

IN THE COURT OF APPEALS OF IOWA

No. 3-532 / 92-1973

**FILED**

NOV 29 1993

CLERK SUPREME COURT

000645

**IN RE THE MARRIAGE OF PAUL M. VON EBERS AND  
KATHLEEN L. MURRIN**

Upon the Petition of  
**PAUL M. VON EBERS,**

Appellant,

And Concerning  
**KATHLEEN L. MURRIN,**

Appellee.

---

Appeal from the Iowa District Court for Polk County,  
James W. Brown, Judge.

The petitioner appeals various economic and child  
custody provisions of the parties' dissolution decree.

**AFFIRMED.**

Jerry R. Foxhoven, Des Moines, for appellant.

Harvey L. Harrison, Des Moines, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,  
JJ. Donielson, J., takes no part.

000615  
PER CURIAM

Paul Von Ebers and Kathleen Murrin were married in Chicago on September 6, 1980. The parties separated in August 1988. Paul and Kathleen had two children: Tracy, born in May 1983, and David, born in August 1985.

Prior to the birth of the children, both Paul and Kathleen had full-time careers. Paul is an executive with Blue Cross and Blue Shield, reporting directly to the CEO. At the time of trial, Paul earned an annual income of approximately \$130,000. Kathleen has a master's degree in communicative disorders. Prior to the birth of Tracy, Kathleen worked for various health care foundations. In August 1984 Kathleen returned to work for four months, then the family moved to Des Moines. Kathleen was earning approximately \$35,000 in 1984.

Upon moving to Des Moines the couple decided Kathleen should stay at home with the children. Kathleen has not worked outside of the home since 1984, with the exception of a small amount of consulting work she did in 1990. Although they separated in 1988, Paul and Kathleen conducted their financial affairs as though they were still living together. Kathleen had physical custody of the children, but Paul had considerable contact with them.

On March 7, 1991, Paul filed a petition for dissolution of marriage. A trial was held in August 1992. Paul was thirty-nine years old at the time of trial, and Kathleen was forty-six years old.

000647

In its decree, the district court awarded joint legal custody of the minor children, with Kathleen having primary physical custody. The court established a minimum visitation schedule for Paul. The court ordered Paul to pay Kathleen \$2000 per month in child support for the two minor children. Paul was ordered to maintain at least \$400,000 of life insurance and name the children as beneficiaries for the duration of his child support obligation. Paul was to pay for health insurance for the children and was ordered to pay seventy-five percent of all medical bills not covered by insurance. Paul was additionally ordered to pay Kathleen \$1800 per month alimony for eighteen months, to be reduced to \$1000 per month for the next fifty-four months. The court distributed the parties' property. In order to balance the distribution, the court ordered Kathleen to pay \$27,901 to Paul. Paul was ordered to pay \$6000 towards Kathleen's attorney fees and \$1000 for trial expenses. Paul appeals, and Kathleen cross-appeals.

Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound, however, by those determinations. Id. 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 Manson, 503 N.W.2d 427, 429 (Iowa

App. 1993) (citing In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983)).

I. Property Distribution. Paul contends the district court's property distribution is inequitable. Paul, however, contests only the distribution of one particular item. Paul argues the district court should have awarded him an old farmhouse bed. He contends he bought the bed prior to the marriage but refinished it sometime thereafter. Iowa Code section 598.21 provides: "The court shall divide all property, except inherited property or gifts received by one party, equitably between the parties after considering all of following: [t]he property brought to the marriage by each party." Iowa Code § 598.21 (1991). Property brought into the marriage by one party need not necessarily be divided. In re Marriage of Lattig, 318 N.W.2d 811, 815-16 (Iowa App. 1982).

Kathleen contests several aspects of the property distribution. The Iowa courts do not require an equal or percentage division. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The determining factor is what is fair and equitable in each particular circumstance. Id. Kathleen has failed to show the distribution was inequitable. We affirm the property distribution as set forth by the district court.

II. Custody. Paul next asserts the district court should have awarded joint physical custody to the parties. The trial court designated Paul and Kathleen joint legal

custodians of the children and awarded primary physical care to Kathleen.

A shared physical custody arrangement is not favored by our courts except in the most unusual circumstances. In re Marriage of Coulter, 502 N.W.2d 168, 171 (Iowa App. 1993) (citing In re Marriage of McElroy, 475 N.W.2d 221, 223 (Iowa App. 1991); In re Marriage of Muell, 408 N.W.2d 774, 776 (Iowa App. 1987)). We determine the circumstances of this case do not warrant an award of joint physical custody. We affirm the decision of the district court on the custody issue.

III. Child Support. Kathleen contends the trial court erred in failing to include Paul's incentive compensation as part of his income for purposes of computing his child support obligation. Incentive pay should be included as part of the gross income for purposes of child support. State, Dept. of Human Servs. v. Burge, 503 N.W.2d 413, 414-15 (Iowa 1993). It is apparent the district court considered the incentive compensation in determining Paul's child support obligation. The district court recognized Paul's annual income and his incentive compensation in its order. There is no abuse of discretion on behalf of the district court. We affirm on this issue.

IV. Alimony. Paul argues the district court erred in awarding alimony to Kathleen. The court ordered Paul to pay alimony in the amount of \$1800 for eighteen months and then \$1000 for the next fifty-four months. When

000650

determining the appropriateness of alimony, the court must consider the factors listed in Iowa Code section 598.21(3) (1993). Those factors include earning capacity, employment skills, and length of absence from job market. Iowa Code § 598.21(3) (1993); see In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). The trial court specifically stated it had considered his incentive pay in determining Paul's total ability to pay spousal support. We do not disturb the alimony award set by the trial court. We affirm on this issue.

V. Medical Costs. Kathleen argues the trial court erred in requiring her to pay twenty-five percent of out-of-pocket medical costs. We disagree. We affirm the district court on this issue.

VI. Attorney Fees. Paul lastly maintains Kathleen should be required to pay her own attorney fees. The trial court ordered Paul to pay \$6000 toward Kathleen's attorney fees and \$1500 toward trial expenses. To overturn an award of attorney fees, the complaining party must show the trial court abused its discretion. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980). Paul has failed to show an abuse of discretion. We affirm the trial court's award of attorney fees and expenses.

Kathleen also seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the discretion of the court and the parties' financial positions. In re Marriage of Hankenson, 503 N.W.2d 431,

433 (Iowa App. 1993) (citing In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983)). We are to consider the needs of the party making the request, 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. Id. at 433-34 (citing In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981)). We note Kathleen was obligated to defend the lower court's decision on appeal. Kathleen's attorney on appeal has submitted a statement of his fees. We have reviewed the statement and order Paul to pay \$1500 toward Kathleen's appellate attorney fees. We award Kathleen a judgment in this amount.

For the reasons stated in this opinion we affirm the trial court's decision in its entirety.

Costs of this appeal are taxed to Paul.

**AFFIRMED.**