.

Considering the same collectively, Joe requested a greater share, if not all, of the escrowed one-half of Rhonda's income tax refund, i.e. $650, and Rhonda requests fees for representation in these appeal proceedings. By the trial court's division of a total of these tax refunds, Rhonda would receive $975 and Joe would receive $445. The parties are entitled to an equitable division of assets, not necessarily an equal division of assets, and the difference noted above is not so inequitable, unreasonable, or abusive to require correction by this court. We refuse to do so.

On the other hand, an award of attorney fees is not a matter of right, but is dependent on consideration of all the circumstances. In that light, this court finds that Rhonda's request for appellate attorney fees is denied.

We affirm the decisions of the trial court awarding Rhonda physical care, custody, and control of Steve. We

affirm the decision of the trial court in its division of the net proceeds of the sale of the marital home and its decision in dividing the couple's income tax refunds.

We deny Rhonda's request for appellate attorney fees.

**AFFIRMED.**