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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF FREDERIC REED CARLSON AND PATRICIA A. CARLSON

Upon the Petition of)
FREDERIC REED CARLSON,)
Petitioner-Appellee,)
And Concerning)
PATRICIA A. CARLSON,)
Respondent-Appellant.)

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8-113
87-1290

Appeal from the Iowa District Court for Winneshiek County (No. D-898), James L. Beeghly, Judge.

Respondent wife appeals the decree dissolving the parties' marriage. **AFFIRMED.**

Richard D. Zahasky, Decorah, for respondent-appellant.

Kevin J. Visser of Moyer & Bergman, Cedar Rapids, for petitioner-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but considered en banc.

DONIELSON, J.

The respondent wife appeals the decree dissolving the parties' marriage. Respondent asserts that (1) the trial court erred in placing physical custody of the parties' minor children with petitioner; (2) that the property division is inequitable; and (3) that her child support obligation is excessive. Our scope of review is de novo. Iowa R. App. P. 4. We affirm.

The respondent, Patricia A. Carlson, and the petitioner, Frederic Reed Carlson, were married in 1976. Two children were born of the marriage: Andy, born in 1979, and Katie, born in 1980. Reed works as an equipment superintendent for his family's highway construction business. Pat has a masters degree in science education, and taught school for approximately one year prior to Andy's birth. She is currently enrolled in a nursing program at Luther College to be completed in December 1988.

In its dissolution decree, the trial court set up a joint custody arrangement with Reed having physical care of Andy and Katie. The court directed Pat to pay child support of $20 per month for sixteen months and $275 per month commencing on January 1, 1989. The court also awarded Reed the parties' home in Decorah, a car, the household goods in his possession, his life insurance policies, his interest in a real estate partnership, his stock in the family business, his profit-sharing account, and his I.R.A. Pat was

awarded a vacant vacation lot in Illinois, a car, the household goods in her possession, her life insurance policies, and a $15,000 property settlement. Reed was directed to pay all of the parties' debts except the lot contract.

I. **Child Custody.** Pat contends the trial court erred by placing the primary physical care of the minor children with Reed. It is Pat's contention that the best interests of the children would be served by leaving them with her because she has been their primary caretaker. Reed, on the other hand, has only recently taken an active interest in caring for the children.

The controlling consideration in child custody cases is what is in the best interests of the children. Iowa R. App. P. 14(f)(15). Once it has been established that both parents are fit, the court must decide in whose custody the long term best interests of the children will better be served. In re Marriage of Weidner, 338 N.W.2d 351, 359 (Iowa 1983).

The trial court found that both parents qualify as primary caretakers of the children. "Both parents have fulfilled the role of loving, nurturing parents who have provided the children with satisfaction of their basic needs and with emotional support." However, on balance, the court found the long-range best interests of the children will be served by placement with their father.

Under this factual situation, the decision of the trial court is entitled to considerable weight. The trial court heard the testimony and observed the witnesses before performing the delicate task of balancing the appropriate factors. We concur with the result of the trial court.

The factors to be considered in child custody cases are well established. They are outlined in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The factors to be considered together include:

1. The characteristics of each child, including age, maturity, mental and physical health.

2. The emotional, social, moral, material, and educational needs of the child.

3. The characteristics of each parent, including age, character, stability, mental and physical health.

4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.

5. The interpersonal relationship between the child and each parent.

6. The interpersonal relationship between the child and its siblings.

7. The effect on the child of continuing or disrupting an existing custodial status.

8. The nature of each proposed environment, including its stability and wholesomeness.

9. The preference of the child, if the child is of sufficient age and maturity.

10. The report and recommendation of the attorney for the child or other independent investigator.

11. Available alternatives.

12. Any other relevant matter the evidence in a particular case may disclose.

Id. at 166-67.

The trial court found that Reed is demonstrating greater stability in his personal life and for more than the last two years has been able to put the immediate needs of the children ahead of his own. It is true that in the early years of the marriage, Reed's work schedule required him to be gone from the family home a great deal of the time during the week while Pat was at home with the children. Reed did, however, provide a substantial amount of basic care in the evenings and on the weekends. Then as Pat's schedule changed and her evenings became consumed with her job and activities, Reed assumed even more responsibility for the care of the children.

Reed has established his career in the family business. He has hired an assistant and now has more time to spend with the children. The seasonal nature of the paving business also provides Reed with more time to spend with the children during the school year.

Reed has recently developed an interest in health and physical fitness. As a result, Reed is able to involve his children in fitness activities which has strengthened their relationships while promoting their well being. Reed has a good, healthy relationship with his children. He can provide a stable, wholesome environment for his family.

Pat's life shows less stability. Pat earned her master's degree in science education, but only taught for one year. In 1984, Pat took an evening job as a part-time desk clerk at the local racquet club. She quit this job before the support hearing. Her next job was selling newspaper ads. At the time of trial, Pat was living in Rochester, Minnesota, and was enrolled in the nursing program at Luther College.

During the time Pat worked at the racquet club, her consumption of alcohol increased. She was arrested for OWI in April 1986. She subsequently pled guilty and was put on probation for one year. Pat also became involved with other men and admits she had three extramarital affairs. Pat was involved with a man at the time of trial, but as a couple they had no definite plans for the future. Pat's schooling will be complete in December 1988. It is uncertain at this time where her new career will take her. At one point Pat considered moving as far away as Pennsylvania.

The children have been raised in Decorah. They have developed ties with friends in the area and are familiar with the schools. Decorah also provides the benefits of having an extended family in the area. Placement with Reed will ensure the children will be able to stay in the family home in Decorah and will lessen the number of adjustments the children have to make as a result of their parents' divorce.

Placement with Reed is also supported by the recommendation of the custody evaluator. After interviewing the children, the children's teachers, and family friends, the evaluator determined that placement should be with Reed at least while Pat is in school and Reed remains in Decorah. Because both parents have strong relationship with the children, the custody decision rested on the issue of stability for the children's lives.

Applying the applicable Winter factors to the evidence presented, we believe the custody provisions are correct. 223 N.W.2d at 166-67. Determining what custodial arrangement will best serve the long range best interests of the children frequently becomes a matter of choosing the least detrimental available alternative for safeguarding the growth and development of the children. See Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (The Free Press 1973) cited in Winter, 223 N.W.2d at 167. Allowing the children to continue living in Decorah with their father will provide a stable, healthy, and moral environment and will better serve the long-range best interests of the children. This was the conclusion of the trial court and our de novo review. Therefore, we affirm the trial court on the issue of joint custody, physical care, and visitation rights.

II. **Property Distribution.** Pat contends that the trial court erred in its distribution of property where Reed had a higher income potential and received the largest

share of the parties' assets. The trial court awarded Reed the homestead, a 1976 Triumph Spitfire, his own life insurance policies, furniture and appliances in his possession, his one-half interest in real estate partnership, all stock in Fred Carlson Company, Inc., his profit sharing account at Fred Carlson Company, Inc., and his I.R.A. Pat was awarded a vacation lot, a 1983 Toyota Tercel, Patnam-Eberstet Resource T., her own life insurance policies and the furniture, appliances, and other personal items in her possession as well as $15,000 in property settlement.

Iowa follows a theory of equitable distribution of property in a dissolution proceeding. In re Marriage of Byall, 353 N.W.2d 103, 106 (Iowa App. 1984). Our analysis of the property division is governed by section 598.21(1) of the Iowa Code. Viewing the record before this court under section 598.21(1) (1987), we conclude that the court's distribution of the property was equitable.

Inherited or gifted property is the property of the person receiving it and is not subject to property division except upon a finding that failure to divide such property is inequitable to the other party. Iowa Code § 598.21(1). Reed's family and their business have contributed to the couple's economic situation. Even excluding the gifted property, Pat shares in the rewards earned by Reed working for his family. Pat also benefits from the equity in Reed's family home and the value of the pension plan.

It is not unfair to exclude the property gifted to Reed. Id. Among the considerations are: the relatively short marriage (approximately eleven years); Pat stayed out of the work force for only five years when the children were young; Pat is in good health and well educated; and she has the capacity and training to maintain a good standard of living.

The law requires an equitable distribution. It does not require that equality be achieved with mathematical exactness. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa App. 1984). The ultimate question is whether the distribution is equitable under the facts of the case. Id. Pat has received an equitable share of the assets.

All economic aspects of the divorce decree must be viewed as an economic whole. Id. Pat has been left relatively debt free. Reed will be assuming over $100,000 in debt. This distribution allows Pat to continue school if she chooses, using the $15,000 award to support herself. Or Pat could return to teaching and use the $15,000 for other purposes. Either way, the property distribution leaves Pat in an equitable position.

III. Child Support. We affirm the trial court's award after considering the relevant factors listed in Iowa Code section 598.21(4). Pat is currently in school and has been ordered to pay only $20 a month until she finishes her program. Thereafter the amount rises to $275 a month. Pat's prospects for employment as a nurse look good

considering the shortage of nurses in the work force. Both parents have an obligation to support their children according to their ability and circumstances. See In re Marriage of Byall, 353 N.W.2d 103, 108 (Iowa App. 1984). Since Reed will be providing primary physical care of the children, Pat must also fulfill her support obligation. Therefore, we affirm the trial court's order of child support.

AFFIRMED.

All judges concur except Schlegel, J., and Oxberger, C.J., who dissent.

SCHLEGEL, J.

I respectfully dissent. I am not impressed with the delayed concern shown by Reed when this marriage commenced to deteriorate. He apparently underwent a last-minute conversion to address the needs of his children only when it appeared that the marriage was headed to disaster. Up to that time, he was content to tend to his own and his family's business and have little to do with his children. Suddenly, Pat becomes an unfit parent in his eyes.

Although Pat was guilty of some indiscretion during the separation of these parties, she did nothing that affected the children or her care of them. She provided them the kind of care that they needed, even though she was going through some traumatic times.

The best interests of the children would be served by having them in the physical custody of Pat.

Under these circumstances, child support from Reed would be appropriate in an amount that would enable Pat to provide the necessities to them that her income could not afford.

Eleven years and two children does not make for a short-term marriage. Since Pat remained in the work force for a large part of the marriage, she contributed to the maintenance of the family and the purchase of the home, though from Reed's father, and maybe even at a bargain price. The property distribution is inequitable. Her share of the marital assets should be more than doubled.

I would substantially modify this manifestly unwise and unfair decree.

Oxberger, C.J., joins this dissent.