FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 442

IN RE THE MARRIAGE OF ROSEMARY L. MILLER AND FREDERICK B. MILLER

Upon the Petition of	)	
ROSEMARY L. MILLER,	)	Filed August 26, 1980
Petitioner-Appellant,	)	
And Concerning	)	
FREDERICK B. MILLER,	)	0-143 2-64275
Respondent-Appellee.	)	

Appeal from Polk District Court - James P. Denato, Judge.

Petitioner appeals child custody, health insurance, visitation, and property division provisions of parties' dissolution of marriage decree. AFFIRMED AS MODIFIED AND REMANDED.

David J. Stein of Stein & Chozen, Milford, for petitioner-appellant.

Marilyn S. Scheer of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Petitioner, Rosemary L. Miller, appeals child custody, health insurance, visitation, and property division provisions of the parties' dissolution of marriage decree. We affirm the trial court decree as modified and remand this matter with directions to enter a decree in accordance with this opinion.

I.

Our scope of review is de novo. Iowa R. App. P. 4. We will examine the whole record and determine anew the rights of the parties on those issues properly presented. While we give weight to the findings of the trial court, especially concerning the credibility of witnesses, we will not abdicate our function on appeal as trier de novo. In re Marriage of Burham, 283 N.W.2d 269, 274-75 (Iowa 1979).

II.

Rosemary and respondent, Frederick B. Miller, were married in 1962 and have four children, ages fifteen, fourteen, eleven, and ten. On May 25, 1979, Rosemary filed a petition for separate maintenance. On June 20, 1979, the trial court filed an order granting Rosemary temporary custody of the children and requiring Frederick to pay child support of $425 per month. On July 7, 1979, Rosemary amended her petition to request dissolution of the marriage.

The dissolution matter was heard on August 29, 1979. On September 18, 1979, the court held an informal hearing concerning the division of personal property. On September 26, 1979, the court filed its decree, which provided for joint custody of the children—ten months with Rosemary and two summer months with Frederick—subject to visitation by Frederick of one weekend per month, Christmas vacation, and spring vacation. Frederick was ordered to pay child support of $25 per week per child, except during the two months when he had custody. The court divided the real and personal property with the intent of achieving an approximately equal division.

III.

Rosemary contends the evidence in the record does not support dividing custody between herself for ten months and Frederick for two months. She points out the law of Iowa historically has not favored joint or divided custody except under the most unusual circumstances and only when it is clearly shown to be in the best interests of the child. See Burham, 283 N.W.2d at 272-74; Smith v. Smith, 257 Iowa 584, 588-89, 133 N.W.2d 677, 679 (1965); Huston v. Huston, 255 Iowa 543, 553, 122 N.W.2d 892, 898 (1963). In

1979, however, the Supreme Court of Iowa reconsidered its position and announced joint custody arrangements will not be opposed if the arrangement satisfies eight tests enumerated to determine the appropriateness of joint custody. Burham, 283 N.W.2d at 274.

Using the Burham analysis, we conclude joint custody is not appropriate in this instance. Our reasons for this decision start with Rosemary's opposition to joint custody. Due to the delicate nature of joint custody, each party must be committed to making the arrangement work. Rosemary's opposition dooms this arrangement from the start. Second, the parties have not demonstrated an ability to communicate and reach shared decisions in the children's best interests. Third, the distance between Frederick's home in Elkhart, Iowa, and Rosemary's in Milford, Iowa, is approximately 190 miles. This lack of geographical proximity would substantially disrupt the children's association with their friends and their summer activities. A secondary reason for not approving a joint custody arrangement is the children's opposition to it. For these reasons, we hold joint custody is not appropriate in this case.

Since Frederick requested only joint custody be granted, an arrangement we reject, we find it unnecessary to address at length the issue of custody here. Although either parent would provide adequately for the children's needs, the trial court apparently believed Rosemary could minister effectively to the long-range best interests of the children. Applying the principles set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), to these facts and considering Frederick's refusal to request permanent custody, we see no reason to disagree with the trial court's judgment. See Harwell v. Harwell, 253 Iowa 413, 420-21, 112 N.W.2d 868, 873 (1962).

The question of Frederick's visitation rights remains. Neither party contests the weekend, Christmas, or spring visitation provisions of the decree and we consider them appropriate. The hard question concerns summer visitation. Rosemary asserts two months is too disruptive of the children's summer jobs and activities. The children agree. While the children's preferences are not controlling, they are relevant and cannot be ignored. See Burham, 283 N.W.2d at 276. Balanced against the disruption is the benefit the children would gain from being with their father, who appears to be a caring and competent parent. See In re Marriage of McBee, 244 N.W.2d 327, 329 (Iowa 1976). We find the children's best interest will be served by modifying the decree to grant Frederick four weeks of visitation to be exercised sometime during June, July, or

August. The four weeks may either be taken consecutively or in one, two, or three week periods. Every effort should be made to avoid disruption of the children's summer jobs or activities.[1]

Frederick's support obligations are not suspended during these four weeks of visitation. Most of the expenses Rosemary incurs in caring for the children will continue for this period and must be met; the absence of food or other incidental expenses is not sufficient to permit an interruption in support payments. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976); In re Marriage of Glass, 213 N.W.2d 668, 670-71 (Iowa 1973). Due to our structuring of Frederick's visitation rights, we find it unnecessary to grant Rosemary any rights of visitation during his period of visitation. The decree is modified to reflect these changes.

IV.

Rosemary contends the dissolution decree should require Frederick to provide hospital, medical, and dental insurance for their children. Frederick states that his intention is to provide this insurance coverage through his union insurance program. He contends, however, it is not absolutely necessary this requirement be included in the decree. In the interest of avoiding future problems and providing the children with adequate health insurance coverage, we hold the decree shall provide Frederick is required to maintain adequate hospital, medical, and dental insurance for each child until each graduates from high school, marries, or becomes self-supporting. Any coverage should be substantially equal with that now provided by Frederick's union insurance plan. See In re Marriage of Zoellner, 219 N.W.2d 517, 522 (Iowa 1974).

V.

Rosemary asserts the property division set forth in the dissolution decree was unfair, unjustified under the circumstances, and without support in the record. We use the criteria set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except the criterion of fault, In re Marriage of Williams, 199 N.W.2d 339, 344-46 (Iowa 1972), as aids

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[1] During the oral argument of this appeal, this court asked Rosemary's attorney, David J. Stein, for a recommendation to the period of Frederick's summer visitation with the children. Mr. Stein recommended a period not to exceed four weeks. This court directed the parties to attempt to reach a stipulation on this matter. Subsequently, Mr. Stein notified this court of his discussion with the children who indicated any period in excess of two weeks would be too disruptive to their summer jobs and summer activities. The parties were thus unable to reach a stipulation. In our determination of a reasonable visitation period, we have not treated Mr. Stein's recommendation as binding on Rosemary.

in arriving at an equitable determination of financial or property rights and obligations. After doing so, we conclude the property division set forth in the decree is equitable and should be affirmed.

An approximately equal property division is justified under these circumstances. The parties' marriage lasted seventeen years, during which each party contributed significantly to the family and the accumulation of assets. For the first twelve years, Frederick was the sole income source for the family. His job as a truckdriver has permitted him to take a significantly active role in raising the children. During the last three years of marriage, Frederick averaged about $17,500 per year in income. For the last five years of the marriage, Rosemary worked as a beautician. Her income averaged approximately $10,000 per year in the last three years of the marriage.

The court divided the real property equally. The family home, which was built by Frederick and his father, was awarded to Frederick. However, Frederick was ordered to pay to Rosemary $28,625, an amount equal to one-half the value of the property ($60,000) less one-half of the debt of $2,749.50 owed by the parties for a home improvement loan. Although Rosemary asserts the value of the property is $67,500, a professional appraiser valued it at $59,000. We concur in the trial court's assessment of the property's value.

The beauty shop Rosemary operated was sold prior to the dissolution action. The proceeds were divided equally, except for a $500 deduction from Rosemary's share for property damage to the family home shortly before she and the children moved to Milford. This amount was added to Frederick's share of the proceeds.

Rosemary asserts the personal property was not divided equitably in light of the individual assets' respective values. Rosemary was awarded the following goods: A 1973 Chevrolet automobile, which she valued at $200 to $500; household goods, which she valued at $875; and garage items, which she valued at $280. Frederick was awarded: A 1979 Datsun automobile, which Rosemary valued at $4000; a Grand Paige automobile, which she valued at $500-$2000; household goods, which she valued at $960; a trailer, which she valued at $375; and garage items, which she valued at $1700. Frederick contends Rosemary's valuations are not representative of the items' true values and are unsupported by the evidence.

We hold the property division set forth in the dissolution decree is equitable. An equal division of property, even when justified, need not be achieved with mathematical

exactness. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). The trial court's assessment of what constituted an equitable division is to be given some weight. Iowa R. App. P. 14(f)(7). Rosemary presented no reason for us to disagree substantially with the court's valuation or division. The property division set forth in the decree is affirmed.

VI.

Lastly, Rosemary asserts a conference held on September 18, 1979, among the trial judge, her counsel, and Frederick's counsel is grounds for reversal because she received notice of the meeting only 1-1/2 hours before the meeting started. Since this notice reached her at her home, which is approximately 200 miles from the courthouse, she asserts she was denied an opportunity to be heard. At this conference, the court reduced Rosemary's property award by $500 and increased Frederick's by $500 for damage to the parties' home. Frederick contends this conference was not an evidentiary hearing but merely a request for clarification of the decree's property division provisions. Although Rosemary was not at the conference, her attorney was present and took part in it. While the lack of a transcript from this conference hampers our review, we fail to see how Rosemary was prejudiced in any substantial manner by the inadequate notice of this proceeding and find no error.

VII.

Rosemary has requested an allowance for her attorney fees incurred for this appeal. Without determining the amount her attorney may charge, we order Frederick to pay to Rosemary $500 toward these fees. See In re Marriage of Moorhead, 224 N.W.2d 242, 245 (Iowa 1974).

VIII.

This case is remanded with directions to fix the custody and visitation provisions and enter a decree in accordance with this opinion. Provisions of the trial court decree that have not been modified are affirmed. Costs on appeal shall be taxed equally between the parties.

AFFIRMED AS MODIFIED AND REMANDED.