

FILED

JAN 29 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DANIEL E. ALM AND IDA JANE ALM

Upon the Petition of	)	
DANIEL E. ALM,	)	Filed January 29, 1986
Petitioner-Appellee,	)	
And Concerning	)	
IDA JANE ALM,	)	<u>5-538</u>
Respondent-Appellant.	)	<u>85-242</u>

Appeal from the Iowa District Court for Clinton County - L. D. Carstensen,
Judge

Respondent appeals the trial court's dissolution decree awarding petitioner sole custody of their children and also certain provisions relating to alleged marital assets, alimony, and attorney fees. **AFFIRMED AS MODIFIED.**

Thomas M. Mayer, Clinton, Iowa, for respondent-appellant.

Elliott R. McDonald III of McDonald, Stonebraker & Cepican, Davenport,
Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

Respondent *Ida Alm* appeals the trial court's dissolution decree awarding petitioner sole custody of their children and also certain provisions relating to alleged marital assets, alimony, and attorney fees. We modify and affirm the trial court.

Dan Alm filed for dissolution of his eleven-year-old marriage to *Ida Alm* on March 29, 1984. Two children were born to Dan and *Ida* during their marriage. At the time of the dissolution proceedings Stephen was 11 years old and Jeffrey was five.

During their marriage Dan was employed by the Lloyd Aubrey Company, an independent contracting firm. On May 11, 1981, while working for his employer at the Ralston Purina plant in Davenport, Iowa, Dan suffered a severe injury to his left leg, knee, and ankle. After the injury and during the parties' marriage, Dan received approximately \$350 per week from his employer's worker's compensation carrier. Those payments continued until Dan settled his tort action against Ralston Purina Company. The compensation payments were used by the couple to help pay their monthly bills and mortgage payments.

Dan's settlement with Ralston Purina included a lump sum payment initially, with specified monthly payments gradually increasing through the year 2014. Out of the initial lump sum, his worker's compensation carrier was subrogated for sums paid earlier, attorney's fees were paid, and \$2,000 was awarded to *Ida* for settlement of her loss of consortium claim arising from Dan's injury. Dan received nothing from this initial lump sum payment. He is presently receiving \$1,000 a month from his settlement with Ralston Purina. His next increase will begin on December 1, 1989, when he will receive \$1,500 a month. Dan's injuries prevent him from returning to the type of employment he did

before his injury, and his present physical and educational qualifications do not allow for expectations of high paying jobs.

Ida also worked during the marriage. She has been employed at the Clinton Gourmet Company for almost eleven years. She has experienced periodic layoffs and has suffered cutbacks, both in hours and pay. But, for the most part, she had been a dependable source of income to help support the family. Her wage stubs for the two-week period ending October 6, 1984, indicate a net income of \$304.03.

The record shows a bitter separation period prior to the trial court's dissolution decree. There is ample evidence of both parties either physically attacking each other or destroying the other's personal property. We believe the trial court's words sufficiently summarized the parties' behavior in its Findings of Fact.

These people have not reached very hard to perform their obligations as nurturing parents since the separation. Respondent is very close to being out of control. Her rage towards her husband has been displayed in front of and through the children. One of the children was present during the incident when she assaulted his car with her car. Since the original hearings she started a physical altercation with him in the presence of the children, and he instead of retreating as he manfully and legally should have, returned force with force, in front of the children. In her frustration and rage she has destroyed clothing of the children because the "other woman" had provided same. She has been very difficult concerning visitation. He has made little effort to show concern or regard for his wife's hurt. He has put his own welfare above that of the children. He is living with a woman whom he has no intention of marrying. The children inescapably know of the situation. Respondent also has an over night man friend within the knowledge of the children. The Attorney for the children in his report to the court, received by consent of the parties, stated that Petitioner is an interested father concerned about the well-being of his children, but adding — "I do believe, however, that although Mr. Alm is much less tense about the marital breakup, he, to some extent, lacks a great deal of insight into this situation and like Mrs. Alm does not appear to have neces-

sarily placed the children's best interest in front of his own." Respondent has taken out her frustrations on the children emotionally and to some extent physically.

The trial court decided to award sole custody of the children to Dan. Ida appeals the custody award as well as additional provisions of the decree concerning the division of property, alimony, and attorney's fees. We will discuss each issue raised on appeal individually.

I. Custody. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Castle, 312 N.W.2d 147, 148 (Iowa App. 1981). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Id.; Iowa R. App. P. 14(f)(7).

In the case before us, the trial court awarded sole custody to Dan and ordered Ida to pay child support in the amount of \$40 per week for two children, and \$30 per week for one child. Reasonable visitation was also provided in the decree. Despite the emotional shortcomings of both parents in this case, we cannot agree with the trial court that sole custody is the proper solution. Both the legislature and our judiciary have stated that an award of joint custody must first be considered in contested custodial situations. See Iowa Code section 598.41(1); Castle, at 150. The supreme court, in In re Marriage of Bolin, 336 N.W.2d 441, 446, 447 (Iowa 1983), said:

The legislature, however, requires a custody award, "insofar as reasonable and in the best interest of the child, . . . , including liberal visitation rights where appropriate, which will assure a minor child frequent and continuing contact with both parents after the parties have separated or dissolved the marriage and which will encourage parents to share the rights and responsibilities of raising the child." § 598.41(1). Joint custody is intended to foster that objective, leaving each parent with the

"rights and responsibilities associated with parenthood in lieu of reducing a noncustodial parent's role to that of a favorite, visiting relative." In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981) (Johnson, J., concurring). This is because the child needs and deserves the help of both parents and not because of joint custody's effect on parental self-esteem.

We therefore hold that the parties shall have joint custody of their two children.

We also hold that the best interests of the children require Ida to have primary physical care and custody of the children. The record shows that during their marriage it was always Ida, rather than Dan, who was the primary caretaker of the boys. It was Ida who always took the children to the doctor, washed their clothes, and fixed their meals. When Dan had sufficiently recovered from his injury, he chose to pursue the personal pleasures of hunting and fishing rather than babysit with the children. We also note that Dan has chosen to live with a woman that he has no intention of marrying. Most importantly, however, we note evidence that Dan's children's needs and aspirations would be subordinated to the needs and aspirations of his girlfriend's children. We do not regard this overall living arrangement as being in the best interests of Stephen and Jeffrey. Our award of physical care and custody to Ida should in no way be interpreted as justifying any of her immature emotional outbursts. However, at least with Ida, the custodial parent will assume the duties previously performed during the marriage and there will be no potential source of jealousy between cohabitating adults concerning the needs and aspirations of the children.

Our award of custody to Ida should not cause problems with the visitation schedule outlined in the decree. Instead of Ida being entitled to visitation every other weekend, that right shall be afforded to Dan. Likewise, the summer visitation rights should be transferred to Dan instead of Ida. The visitations awarded for holidays, birthdays, and all other special occasions shall remain the same.

II. Child Support. Because we have awarded primary care and custody to Ida, we in turn order Dan to pay \$100 per child per month in child support. Both parents are liable for support of their children, not necessarily in equal shares, but proportionately according to their ability to pay. In re Marriage of Novak, 220 N.W.2d 593, 598 (Iowa 1974). Dan is presently receiving \$1,000 per month from his settlement with Ralston Purina. His girlfriend has testified that he pays only the telephone bill and the cablevision bill at their home. Support payments of \$200 per month are within Dan's ability to pay for the welfare of his children.

III. Alimony. Ida alleges the trial court erred in refusing to award her alimony. We disagree.

The criteria for awarding alimony are set forth in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), and were modified in In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972), and are codified at Iowa Code section 598.21(3).

The equitable principles that we have recognized and enforced in the past require, in dissolution cases, that the spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well.

In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa App. 1983).

In her brief, Ida alludes to Iowa Code section 598.21(3)(e)-(f), in support of her argument that because Dan is receiving more from his structured settlement per month than she receives from her employment, she should be awarded alimony. However, the code sections she refers to, as well as the cited principles above, do not necessarily call for an equality of income for each parent. Alimony is intended as well to provide an opportunity for the party seeking maintenance to find appropriate employment, and achieve a standard of living reasonably

comparable to that enjoyed during the marriage. (Emphasis ours.) In her case, Ida is still employed where she has been all during her marriage. She needs no financial assistance "to find appropriate employment." Moreover, the criteria of a "reasonable" standard of living "comparable to that enjoyed during the marriage," is all that is required. Ida has not provided evidence that the removal of Dan from the household, under the conditions of the decree, will deprive her of a reasonable comparable standard of living to that enjoyed during the marriage. She merely argues equality of income between his income and her wage. That is not sufficient to prove the need for alimony.

IV. Property Division. Ida alleges on appeal that the trial court erred when it failed to consider the personal injury settlement award as a marital asset. She argues that she should share in the settlement. We reject both allegations.

It is clear from the trial court's Conclusions of Law in the decree that the trial court considered the award.

The award to Petitioner was for personal injuries. Because of his personal injuries his income probably will be diminished. I do consider in this case that the award should be considered in regard to the questions of alimony, child support and property division. Specifically in regard to property division it is the court's consideration of the personal injury settlement which dictates the conclusion that the real estate should be awarded to Respondent, that Petitioner should not be credited with the damage to his automobile caused by Respondent, and that Petitioner should pay the VISA debt and the costs of the suit including the award for attorney fees. I have considered the award in determining the amount of child support obligation.

We find the trial court did indeed consider the settlement award. The parties have not cited an Iowa case, nor have we found one, that specifically defines a personal injury award as a personal asset, or a marital asset. The applicable statute calls for the division of "... all property except inherited

property or gifts received by one party," Iowa Code § 598.21(1). We decline to say, based upon the record before us, whether this award is a personal rather than a marital asset. "The ultimate test is whether, considering all of the circumstances, the division is fair and just." In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). We must remember that although Dan is receiving this compensation, his ability to better his employment status will always be physically impaired. While Ida may not have an equal income at the present, her future abilities are not restricted by any physical capabilities that she has relied upon in the past. We hold the trial court fairly and equitably considered the personal injury award in this case and we affirm its decision.

V. Attorney's Fees. Ida requests that we award her attorney's fees on appeal. Such an award may be granted depending upon the parties' respective abilities to pay. In re Marriage of Giles, at 546. Considering the respective financial condition of both parties, we order Dan to pay Ida the sum of \$500 towards her attorney's fees associated with this appeal.

We hold the trial court erred in awarding sole custody of the children to Dan, and therefore modify the decree to award joint custody in both parties, and the physical care and custody of the children in Ida. We also award \$500 in attorney's fees to Ida and assess the costs of this appeal to Dan. We affirm the trial court in the remaining issues.

AFFIRMED AS MODIFIED.