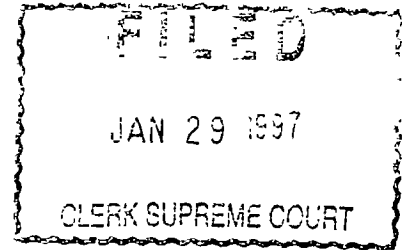


IN THE COURT OF APPEALS OF IOWA

No. 6-676 / 96-0699



**IN RE THE MARRIAGE OF STEVEN
L. SISCO AND HAZEL S. SISCO**

000301

**Upon the Petition of
STEVEN L. SISCO,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning
HAZEL S. SISCO,**

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Hazel Sisco appeals the district court's ruling awarding primary physical care of the parties' children to Steven. **AFFIRMED AS MODIFIED.**

Franklin R. York, Cedar Rapids, for appellant.

Lorraine K. Ingels of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Hazel Sisco appeals the district court's ruling awarding primary physical care of the parties' children to Steven. Steven cross-appeals. He argues the court erred in: (1) awarding visitation to Hazel three weekends each month; and (2) inequitably dividing property. Steven seeks appellate attorney fees. We affirm as modified.

I. Background Facts and Proceedings. Steven and Hazel were married in 1980. They have two children, Sarah, born February 28, 1995, and Anna, born March 24, 1994.

At the time of the decree, Steven was forty-two years of age. He is employed as a supervisor at Midland Forge. Hazel was thirty-four years of age. She is employed at a HyVee store in Cedar Rapids and is a part-time student at Kirkwood Community College. Hazel has a history of emotional problems and has been hospitalized for depression.

The Siscos were awarded joint custody of their children. The district court, citing Hazel's emotional instability, awarded physical care of the children to Steven. Hazel was awarded liberal visitation including three weekends per month.

Hazel was awarded the family residence and approximately 120 acres of adjoining farm land. The district court awarded Hazel all of the real estate after determining Hazel inherited this property from her great-grandfather. Steven was awarded one-half of the Siscos' equity in the house (\$14,371) because the house was

built on this property after Hazel inherited forty of the above acres. Hazel was given ten years to repay Steven's share of the equity. The only terms of repayment imposed were a ten-year duration and a three percent interest rate.

Hazel appeals the district court's physical care award. Steven cross-appeals from the visitation provisions of the decree. He also argues the district court miscalculated the equity in their home and erroneously found 80 of the 120 acres were inherited property not subject to division.

II. Standard of Review. Our review in this case is de novo. Iowa R. App. P. 4. Prior cases have little precedential value and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's findings of fact but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Physical Care. The parties have agreed to joint custody. Our consideration is therefore limited to resolution of the Sisco's competing demands for physical care. Iowa Code § 598.41(4) (1995).

In determining which parent should be awarded physical care, the first and governing consideration is the best interests of the children. Iowa R. App. P. 14(f)(15). The court also considers the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of the

proposed environment, and the effect of continuing or changing an existing custodial status. *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The critical issue is which parent will do better in raising the child. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Neither party has a greater burden than the other in attempting to gain custody. *Id.*

Greater primary care experience is one of many factors the court considers, but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). The role of primary care giver is, however, critical in the development of children, and careful consideration is given in custody disputes to allow the children to remain with the parent who has been the primary care giver. *Id.*

A parent's violent tendencies adversely reflect on the fitness of that parent to be the primary caretaker of a child. *See In re Marriage of Snyder*, 241 N.W.2d 733, 734 (Iowa 1976). Evidence of domestic abuse is also a factor. *In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa App. 1994).

The record indicates this has been a particularly turbulent marriage. There is a substantial history of violence. Hazel has "taken a knife" to Steven and fired a handgun at him. Steven admits hitting Hazel but claims it was necessary to do so for his own protection. Unfortunately, many of these violent episodes were witnessed by the children.

Hazel's actions have been attributed to her emotional instability. She has been treated for depression. Hazel attributes her behavior to lingering ill feelings about Steven's affair with another woman. This resentment has been expressed in her threats of suicide and to kill Steven and the children. She has also declared her intentions to teach the children to hate Steven for what he has done to hurt her.

Hazel argues Steven's violent tendencies and past substance abuse make him an undesirable primary care provider. She also cites his limited primary care experience and claims his interest in the children is of recent origin.

There is evidence indicating Steven has a history of substance abuse. However, we accept his assertion that he no longer uses drugs. In any event, there is nothing to suggest his ability to care for the children has been compromised by past substance abuse.

Steven does not deny striking Hazel. Although we do not excuse his resort to violent retaliation, we consider his conduct in the context of the earlier described altercations. Under these circumstances, we conclude Hazel's emotional instability and violent history present a greater risk to the children's well being than Steven's character flaws and limited primary care experience. We affirm the district court's physical care award.

IV. Visitation. Hazel's weekend visitation schedule includes all but one weekend each month. Steven argues this arrangement deprives him of meaningful weekend time with the children.

Liberal visitation rights are in the best interest of the children. Iowa Code § 598.41(1) (1995); *In re Marriage of Merrell*, 408 N.W.2d 774, 777 (Iowa App. 1987). The parent who has primary care is entitled to enjoy weekend time with the children. *Weidner*, 338 N.W.2d at 359; *In re Marriage of Ertmann*, 376 N.W.2d 918, 921 (Iowa App. 1985).

The decree does not explain the rationale for this award nor does the record reveal any circumstance necessitating disproportionate weekend visitation. We accordingly modify the decree to provide Hazel alternating weekend visitation.

V. Property Division. Steven's challenge to the district court's property division concerns the award of real estate and the determination of the parties' equity in their home. Except for inherited property or gifts received by one party, property should be divided equitably between the parties after considering the factors enumerated in Iowa Code sections 598.21(1)(a) through (m) (1995). Each party should receive an equitable share of the property accumulated through their joint efforts. *In re Marriage of Havran*, 406 N.W.2d 450, 452 (Iowa App. 1987).

In 1984, Hazel inherited forty acres of land from her great-grandfather Leslie Clark. Clark also left Hazel's mother Virginia and Hazel's sister Nettie forty acres

each. The record indicates the value of this property in 1984 was \$1411 per acre. Each of Clark's beneficiaries paid the inheritance tax resulting from these bequests.

In 1987, Steven and Hazel purchased Nettie's forty-acre parcel for \$21,000. This price was the approximate amount of Nettie's inheritance tax liability. The Siscos financed their acquisition by borrowing \$29,000 from the Palo Savings Bank. The promissory note indicates the funds were designated for purchase of Nettie's forty acres and a rewrite of the balance owed on Hazel's forty acres.

The Siscos built a new home on Hazel's forty acres in 1989. The construction costs were financed by a loan from the Palo Savings Bank. This promissory note indicates the purpose of the loan was "rewrite of construction loan and farm loan into amortized loan." The original principal was \$70,922.93. The unpaid balance as of trial was \$49,256.39.

The amount of loan funds used for the house is disputed. Steven testified \$45,000 was spent on the house and the balance represents the remainder of Hazel's inheritance tax liability and payments made to Nettie for her forty acres. Hazel testified the loan was used to pay off a car loan and five to six thousand dollars of her inheritance tax bill. We find Steven's version more credible because no reference to a car loan is made on the face of the promissory note.

The Siscos also purchased Virginia's forty acres in 1991. The \$20,000 purchase price was financed by the Palo Savings Bank. As of the trial date, the unpaid balance of this promissory note was \$17,006.

The parties have stipulated the present value of their home is \$95,000. The record indicates the appraised present value of the farm land is \$1450 per acre. The record also indicates the unpaid balance of the loans secured by the Siscos' home and the 120 acres of land is \$66,262.39 (\$49,256.39 + \$17,006.00).

As earlier noted, Hazel was awarded the house and all 120 acres of the farm land. The district court determined Hazel inherited forty acres and the additional eighty acres was essentially a gift because of the below-market prices she paid for each tract. Hazel was ordered to assume the balance of the real estate loans and pay Steven \$14,371 for his share of their equity in the house. The district court granted Hazel ten years to pay Steven and imposed a three percent interest rate on the unpaid balance.

Steven argues the amount of home equity was unfairly reduced by inclusion of the entire unpaid balance of the Siscos' obligations to the Palo Savings Bank. According to Steven's calculation, their equity in the house was \$63,950. He arrived at this figure by reducing the amount of the loan attributable to the house to \$45,000 and multiplying this amount by the percentage of principal repaid ($\$45,000 \times .31 = \$13,950$) ($\$45,000 - \$13,950 = \$31,050$) ($\$95,000 - \$31,050 = \$63,950$). Steven's

percentage calculations were based on the amount of principal paid on the \$70,922.43 home loan ($\$49,256.39 \div \$70,922.43 = 69\%$ remaining on principal and 31% of principal repaid).

We agree with Steven. The Siscos' true equity in their home is \$63,950 and it was error for the district court to conclude otherwise. Steven is accordingly awarded \$31,975, representing one-half of the equity in the house.

Steven also takes issue with the district court's conclusion that the transactions with Hazel's mother and sister were essentially gifts. Steven cites his contribution towards payment of the purchase price, Hazel's inheritance tax liability, and the resulting joint obligation to the Palo Savings Bank. Steven suggests the court award him an additional \$15,000 as his equitable share of the 120 acres Hazel acquired during their marriage.

As already noted, Hazel inherited forty acres from her great-grandfather. This property was correctly set off to her because it was not marital property subject to division. Iowa Code § 598.21(2). The record also indicates the Siscos acquired an additional eighty acres for a price far below its market value. All parties agree this transfer was intended to preserve ownership of this land within Hazel's family. Under these circumstances, we conclude the transfers between Hazel and her family were gifts to the extent the value of the land exceeded its purchase price. Any division of

this property should accordingly be limited to the contribution of marital assets towards its acquisition.

The disputed eighty acres were appraised at \$116,800. The combined purchase price was \$42,000. The unpaid balance on the \$20,000 obligation for Virginia's forty acres was \$17,006. According to Steven's calculations, thirty one percent (\$6510) of the \$21,000 borrowed to buy Nettie's forty acres has been repaid. The Siscos have accordingly expended \$9504 of marital funds towards principal payments on these obligations. We award Steven one-half of this amount, or \$4752.

Hazel's combined obligation to Steven is \$36,727. Steven needs these funds to meet the children's immediate physical care needs. Hazel, however, does not have the liquidity or income sufficient to make immediate payment. This dilemma is best resolved by allowing Hazel sufficient time to obtain the financing necessary to meet her obligations under this opinion. In the event Hazel is unable to secure adequate financing within 120 days from the date procedendo issues in this case to meet this obligation, she shall liquidate as many of her assets as are necessary to meet these obligations. Interest on Hazel's obligations shall accrue at the judgment rate until paid in full. The conflicting provisions of the district court's decree are stricken.

VI. Attorneys Fees. Steven demands an award of attorney's fees resulting from this appeal. An award of attorney's fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 438 (Iowa App.

1994). We consider the needs of the requesting party, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We order Hazel to pay \$1000 of Steven's attorney's fees.

AFFIRMED AS MODIFIED.