

IN THE COURT OF APPEALS OF IOWA

No. 2-450 / 92-191

FILED

OCT 27 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF MAUREEN SUE WIECHMANN AND
DANIEL FREDERICK WIECHMANN, JR.

Upon the Petition of

MAUREEN SUE WIECHMANN,

Appellant,

And Concerning

DANIEL FREDERICK WIECHMANN, JR.,

Appellee.

Appeal from the Iowa District Court for Franklin
County, Milton D. Seiser, Judge.

Maureen appeals from the decree dissolving the parties'
marriage. **AFFIRMED.**

Sharon Soorholtz Greer and John B. Grier of Cartwright,
Druker & Ryden, Marshalltown, for appellant.

Michael G. Byrne of Winston, Reuber & Byrne, P.C.,
Mason City, for appellee.

Heard by Donielson, P.J., Sackett, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

Maureen Wiechmann appeals from the decree dissolving the parties' marriage.

Maureen Wiechmann and Daniel Wiechmann, Jr. were married in 1963. At the time of their marriage, both were students and neither had substantial assets. Daniel was completing his final year in law school while Maureen completed her final year in education. Throughout their marriage, both were employed outside the home. Daniel practices law as a sole practitioner, and Maureen works as an administrator for a county care facility. They have three children all under eighteen years of age.

In 1989 and 1990, Daniel began to experience severe depression after suffering financial losses in his law practice and pleading guilty to criminal charges that he had supplied beer to boys in his Boy Scout troop. In March 1991, Daniel was hospitalized for treatment of depression.

The district court dissolved the parties' marriage in January 1992. The court awarded the parties joint legal custody, with primary physical care of the children to Maureen. The court awarded Daniel unsupervised visitation. In calculating child support, the court used Daniel's net income for 1991, rather than his average income for past years. The court set Daniel's child support obligation at \$500 per month. However, the court ordered the support to be adjusted annually in accordance with the child support guidelines if there is a change in

income or the number of dependents. Daniel was ordered to reimburse Maureen for one-half of the health insurance premiums and uninsured medical expenses for the children on a monthly basis. Daniel received the right to claim two children as tax deductions.

The court awarded Maureen the parties' homestead and awarded Daniel the two rental properties. Each was to assume the debts on their respective properties. The decree gave each party an insurance policy, a motor vehicle, and various financial accounts. The court directed each party to pay their respective attorney fees and ordered Daniel to pay the guardian ad litem's \$5,000 fee.

Maureen appeals. She challenges the unsupervised visitation awarded to Daniel. She seeks an increase in the amount of child support. She argues she should be allowed to claim the tax exemption on two of the children. She seeks an order requiring Daniel to pay two-thirds of the health insurance premiums for the parties' two children. She contends the property distribution was inequitable and asks the court to award her additional liquid assets in the form of a rental house and a money market account. She contends the provision in the decree which requires her give notice of her intent to move is unduly restrictive. Finally, Maureen requests attorney fees at trial and on appeal. Daniel also seeks appellate attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Visitation. Maureen first challenges the district court's award of unsupervised visitation to Daniel. She contends because of Daniel's recent psychological and emotional problems, his visitation with the children must be supervised. She also argues his visitation must be limited to no overnight stays, should include church attendance, and should end at 5:00 p.m. instead of 8:00 p.m. on Sunday nights. Maureen also contends the children's regularly scheduled activities should continue during Daniel's visitation. Finally, she requests the court modify both the Christmas and summer visitation periods.

We remind Maureen that liberal visitation rights are in the best interests of the children. Iowa Code § 598.41(1) (1991); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as joint custodians, are charged with maintaining those interests. Unless visitation with the noncustodial parent will in some way injure the child, it is not to be prohibited. Fitch v. Fitch, 207 Iowa 1193,

1197, 224 N.W. 503 (1929). Access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. Willey v. Willey, 115 N.W.2d 833, 838 (Iowa 1962). Likewise, any restrictions or limitations on Daniel's visitation should not be imposed unless they are in the best interests of the child.

We do not agree supervised visitation is necessary, or in the best interests of the children. Daniel's psychologist, the children's guardian ad litem, and the persons who had supervised visitation prior to the dissolution decree all testified there was no need for supervised visitation. While Maureen contends the children have expressed a wish to have only supervised visitation with their father, we note the district court's findings:

This dissolution has been difficult for the children. Because of the divided loyalty, they have tried to say things which pleased the parent they are with. Each parent then construes this in [his or her] favor and it adds to the problems. . . . An example of this is the statements of the children as to their desire for supervised visitation.

We do not agree the children's regularly scheduled activities should be ordered to continue during Daniel's visitation period. Maureen and Daniel have joint legal custody of the children. Maureen should not be allowed to enroll the children in activities which infringe upon Daniel's visitation without first conferring with Daniel and the child. We find the other limitations and

modifications which Maureen has requested, including a reduction of the visitation periods during Christmas and summer, are unduly restrictive, unnecessary, and not in the best interests of the children.

Finally, we remind both parties court-ordered visitation is only the minimum. Maureen and Daniel are both expected to be generous in visitation to effectuate what is in the best interests of the children. We affirm the visitation schedule in its entirety.

II. Child Support. Maureen also argues Daniel's average earning capacity should have been considered by the district court in assessing Daniel's child support obligation. She further contends Daniel should be required to pay two-thirds of her health insurance premiums on the children.

Before using earning capacity rather than actual earnings in the child support guidelines, a court must make a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. Iowa Dep't of Human Servs. v. Gable, 474 N.W.2d 581, 582-83 (Iowa App. 1991). Here, the district court calculated Daniel's support obligation based on his actual earnings in 1991, approximately \$16,000 to \$17,000. We agree with the district court's observation that Daniel did not willfully cause the economic decline or his own personal problems which aggravated his current

economic situation. During 1991, several of Daniel's major clients and sources of income were terminated. His income from representing indigent criminal defenders plummeted when the public defender system was expanded. The Farmer's Home Administration changed their method of operation and no longer required Daniel's legal services. Consequently, a significant portion of Daniel's business dropped off.

In the district court's decree, the court ordered that, if Daniel's income should increase, Maureen is entitled to have the decree modified without showing any other change in circumstances. We recognize the hardship Daniel's decrease in income imposes on Maureen and the children. However, in light of this additional provision in the decree, we do not find substantial injustice results from using Daniel's actual earnings from 1991 in calculating his child support obligation.

We also affirm the district court's order regarding health insurance and other uninsured medical expenses. It is well established that both parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 222 (Iowa 1976). This obligation should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). Based upon the relatively limited resources and incomes of both parties, we find it equitable to order the parties to split the children's medical expenses.

III. Tax Exemptions. Maureen next contends she should be awarded the tax exemptions on two of the children, and Daniel should be awarded an exemption on one of the children.

While the general rule is that the custodial parent is allowed to claim the exemptions for the children, the district court is entitled to award the exemption to the non-custodial parent in its order and decree. In re Marriage of Kerber, 433 N.W.2d 53, 54-55 (Iowa App. 1988) (citing I.R.C. § 152(e)(2), (3) and (4) (1988)). In light of Daniel's child support and medical expenses obligations, and his current financial situation, we find the district court properly awarded Daniel two of the tax exemptions.

IV. Property Distribution. Maureen next argues the division of property is inequitable because she was awarded insufficient liquid assets and no income-producing assets. Specifically, Maureen contends the district court should have awarded her a rental house and the money market account.

The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Iowa courts do not require an equal division of percentage distribution. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991).

Both parties received substantial property awards in the decree. Maureen was awarded, among other assets, the homestead and a certificate of deposit with a value of about \$5,000. Daniel was awarded, among other assets, the two rental properties and a money market account worth about \$5,200. We do not find Maureen must be awarded an income-producing asset in order for the distribution to be equitable. While Daniel was awarded the money market account, we note Maureen was awarded a certificate of deposit of comparable value. We find the district court's property distribution equitable in its entirety.

V. Notice of Intent to Move. Maureen further contends she should not have to give sixty days notice of her intent to move more than one hundred miles from Hampton.

The court's order neither prevents Maureen from moving nor requires Maureen to obtain court approval if she decides to move elsewhere. The court simply ordered that, if Maureen chooses to move more than one hundred miles, she must give Daniel sixty days notice. A decision by a joint custodial parent with physical care of children to move over one hundred miles is "obviously the kind of decision the other joint custodian has a right to be consulted about." In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983). We do not find this notice provision unduly restrictive and we decline to strike it from the decree.

VI. Attorney Fees. Maureen finally contends Daniel should pay her attorney fees for both the lower court and the appellate court. Daniel also requests attorney fees for the cost of this appeal.

A. District Court Attorney Fees. In its decree, the district court ordered each party to pay his or her own attorney fees. The court also ordered Daniel to pay the guardian ad litem's fees and the costs of the dissolution action. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We do not find an abuse of discretion and affirm the district court's order regarding attorney fees.

B. Appellate Attorney Fees. Maureen and Daniel both request attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Based upon these factors, we deny the requests of both parties.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

The costs of this appeal are taxed to Maureen.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.