IN THE COURT OF APPEALS OF IOWA

No. 8-498 / 97-2326

IN RE THE MARRIAGE OF DAN E. MIKKELSEN AND LAURA LEE MIKKELSEN

Upon the Petition of DAN E. MIKKELSEN,

Petitioner-Appellant,

And Concerning LAURA LEE MIKKELSEN,

Respondent-Appellee.

FILED
OCT 20 [illegible]
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cass County, Leo F. Connolly, Judge.

Petitioner appeals various child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Terrance G. Rutherford of Rutherford, Trewet & Petersen, Atlantic, for appellant.

Joanne C. Lorence of Otto, Lorence & Barry, Atlantic, for appellee.

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

SACKETT, P.J.

Petitioner-appellant Dan E. Mikkelsen appeals challenging the custodial and property provisions in the decree dissolving his seven-year marriage to respondent-appellee Laura Lee Mikkelsen. We affirm as modified.

Dan and Laura have two children: Nathan, born in 1989, and Tyler, born in 1993. The trial court placed the children in joint custody. The physical care of the two children was awarded to Laura.

On appeal, Dan contends he, not Laura, should be the physical custodian. He advances the district court failed to give adequate consideration to the factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974), and the district court's decision reflects gender bias.

We review de novo. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We look to the children's long-term interest. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). Neither parent has a heavier burden. *In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa App. 1993).

The factors the court considers in deciding physical custody are enumerated in Iowa Code section 598.41(3); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983); and *Winter*, 223 N.W.2d at 166-67. The critical issue is which parent will do better in raising the children; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *See In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993)

(dissent by Oxberger, C.J., and Schlegel, J.); *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). We do not award custody based on hours of service for past care. *Engler*, 503 N.W.2d at 625. We attempt to look to determine which parent will in the future provide an environment where the children are most likely to thrive. *Id.*

Laura, thirty at the time of the dissolution, and Dan, thirty-one, both love their children and were involved with their care prior to the separation. Either is able to serve as a very adequate custodian. Therefore, the issue is which parent can better serve the children's best interest.

Both parents are high school graduates. Dan is employed by Hy-Vee and Laura by Kum & Go. Unfortunately, neither Laura nor Dan have been able to put aside their hostilities toward each other and jointly focus on the general well being of their children. Neither parent is without fault. Their respective positions for custody focus substantially on the faults of the other, which our review of the record convinces each has overplayed. A recitation of these charges serves no useful purpose. We find no reason to disagree with the trial court's decision on physical care and affirm it on appeal.

Dan next challenges the property division. He contends he was not given sufficient credit for (1) $8000 Laura took when she left the family home; (2) property, including pension rights acquired prior to marriage; and (3) property gifted to him.

Dan and Laura cohabited four years before their marriage and, starting then, at least in part co-mingled their funds. Consequently, the record is far from clear as to which assets either had purchased exclusively prior to marriage. Additionally, Dan has failed to direct us to that part of the record establishing his claim Laura left with $8000.

Iowa is an equitable distribution state, meaning the partners to a marriage are entitled to a reasonable and equitable share of property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa App. 1995). The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1995). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Pensions are subject to division in a dissolution. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996) (Lavorato, Larson, and Ternus, JJ., dissenting). Retirement benefits are properly considered in formulating an equitable division in a dissolution. *In re Marriage of Miller*, 475 N.W.2d 675, 677 (Iowa App. 1991); *see also In re Marriage of Voss*, 396 N.W.2d 801, 803 (Iowa App. 1986).

The question is whether the property division, when viewed in its entirety, is equitable to both parties. Dan has an annual salary of $20,555; Laura's is $10,831. No alimony was awarded. The trial court made a nearly equal division of the parties' assets, but ordered Dan to pay Laura $2000 to equalize the value of the vehicles each took from the marriage. Dan was also ordered to pay $1000 toward Laura's attorney fees.

Dan contends he should have been given credit for property, including a retirement account he brought to the marriage and property Laura took when she left. The record does not clearly reflect values of property Dan claims to have brought to the marriage. We, therefore, do not consider this challenge to the property division.

Dan contends his retirement account should have been divided at the date of separation. We disagree. Property, including retirement benefits, should be valued as of the trial date. *See In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979).

Dan further contends he was not given adequate credit for a gift his father gave him. We agree and modify to provide the proceeds from the sale of the house should be divided equally, and we strike the provision Dan pay Laura an additional $2000 to equalize the property division.

We award no attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.