

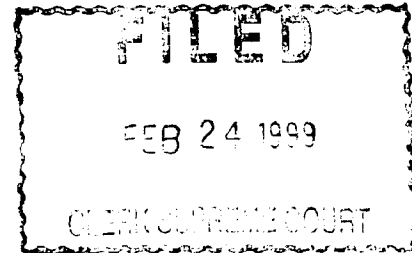
IN THE COURT OF APPEALS OF IOWA

No. 8-741 / 98-0996
Filed February 24, 1999

**IN RE THE MARRIAGE OF DONALD R.
HARRIS III AND NANCY J. HARRIS**

Upon the Petition of
DONALD R. HARRIS III,
Appellee,

And Concerning
NANCY J. HARRIS,
Appellant.



Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Nancy Harris appeals, and Donald Harris III cross-appeals, from the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Stephen W. Newport and Cheryl J. Newport of Newport & Newport, Davenport, for appellant.

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellee.

Heard by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Nancy Harris appeals the trial court's award of joint legal custody to Donald Harris and the court's award of liberal visitation to the father. She further appeals the trial court's denial of her request for injunctive relief, the court's division of property, and seeks attorney fees. Donald Harris seeks extended visitation rights and the tax dependency exemption. Because we find joint legal custody not in the best interests of the child, we modify the court's decision in that respect, and award the father the tax dependency exemption. All other rulings by the trial court are affirmed.

I. Background Facts & Proceedings.

Donald and Nancy Harris were married in April 1994. They have one child, Blaize, born October 9, 1993. Donald was twenty-nine and Nancy was thirty years old at the time of trial.

In September 1997, Nancy filed for a permanent protective order pursuant to Iowa Code chapter 236, claiming Donald had abused both her and Blaize. Donald filed for divorce two weeks later. Following a hearing on the chapter 236 motion, the district court issued an injunction and a temporary order that Donald was not entitled to visitation with Blaize.

Donald requested a new visitation and custody hearing in the divorce proceeding. The district court entered a temporary order giving Donald visitation, but limiting it to Monday from 10:00 a.m. to noon and 2:00 p.m. until 4:00 p.m. The

court concluded Donald's parents' home was rife with potential verbal, physical, and sexual abuse, illegal drugs, and otherwise inappropriate behavior.

The divorce proceeding progressed to trial. The district court concluded Nancy failed to prove Donald was violent, came from a violent family, or that loose morals existed in Donald's parents' home. The court ordered joint legal custody, with physical care of Blaize awarded to Nancy. Donald was awarded liberal visitation and ordered to pay Nancy child support of \$228 per month. The court dissolved the permanent injunction.

In regard to property distribution, Donald was awarded the Nissan Sentra automobile, his Dutrac credit union account, and the personal property in his possession. Nancy was awarded the Buick automobile, VCR, and all personal items in her possession. Donald was ordered to pay the debts to Chrysler Credit Corporation, Chase VISA, Younkers, Sears, and to family members. Nancy was ordered to pay the marital debts owed to Best Buy and Wells Fargo. Nancy appeals. Donald cross-appeals.

II. Standard of Review.

We review this equity action de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew the rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (Iowa 1981). We give

weight to ~~the~~ fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Joint Legal Custody.

Nancy argues the trial court should not have awarded Donald joint legal custody of Blaize.

Our statutes express a preference for joint custody over other custodial arrangements. *In re Marriage of Miller*, 390 N.W.2d 596, 598-99 (Iowa 1986). To deny joint custody, there must be clear and convincing evidence joint custody is unreasonable and not in the best interests of the child. See Iowa Code § 598.41(2); *Miller*, 390 N.W.2d at 599.

Our supreme court has set out the following factors as indicative joint custody is viable: (1) Each parent would be a suitable custodian for the child; (2) Both parents have actively cared for the child since the separation; and (3) Geographic proximity presents no great problem if joint custody were awarded. Factors indicative of joint custody not being in the best interests of the child are: (1) Both parties do not agree to joint custody; and (2) The parents fail to communicate with each other regarding ~~the~~ children's needs. *Miller*, 390 N.W.2d at 601. Other factors set out in our statutes as indicative of joint custody not being in the best interests of the child include: (1) Whether the safety of the child or the other parent will be jeopardized by the award of joint custody; (2) Whether there is a history of domestic abuse; (3)

Whether an action has commenced pursuant to section 236.3 of the code; and (4) Whether a protective order has issued against a parent pursuant to 236.6. *See Iowa Code § 598.41d (3)(I)(j)(1997).*

After applying the factors above to the facts of this case, we disagree with the trial court's grant of joint legal custody to Nancy and Donald because clear and convincing evidence establishes parental joint custody would be unreasonable and not in Blaize's best interests. *See Iowa Code § 598.41 (1985).* This is not a case where either parent would be a suitable custodian for the child. There is a history of domestic abuse between Donald and Nancy which resulted in police intervention, the commencement of a chapter 236 action, and a protective order issued against Donald. The specific incidents of domestic abuse included: Donald's assault of Nancy while she was pregnant with Blaize; his demonstration of rage by throwing and breaking chairs; assaulting Nancy on Labor Day 1997; and threatening to bury her mother in his backyard. There is no evidence in the record, however, Donald has ever harmed Blaize or Donald is prone to dealing with Blaize in an abusive manner. Due to the volatile nature of the relationship between Nancy and Donald, it is unlikely the parents can communicate with each other regarding Blaize's needs. Further, awarding joint custody to Donald and forcing the parties to make joint decisions may put Nancy's safety in jeopardy when the parties disagree; a factor in determining whether joint custody is appropriate. *See Iowa Code § 598.41 (2)(I).*

Donald has not actively participated in Blaize's care since the separation of the parties. The court ordered Donald supervised visitation with Blaize on November 21, 1997. He did not exercise visitation until January 26, 1998, and during the pendency of the divorce proceeding he exercised his visitation rights approximately one-fourth of time.

Under these circumstances, we find clear and convincing evidence supports the decision Nancy should be awarded primary physical custody as well as sole legal custody of Blaize. We modify the trial court's decision awarding the parents joint legal custody of Blaize and award sole legal custody of Blaize to Nancy. We further modify the trial court's ruling to award Donald, providing he is current on his child support obligation, the dependency tax exemption for Blaize.

IV. Award of Liberal Visitation to Donald.

Nancy contends the trial court should not have awarded Donald liberal visitation. Donald, by cross-appeal, seeks increased visitation rights. Although we do find the history of domestic abuse between Donald and Nancy a crucial factor in awarding Nancy sole legal custody of Blaize, we do not find merit in Nancy's contention **Donald's** visitation of Blaize must be supervised. By our holding, we do not minimize the seriousness of domestic violence and the negative impact it has on children. Nancy and Donald had an aggressive, volatile relationship. As stated, there is no evidence Donald has acted in a harmful manner toward Blaize. While it is not

appropriate for these parents to share legal custody of Blaize, Donald must not be denied a continuing relationship with Blaize due to the nature of his and Nancy's relationship. Further, we find Nancy's contention Donald's parents' home is not a suitable place for visitation to be exercised unsupported by the record.

The trial court's award of alternate weekend visitations, three weeks visitation each summer, and alternating holidays fits the statutory guidance of section 598.41(1) by assuring Blaize the opportunity for "the maximum continuing physical and emotional contact with both parents." We affirm the trial court's award of liberal visitation to Donald.

V. Denial of Injunctive Relief.

Nancy contends the trial court erred in refusing to grant her a permanent injunction to keep Donald away from her.

The grant or denial of injunctive relief is largely within the sound discretion of the trial court under the facts of the particular case. *In re Marriage of Knight*, 507 N.W.2d 728, 731(Iowa App. 1993). While a trial court may order an injunction in appropriate circumstances in a divorce proceeding, *see In re Marriage of Hass*, 538 N.W.2d 889, 894 (Iowa App. 1995), such relief must be pled at trial. Nancy did not plead for injunctive relief at trial by way of answer or counter-claim. She did file a post-trial motion to enlarge the findings of the trial court to address the issue of injunctive relief. The issue has not been preserved for appellate review.

VI. Property Division.

Nancy contends the trial court's distribution of property was inequitable. She requests Donald be ordered to pay all marital debt.

It is a fundamental principle that parties to a marriage are entitled at the time of a divorce to a just and equitable share of the property accumulated from their joint efforts. *In re Marriage of Wiedemann*, 402 N.W.2d 744, 747 (Iowa 1987). What constitutes a just and equitable award depends on the particular circumstances of each case, after consideration of all the recognized criteria. *In re Marriage of Hanson*, 475 N.W.2d 660, 662 (Iowa App.1991). See Iowa Code § 598.21(1) (1995). Although an equitable award is not required to be equal, substantially equal property awards are generally appropriate in marriages of long duration. See *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). The division of marital debts inheres in the property division. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). We find the district court made an equitable distribution of the marital property and debt division and do not disturb it on appeal.

Nancy seeks trial and appellate attorney fees. Both parties are struggling financially. Donald has a net income of approximately \$200 per month more than Nancy. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App.1991). We find no abuse of discretion in the court's failure to award Nancy attorney fees. In determining whether

to award appellate attorney fees, we consider, among other things, the needs of the party making the request and the ability of the other party to pay. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App.1997). In light of the relative equal financial positions of the parties, we do not award attorney fees on appeal.

AFFIRMED AS MODIFIED.