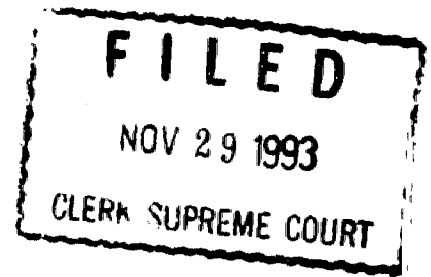


IN THE COURT OF APPEALS OF IOWA

No. 3-477 / 92-2031



IN RE THE MARRIAGE OF LINDA KAY SHIRLEY AND
TIMOTHY HENRY SHIRLEY

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Upon the Petition of

LINDA KAY SHIRLEY,
Appellee,

And Concerning
TIMOTHY HENRY SHIRLEY,
Appellant.

Appeal from the Iowa District Court for Fremont County,
Keith E. Burgett, Judge.

The husband appeals the child custody and economic
provisions of the decree dissolving the parties' marriage.
AFFIRMED.

Ronald W. Comes and Timothy J. Pugh of McGrath, North,
Mullin & Kratz, P.C., Omaha, for appellant.

Michael W. Manske of Marks & Clare, Omaha, for
appellee.

Heard by Oxberger, C.J., and Habhab, J., and Keefe,
S.J.* Donielson, J., takes no part.

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

KEEFE, S.J. 000548

Linda and Timothy Shirley were married on June 27, 1987. The parties had two children: Timothy Tyler Shirley (Timmy), born March 15, 1988, and Jamie Renee Shirley, born March 18, 1989. During the marriage the family lived in rural Fremont County in a house owned by Timothy's father.

Timothy farmed and ranched through a partnership known as BTR Partnership. The other members of the partnership were Timothy's father, Bob Shirley, and his brother, Matt Shirley. Timothy receives \$1,170 per month as his partnership draw. He also receives health insurance, a company truck, a Christmas bonus, and a whole beef as benefits from the partnership. The district court found Timothy's net monthly income was \$1,565.

Linda worked for Golden Valley Microwave Foods, which was formerly Vogel Popcorn, in Hamburg, Iowa. She earns about \$13,118, and her net monthly income is \$797. After the dissolution Linda expected to be placed on the evening shift, which is from 2 p.m. until 10 p.m. Linda stated she planned on moving to Nebraska City, Nebraska, but that she planned on keeping her job at Golden Valley.

A dissolution decree was entered for the parties on October 1, 1992. The district court granted the parties joint legal custody of the children and gave Linda primary physical care. The court noted that Linda was the primary care giver prior to the separation and that the disinterested witnesses testified Linda could better care

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for the children. The court devised a specific visitation schedule. Applying the child support guidelines, the court determined Timothy should pay child support of \$500 per month for the two children.

The court found the net equity increase in BTR during the marriage was \$106,484. Timothy's share as a partner would be about \$35,000. The court awarded Linda a cash property settlement of \$15,000 to represent her share of Timothy's partnership increase. Linda was also awarded the parties' Chevrolet Blazer and household goods she brought to the marriage. Linda was ordered to pay debts of about \$2,226. Timothy was awarded \$20,000 of the partnership increase in net worth and the remainder of the household goods. Timothy was ordered to pay debts of about \$17,047. In addition, Timothy was ordered to pay \$5,000 towards Linda's trial attorney fees, \$1,355 for expert witness fees, and court costs. Timothy has appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Timothy contends he should have been awarded custody of the parties' children. He claims he could better care for the parties' children because he is more stable than Linda. He points out that Linda has changed

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 jobs many times since graduating from high school. Timothy claims Linda's use of profanity is detrimental to the children. Furthermore, Timothy feels that it will be detrimental to the children to move to Nebraska City and change day-care programs.

In child custody cases, the long-term best interests of the children is the first and governing consideration. In re Marriage of McElroy, 475 N.W.2d 221, 222 (Iowa App. 1991). The factors we consider are enumerated in Iowa Code section 598.41(3). Id. Our objective is to place the children in an environment most likely to bring the children to healthy physical, mental, and social maturity. In re Marriage of Rodgers, 470 N.W.2d 43, 45 (Iowa App. 1991).

Linda admitted she planned on moving to Nebraska City and enrolling the children in a different day-care program. However, she testified she planned on keeping her job at Golden Valley for some time. Any job changes she had in the past are not important to our consideration. Linda also testified both parties had used profanity during the marriage. She stated she would try not to use it in front of the children in the future.

In this case, the credibility of the parties was an important consideration. The district court found Timothy was not as credible as Linda. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

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We have also considered the testimony of the other witnesses at the trial. Robin Bohlen, the children's day-care provider, testified the children behaved better when they were in Linda's care and that Timmy had discipline problems when he was in Timothy's care. Shelly Phillips, a baby-sitter for the children, also testified the children behaved better when they were in Linda's care. Teresa Murphy, a legal secretary who knew the family, testified Timothy had encouraged Timmy to be disrespectful to Linda because she was a woman. All of the witnesses agreed Linda was the primary caregiver to the children during the marriage.

We conclude it is in the best interests of the children that they be placed in the physical care of Linda. We affirm the district court on this issue.

III. Timothy contends the property distribution in the dissolution decree was inequitable to him. He claims the court did not properly value his interest in the partnership. In particular, Timothy claims the partnership's net equity should have been reduced by a claim made against the partnership by the Agricultural Stabilization Conservation Service (ASCS) for \$73,800. If this amount is deducted from \$106,484, the increase of the partnership's net worth during the marriage is reduced to \$32,684, of which Timothy's share would be \$10,895.

Timothy, his father, and Ralph Lutz (the partnership's C.P.A. and Timothy's uncle) testified that the partnership

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owed the ASCS \$73,800. However, the partnership did not carry the alleged claim as a liability in its books, income tax returns, or financial statements prepared for banks. No documentary proof of the alleged claim was submitted at trial. We agree with the district court that the alleged ASCS claim should be disregarded in considering the parties' marital property.

Timothy also contends that Linda was awarded a greater share of the marital property and that this distribution was inequitable. He asks that she be made responsible for the debt on the blazer, or in the alternative, that the cash property settlement to her be reduced to \$10,000 instead of \$15,000.

The partners in 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). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular case. Id.

We conclude the property distribution here was equitable. Although Linda received a greater share of the marital property, it is clear she needed a greater share of the property and that Timothy's needs are less. Through his family and the partnership Timothy receives a house he lives in free of charge and a vehicle for his use. He also receives a whole beef so that his grocery bills will be

less than Linda's. Linda must pay for suitable accommodations for herself and the children. She also needs a vehicle to drive to work and take the children to day-care. We affirm the property distribution as set forth by the district court.

IV. Linda seeks attorney fees for this 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine Timothy should pay \$750 towards Linda's attorney fees for this appeal.

We affirm the district court on all issues raised in this appeal. Costs of the appeal are assessed to Timothy Shirley.

AFFIRMED.