

IN THE COURT OF APPEALS OF IOWA

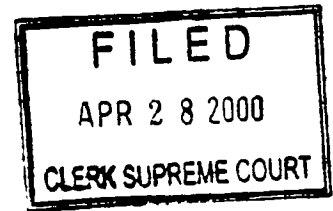
No. 0-125 / 99-1400

Filed April 28, 2000

**IN RE THE MARRIAGE OF CHAD LARRY SULZNER
AND AMY BETH SULZNER**

**Upon the Petition of
CHAD LARRY SULZNER,
Petitioner-Appellant,**

**And Concerning
AMY BETH SULZNER,
Respondent-Appellee.**



Appeal from the Iowa District Court for Cedar County, James E. Kelley,
Judge.

Petitioner appeals the district court's award of permanent primary physical
care and permanent legal custody of the parties' child to the respondent.

AFFIRMED AS MODIFIED AND REMANDED.

Bradley Norton of Norton & Norton, P.C., Lowden, for appellant.

Nick Strittmatter of Strittmatter & Herman, Monticello, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

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HUITINK, P.J.

I. Background Facts and Proceedings.

Chad and Amy were married on February 14, 1997. Chad is twenty-five years of age. Amy is twenty-six. Their son, Aksel, was born July 12, 1995.

The parties separated in August 1998 when Amy and Aksel moved to Pennsylvania to reside with her parents. Chad continues to reside in the family's home in Stanwood.

These proceedings were initiated by Chad's petition filed September 2, 1998. The disputed issues below included Aksel's custody, physical care, and visitation. Chad and Amy were also unable to resolve their differences concerning division of their property.

Chad's custodial claims were premised on his preseparation parenting experience and Amy's decision to move to Pennsylvania. He offered evidence of Amy's written and oral expressions of Chad's favorable parental qualities before they separated. Chad also testified that Amy has interfered with his attempts to maintain contact with Aksel and has otherwise tried to destroy his relationship with Aksel.

Like Chad, Amy cited her parental experience prior to separation in support of her custodial demands. Amy also claimed she left Chad because he was violent and abusive. Amy offered evidence describing multiple incidents involving Chad's abusive behavior towards her in Aksel's presence. This evidence included a violent altercation resulting in Chad's conviction for domestic assault against her.

Chad denied most of Amy's allegations of abusive behavior, citing the absence of context and Amy's dramatic embellishments of otherwise nonabusive behavior. He also cited his completion of a court-ordered batterers' education program.

The district court, noting Amy's greater credibility and Chad's history of domestic abuse, invoked the statutory presumption against joint custody and awarded Amy sole custody and physical care of Aksel. The district court's concern for Chad's violent propensities and its implications for Aksel's welfare resulted in imposition of the following structured visitation arrangement:

The Court further orders that Chad Larry Sulzner is granted supervised visitation with Aksel C. Sulzner once each month for no longer than six hours, until Aksel is six years old. Chad Sulzner shall have telephone contact once each week with Aksel, with the expense of the telephone conference to be paid by Chad Sulzner. After Aksel Sulzner is six years of age, and after Chad has had at least ten supervised visitations with him, then Chad is granted unsupervised visitations with Aksel to be exercised in the state where Respondent resides, each visitation to be of a 48 hour duration, and no more frequently than once per month, and is also granted 48 hour alternate holiday visitation with the same restriction on place. All transportation for visitation shall be provided by Chad.

The district court's decree also included the following property division:

The parties were jointly buying a house in Stanwood located at 202 1st Avenue, Stanwood, Iowa 52337. It is legally described at Lot 10 and the north 40 feet of Lot 1, Block one, Preston's 2nd Addition to Stanwood, Cedar County, Iowa. The parties have agreed that the house has a market value of \$55,000, and a mortgage balance debt against it of \$49,000. The Court finds that Chad should pay Amy \$3,000 as her portion of the equity in that house and hold her harmless on the mortgage. The Court finds that judgment should be entered in favor of Amy against Chad for the sum of \$3,000, and the judgment should be a lien on that real estate, until paid. The Court also finds that Amy should be given sole ownership of the 1992 Grand Am automobile which the parties agree is worth \$1900, and should be allocated one-half of the

Starwood Savings Bank account, or \$1,565. The Court finds that Chad should be allocated as his sole property the Mechanicsville bank account of \$600. The Court further finds that Amy should pay her student loan of \$1,640 and hold Chad harmless on that loan. The Court further finds that since Chad bought a 1996 Grand Am automobile for \$13,000 and owes a \$13,000 loan on it, such purchase and loan being made after the parties separated, he should be responsible for that loan and hold Amy harmless on it.

On appeal, Chad argues the district court erred in failing to award the parties joint legal custody of Aksel and erred in failing to award him sufficient visitation. In addition, he argues the district court's property division was inequitable.

II. Standard of Review.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 4. See *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). Our review of a custody order is also de novo, and our primary consideration is the best interests of the child. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). In assessing a custody order we give considerable weight to the judgment of the district court, which has had the benefit of hearing and observing the parties firsthand. *Id.*

III. Joint Custody.

Joint custody is favored whenever reasonable and in the child's best interest. *In re Marriage of Brainard*, 523 N.W.2d 611, 614 (Iowa App. 1994). Joint custody advances the important goal of assuring children the opportunity for maximum continuing physical and emotional contact with both parents following a dissolution. *Id.*

~~If, however,~~ the court finds there is a history of domestic abuse, there is a rebuttable presumption against awarding joint custody. Iowa Code § 598.41(1)(b). If the resulting presumption remains un rebutted, a history of domestic abuse is given greater weight than any other custodial consideration. Iowa Code § 598.41(2)(c).

A history of domestic abuse is not necessarily established by a single documented incident. *In re Marriage of Forbes*, 570 N.W.2d 757, 759-60 (Iowa 1997). The benefit of the presumption is not, however, limited to domestic violence resulting in judicial proceedings under the domestic abuse provisions of Iowa Code section 236.3.

Although Amy cites several disputes with Chad that do not fall within the definition of domestic abuse, there is credible evidence Chad has repeatedly abused Amy. As noted earlier, he was convicted of domestic assault for physically abusing Amy in 1998. There are at least two other incidents in which Chad struck Amy, pulled her hair, threw her to the floor, and otherwise threatened her with serious injury. Because the district court's findings of a history of domestic abuse are abundantly supported, we conclude the statutory presumption against joint custody was properly invoked.

~~We, like the district court,~~ also conclude the resulting presumption has not been rebutted. Despite his contrary assertions, Chad's postseparation hostility towards Amy suggests he does not understand the extent to which his abusive behavior adversely affects Aksef.

We accordingly affirm on this issue.

IV. Visitation

Ordinarily, the best interests of children require continuing association with the noncustodial parent unless the contrary is clearly shown. *Metallo v. Musengo*, 353 N.W.2d 872, 875 (Iowa App. 1984). In establishing visitation rights, the court's governing consideration is the best interests of children, and generally liberal visitation rights are in the children's best interests. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa App. 1992). Although liberal visitation is the benchmark, the governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation. *In re Marriage of Brainard*, 523 N.W.2d at 615.

Although the trauma associated with the parties' separation and the distance separating their residence necessitates a transitional visitation schedule of increasing frequency, we find the visitation schedule prescribed by the district court unduly restrictive. The de minimis time limit of six hours once a month at a place of such great distance falls far short of the duration and frequency necessary to accomplish the purposes for which visitation is granted. Additionally, we question the necessity of supervised visitation and note the practical problems attending selection and accountability of an appropriate person to supervise visitation. We think the objective of transitional visitation with increasing frequency can be accomplished by initial unsupervised visits of forty-eight hours in Pennsylvania.

Because the time elapsed from the date of the decree leaves us without sufficient perspective on the parties' present circumstances, we are unable to

craft a specific visitation schedule sufficiently remedial of the inequity of that ordered by the district court. We accordingly remand this issue to the district court with instructions to order a more equitable arrangement including no less than forty-eight hours unsupervised weekend visitation each month in Pennsylvania until Aksel is six years old. Thereafter, the court shall provide for additional alternating holiday visitation in Iowa and no less than two weeks summer visitation in Iowa with Chad. The costs associated with transportation shall be equally assessed to the parties.

V. Property Division.

Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa App. 1998). Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa App. 1998). Instead, each particular circumstance determines what is fair and equitable. *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa App. 1998). Further, the property distribution should be made pursuant to criteria codified in Iowa Code section 598.21(1) (1997). *Id.*

Chad's primary complaint is the division of the parties' home equity in view of his continuing obligation to pay the debts secured by its encumbering mortgage. We have carefully considered the terms of the court's property division and are unable to say they are inequitable. Each party received an equal share of the equity in their home. The division of the remaining assets and

debts fairly addresses the need of each party for those assets and ability to pay debts. We also note that the extra expenses Amy has incurred for counseling and Akse's medical needs lend additional support to the equity of the district court's property division. We affirm on this issue.

The judgment of the district court is affirmed as modified and remanded. Costs of this appeal are to be divided equally between the parties.

AFFIRMED AS MODIFIED AND REMANDED.