

FILED

APR 25 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF FITZGERALD

Upon the Petition of)

MICHAEL L. FITZGERALD,)

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Petitioner-Appellant,)

And Concerning)

8-567
88-156

SHARON L. FITZGERALD,)

Respondent-Appellee.)

Appeal from the Iowa District Court for Polk County (CD 57-33927), Luther T. Glanton, Senior Judge.

Petitioner husband appeals certain provisions of the decree of dissolution entered for the parties in the district court. **AFFIRMED AS MODIFIED.**

Lorna A. Gilbert, Des Moines, for petitioner-appellant.

Steven H. Shindler and Roger J. Hudson, Des Moines, for respondent-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

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Petitioner husband appeals certain provisions of the decree of dissolution entered for the parties in the district court. Petitioner claims the district court erred in: 1) awarding primary physical care of the parties' minor children to respondent wife; 2) obligating him to pay an inequitable amount of child support; 3) awarding respondent wife an excessive amount of alimony; 4) making an inequitable property division; and 5) ordering him to pay all of respondent's attorney fees on appeal. We affirm as modified.

Michael and Sharon Fitzgerald were married on December 15, 1979. Two children were born of the marriage: Ryan William, born November 29, 1980; and Erin Elizabeth, born July 1, 1983. At the time of trial Michael was 36 and Sharon was 34. Michael is presently the Treasurer for the State of Iowa and earns a gross income of \$50,000 per year. He has a bachelor's degree in business. Sharon works part-time for Kirke Van Orsdel Insurance and earns \$10,811 per year in gross income. She has an associate degree in business.

The district court awarded the parties joint legal custody and gave Sharon primary physical care of the children. Michael was given visitation rights and ordered to pay \$385 per month per child in child support. He was also ordered to pay \$300 per month in alimony for

twenty-four months. The court awarded Sharon the right to occupy the homestead with the minor children until the youngest child reaches 18 or graduates from high school, Sharon marries, or moves. Upon the occurrence of one of these conditions, the court ordered the house to be sold and the proceeds to be divided evenly after Sharon is refunded all principle payments she made. Michael was also ordered to pay \$13,546 for Sharon's attorney fees.

I. Michael first claims that the trial court erred in awarding physical custody of the parties' minor children to Sharon. Our review in this matter is de novo. In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974); Iowa R. App. P. 14(f)(15). In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrbanc, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Our review of the record convinces us that the children's best interests in this case dictate that physical custody be with Michael. At the dissolution hearing, the court heard testimony from Dr. John Tedesco, Chief Psychologist of the Des Moines Child Guidance Center. Dr. Tedesco was selected by both parties to conduct a custody study and, after hours of personal interviews and observations of both parties and their children, Dr. Tedesco concluded that the children's interests would best be served by placement with Michael. The trial court chose to disregard Dr. Tedesco's report because Dr. Tedesco "put too much emphasis on the respective financial position[s] of the parties and on his interpretation of the test results . . . read the Respondent's deposition but did not read the Petitioner's deposition . . . did not interview neighbors or family members or other witnesses," and concluded that the "investigation was so superficial and lacking in scope that [Dr. Tedesco's] opinions and conclusions were without significant probative value." We disagree with the court's assessment of the reliability of Dr. Tedesco's report. The record indicates that Dr. Tedesco has conducted approximately 200 formal custody studies during his professional career, which has spanned fourteen years, and has used the same methods in evaluating parents and their children throughout the years. Those methods, as described

by Dr. Tedesco in court, include an evaluation of "the parents' attitudes towards one another as it may be conveyed to the children" and "the [parents'] knowledge, skills and abilities to rear the children." In conducting this evaluation, Dr. Tedesco relied upon certain standardized diagnostic tests and we see no reason to question the validity or reliability of the tests or the testing procedures. We further note that the respective financial conditions of the parties was given only a minimal amount of weight (5%) by Dr. Tedesco in making his recommendation.

As Sharon correctly points out in her brief, the custody investigator's report and recommendation is but one factor among many that we are to consider when viewing the record as a whole, see Marriage of Winter, 223 N.W.2d at 166-67; however, we believe that the weight of the evidence nonetheless favors Michael as the more suitable primary caretaker. At trial, evidence was introduced concerning Sharon's sexual relationship with a neighbor and her drinking habits. Although evidence of moral misconduct is but one factor to be considered along with other circumstances in custody determinations, see, In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983), we believe that such conduct casts doubt on Sharon's maturity and ability to minister to the best interests of the minor children. On the other hand, the record is

devoid of any evidence that Michael has conducted himself in any way that could possibly effect the best interests of the children.

In making our determination we note that we are faced with a very difficult decision in this case. It is apparent from the record that both Sharon and Michael are good, conscientious parents who have demonstrated a keen parental interest in their children, and that both parents are able to adequately care for the children on a day-to-day basis. On balance, however, we believe that the trial court erred in placing primary physical custody with Sharon. We therefore modify the court's decree and hold that primary physical care of Ryan and Erin shall be with Michael. Joint custody is affirmed. Sharon is granted reasonable rights of visitation, which visitation shall include, but not be limited to: every other weekend from Friday at 5:00 p.m. until Sunday at 8:00 p.m.; Sharon's birthday from 9:00 a.m. to 9:00 p.m.; Wednesday evening of each week from 5:00 p.m. to 8:00 p.m.; Mother's Day from 9:00 a.m. until 9:00 p.m.; four weeks' visitation during the summer months subject to giving Michael sixty days notice; every other federal holiday, which shall include Memorial Day, Independence Day, Labor Day, Thanksgiving Day, New Year's Eve, New Year's Day, President's Day, and Easter Sunday; the parties shall alternate Christmas Eve and Christmas Day and the parties shall divide the children's birthdays.

II. Michael also contests the trial court's award of alimony to Sharon and claims that it is inappropriate, inequitable, and excessive. The criteria to be considered in awarding alimony have been codified in Iowa Code section 598.21(3). Under this section, we consider the length of the marriage, the age and physical and emotional health of the parties, the distribution of property, the educational level of each party at the time of the marriage and at the time the action is commenced, the earning capacity of the party seeking maintenance, the feasibility of the party seeking maintenance becoming self-supporting, and other relevant factors. Iowa Code § 598.21(3) (1987).

The trial court ordered Michael to pay Sharon alimony for 24 months at \$300 per month based upon the fact that "Sharon's [earning] capacity is limited without further education and training." Although we agree with the court's finding in this regard, we do not agree that Sharon should be entitled to rehabilitative alimony in this case. The record shows that Sharon completed her two-year associate degree in business administration after the parties were married, and she has expressed no intent or desire to continue her schooling in the near future. At the time of trial Sharon was employed part-time at Kirke Van Orsdel, yet the record indicates that she was previously employed there full-time and that she voluntarily cut back her hours after the petition was filed

in this matter to spend more time with her children. The record also shows that Sharon has held a number of jobs, both before and after she was married. Overall, we believe the record supports a finding that Sharon, 34 at the time of trial, is a healthy, intelligent person who is quite capable of advancing in paid employment.

Sharon urges us to consider In re Marriage of Ogren, 375 N.W.2d 710 (Iowa App. 1985), and In re Marriage of Janssen, 348 N.W.2d 251 (Iowa 1984), in defense of her alimony award and claims that her contribution to Michael's political career and increased earning capacity is yet another factor to be considered in her alimony award. We find both cases to be distinguishable. Marriage of Ogren involved a 26-year marriage during which the husband obtained 12 years of higher education, including a bachelor's degree and two master's degrees. The wife, at age 45, had just begun working on her college degree at the time of the divorce decree. Marriage of Janssen involved a husband who had obtained his medical degree during the marriage, and a wife who had been accepted into law school at the time of the decree. We believe that Sharon's contributions to Michael's political career, although commendable, do not rise to the level of contribution found by the courts in these cases.

Upon consideration of the relevant factors, we hold that the trial court erred in awarding Sharon rehabilitative alimony.

III. Michael also claims that the trial court's property award was inequitable. He claims that the court's division leaves him with a net negative value of \$10,662 and entitles Sharon to a positive value of \$20,684. He further claims that he was not given sufficient credit for the property that he brought into the marriage.

In our determination of this issue we are guided by certain well-established principles. The distribution of the parties' property in a dissolution proceeding should be that which is equitable under the circumstances upon consideration of the criteria codified in Iowa Code section 598.21 (1987). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Under this statute, the ultimate question is whether the distribution of the property is equitable; there is no rule based upon a strict percentage division of assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). Division of marital property is based upon each marital partner's right to a just and equitable share of the property accumulated as the result of their joint efforts. Marriage of Hitchcock, 309 N.W.2d at 437 (Iowa 1981).

In the instant case, the trial court awarded Sharon the right to occupy the family home with the minor children until the youngest child reaches 18 or graduates from high school, Sharon marries, or dies. Upon the occurrence of one of these conditions, the court ordered the house to be

sold and the proceeds to be divided evenly after Sharon is refunded all principle payments she made. We disagree with this disposition. The record indicates that Michael purchased the house prior to the parties' marriage, and that the parties had "broken up" at the time of the purchase. The record also reflects the fact that Michael made the \$2700 down payment from his own separate funds. The purchase price of the property was \$43,500. The parties stipulated that the mortgage balance was \$38,615 at the time of trial. We believe that the home should be awarded to Michael and that Michael should be required to pay Sharon a share of the equity in the home. The net equity in the home, \$9,985, should be divided equally between the parties, after setting off \$2700 to Michael as his separate premarital property. We note that this adjustment in the trial court's decree is particularly appropriate in light of our award of the children's primary physical custody to Michael. See Iowa Code § 598.21 (1)(g) (1987).

As for the remaining property, we believe that the trial court's decree is equitable, except that both parties should be given full credit for the assets each brought into the marriage. The parties stipulated to the fact that \$5,752 of the Home Plan IRA in Michael's name was acquired by him prior to the marriage, and we hold that this amount should be set off to him as his separate premarital

property. The parties further stipulated that as a result of the additions to this IRA from joint funds during the course of the marriage, its value at the time of trial was \$14,680.50. We hold that the remaining \$8928 (after setoff) is to be considered marital property, and is to be divided evenly between the parties.

IV. Michael last claims that the trial court erred in requiring him to pay all of Sharon's attorney fees at trial. Attorney fees are not recoverable as a matter of right, but rest within the court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. Marriage of Estlund, 344 N.W.2d at 281. The record indicates that Sharon incurred attorney fees in the amount of \$13,556 at trial. We modify Michael's obligation and hold that he shall be required to pay \$2000 towards Sharon's attorney fees at trial. Court costs should be taxed fifty percent to each party. Each party shall be responsible for his/her attorney fees and costs on appeal.

AFFIRMED AS MODIFIED.