

BACKGROUND: Brian and Carolyn were married and have two sons, 6 year old Kyle and 4 year old Craig. Frank represented Brian at trial and on appeal. At the time of the divorce trial, Brian worked full-time as a maintenance worker and Carolyn worked part-time at a hospital. Under the trial court's temporary order, Carolyn had custody of the children and Brian had visitation every other weekend and on Wednesday evenings. Brian was arrested twice for domestic abuse assault and Carolyn obtained a no contact order that was in effect at the time of the trial.

TRIAL COURT'S DECISION: The trial judge awarded custody of the children to Brian, granted Carolyn visitation, ordered Carolyn to pay Brian child support and awarded Brian the family home.

APPELLATE COURT'S DECISION: Carolyn appealed, arguing that the trial court had not adequately considered the evidence of domestic abuse and that she should have custody of her two young sons. The Iowa Court of Appeals found that Carolyn was less mature than Brian, less stable in her employment and more dependent on her family than Brian, leaving custody of the boys with their father.

IN THE IOWA DISTRICT COURT IN AND FOR ██████ COUNTY

IN RE: THE MARRIAGE OF
HUSBAND AND WIFE

UPON THE PETITION OF)
)
-- HUSBAND)
)
Petitioner,)
)
AND CONCERNING)
)
WIFE ,)
)
Respondent.)

No. ██████

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECREE OF DISSOLUTION

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CLERK OF DISTRICT COURT
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COUNTY IOWA

On May 30 and 31, 2001, this case was tried pursuant to assignment. The Petitioner appeared in person with Attorney Frank J. Nidey. The Respondent appeared in person with Attorney Mark S. Beckman. Evidence was received and the matter was submitted.

FINDINGS OF FACT

The parties are in agreement on the issues of medical insurance for the children, alimony, attorney fees, court costs, distribution of debts, and the distribution of most personal property. The Court finds their agreement should be approved. The remaining issues for trial are child custody and physical care, child support, visitation, tax exemptions, and the division of real estate and remaining personal property.

The Court has jurisdiction of the parties and the subject matter. The parties meet the residency requirements of Section 598.6, The Code. The ninety-day waiting period has expired.

There has been a breakdown of the marriage relationship to the extent the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. Further conciliation procedures would not preserve the marriage.

The Petitioner, HUSBAND [REDACTED], Iowa, was born [REDACTED]. He was 38 years old at the time of trial.

The Respondent, WIFE [REDACTED] resides in [REDACTED], Iowa. She was born on [REDACTED], and was 35 years old at the time of trial.

The parties were married on August 6, 1988, and have two minor children whose welfare will be affected by this action: K [REDACTED], DOB: [REDACTED]-94; and C [REDACTED], DOB: [REDACTED]-96.

The Petitioner is a high school graduate in apparent good health. He lives alone in a single-family home. He is employed full-time by [REDACTED] as a maintenance worker. The Court finds his net monthly income for child support purposes is \$1,361.07. He works the day shift Monday through Friday and has a flexible schedule that allows him to leave work for child emergencies. He has an established day-care provider who is familiar with the children. He is able to look in on the children during the noon hour and during his periodic breaks as needed. During the marriage, he worked days and the Respondent worked evenings and they alternated physical-care duties for the boys. He has been active in raising the children from their births onward. He did at least half of the cooking, bathing of the boys, entertaining of the boys, housework and child care. He has a very positive attitude and is interested in the practical education of the children and enjoys spending time with them. Although he is a fine parent, he has not yet completed the "Children In The Middle" class which he must do and failed to pay the full amount of child support to which he was obligated to pay following the temporary support hearing in February 2001.

The Respondent is a high school graduate. She lives with her parents and the children in [REDACTED], Iowa. She worked at [REDACTED] from 1986 till 1998 working a forty-hour week at \$12.94 per hour. Thereafter, she took a break for one year of schooling obtaining certificates as a microcomputer specialist. She worked at [REDACTED], from September 1999 to September 2000 with a gross salary of \$19,000.00. Since September 2000, she has worked at [REDACTED] at \$12.90 per hour working twenty-four hours per week to allow her to provide care to the children. The Court finds that her net monthly income for child support purposes is \$1,211.36. The Court does not attribute additional income to her although it believes she is capable of working full-time. She has sought full-time work but has been unable to obtain it. The Court does not find that the reduction of her income over the last year was for the purposes of avoiding her obligation to support the children.

The Respondent shared child raising and housekeeping duties with the Petitioner during the marriage. The Respondent suffered a stroke nine years ago which left her without the use of her right arm. The Court finds that her disability in no way prevents her from caring for the children or working full-time. She has taken the "Children In The Middle" course and has benefited from the assistance of a counselor in dealing with discipline and control of the boys.

The Court finds that the children lived in [REDACTED] at the home now occupied by the Petitioner their entire lives until September 2000 when the parties separated. The Respondent has had temporary physical care of the children since the separation. The Petitioner has had visitation every weekend and every Wednesday evening and has kept in close contact with the children.

The Petitioner has a history of allegations of abuse of the Respondent. Two occasions, once two years ago and once in the summer of 2000 resulted in his arrest for assaulting the Respondent and his pleading guilty to a lesser charge of Disorderly Conduct. In September 2000, the Respondent filed a Petition for Relief from Domestic Abuse which resulted in a No-Contact Order by Consent Agreement being entered. The Order was canceled at the Respondent's request following trial on May 31, 2001. At least two of the domestic abuse episodes involved violent actions by each party against the other. The Court need not revisit these occasions but finds no history of abuse of the children by either party. The evidence also indicates that both parties have abused alcohol in the past but that neither has endangered the children because of it.

On balance, the Court finds that the Petitioner can provide a more stable home environment for the children to grow up in. His employment situation is more stable than that of the Respondent. [REDACTED] is the community that they are most accustomed to. The Petitioner is capable of raising the boys and disciplining them appropriately. The Respondent appeared to the Court less mature in her approach to raising the children, less stable in her employment circumstances, and more dependent on family assistant in caring for the children than is the Petitioner.

It is clear both parties love and care for their children and want the best for them. Considering the foregoing and all the other facts and circumstances shown by the evidence which bear on child custody and primary care of children, the Court concludes that it is in the long-range best interests of the children that the parties have joint legal custody of the children with the Petitioner providing

primary physical care for them and the Respondent having substantial visitation with them.

Pursuant to the Child Support Guidelines promulgated by the Iowa Supreme Court, the Respondent should pay child support in the amount of \$363.00 per month so long as two children are entitled to child support and \$273.00 per month when only when child is eligible for child support. The Court will retain jurisdiction over the issue of post-secondary education assistance for the children.

The Petitioner shall provide medical and dental insurance for the children and the uncovered medical and dental expenses should be paid pursuant to the Child Support Guidelines with the Petitioner paying 53% and the Respondent paying 47%.

The Petitioner shall have the right to claim C [REDACTED] as a dependent for tax exemption purposes. The Respondent should have the right to claim K [REDACTED] as a dependent for tax exemption purposes.

Both parties are able to drive and should be required to share the costs of transportation for child visitation purposes equally.

During the marriage, the parties have accumulated certain real and personal property and certain debts, some of which they have divided to their mutual satisfaction and some of which must be divided by the Court in an equitable manner. The parties have agreed that their personal property items have been divided by agreement. The Court finds that the Petitioner should have possession of the 1986 Ford Mustang and 1984 Silverado pickup truck and that the Respondent should have possession of the 1994 GMC Safari van. The Court finds the value of the vehicles allocated to HUSBAND be \$500.00 and the value of the vehicle allocated to the Respondent to be \$8,000.00.

The Court finds that the Petitioner should receive the parties' home as a proper place to raise the children. The Court finds the value of the home is \$75,000.00, less the mortgage obligation of \$47,650.31, with a net equity of \$27,349.69. The Respondent should receive half the equity in the home except that the Petitioner should be credited one-half the value of her vehicle in the net settlement. The Court finds that the Petitioner should be entitled to one-half the net value of the home, less half the value of his vehicles credited to the Respondent, less the \$1,050.00 in unpaid child support which he owed at the time

of the trial. Accordingly, the Respondent should receive a cash settlement of \$10,974.84.

The Court finds that the Petitioner is capable of and should refinance the home to hold the Respondent harmless from the mortgage debt and also to provide the funds to both pay the Respondent the cash property settlement and to rehabilitate the home to bring it up to standards of safety and proper maintenance.

The parties are in agreement that the Petitioner shall be responsible for the VISA-AOL credit-card debt and should hold the Respondent harmless therefrom. He parties also agree that the Respondent should be responsible for her student loan and the DUPACO credit-card debt and that she should the Petitioner harmless from those debts. The parties also agree that each should receive their own bank accounts, their own pensions, and the personal property that they have previously divided by agreement. The Court finds this arrangement equitable between the parties.

The parties further agree that neither party should pay alimony to the other and the Court finds this to be an equitable agreement between the parties based on all the facts and circumstances.

CONCLUSIONS OF LAW

The statutory provisions governing the dissolution of marriage proceedings are found in Chapter 598 of The Code, as amended. Particular reference is made to Sections 598.17 and 598.21.

In child custody cases, the first and governing consideration of the courts is the best interests of the children. This proposition is so well established in Iowa law that citation of authority is not required. Iowa R.App.P. 14(f)(15). There are nine factors in Iowa Code Section 598.41 which the Court considers in deciding what custody arrangement is in the best interests of the minor children. The Court also considers the factors listed in In Re: Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

There has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. Section 598.17, The Code of Iowa.

The division of property in this case is based upon an analysis of the factors set out in Section 598.21(1)(a-m), The Code of Iowa. Further, the Court relies on the factors set out in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968). The Court does not take the fault of either party into consideration. In Re: Marriage of Williams, 199 N.W.2d 339 (Iowa 1972). While the Court has attempted to divide the property fairly and equitably, the Court cannot do so with mathematical precision. See In Re: Marriage of Schissel, 292 N.W.2d 421 (Iowa 1980).

No spousal support is ordered in this case after an analysis of the factors set out in Section 598.21(3)(a-h), The Code of Iowa.

Custody is not a matter of reward or punishment but depends upon which parent can minister more effectively to the long-term best interests of the child. No hard and fast rule governs which parent should have custody. There is no longer any inference that young children are better off in the custody of their mother. In Re: Marriage of Meier, 267 N.W.2d 46 (Iowa 1978); In Re: Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974). Each case must be decided on its own facts and precedent is of little value. In Re: Marriage of Winter, 223 N.W.2d at 166.

The Court considers joint custody of the child by the parties to be the appropriate resolution in this case. Section 598.21(6), The Code of Iowa.

In determining the amount of child support to be paid, the Court has relied upon the Child Support Guidelines adopted by the Iowa Supreme Court.

The fault concept of dissolution of marriage proceedings has been eliminated in Iowa and fault is not a factor to be considered in the determination of property settlement, alimony or support obligations. In Re: Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

DECREE OF DISSOLUTION OF MARRIAGE

The Court, having made the foregoing Findings of Fact and having considered the law applicable to the case, now enters the following Decree:

IT IS, ACCORDINGLY, ORDERED, ADJUDGED AND DECREED as follows:

1. Dissolution. A Decree of Dissolution of Marriage is hereby granted to the parties. The parties' marriage is dissolved and each is restored to the status of a single person.

2. Conciliation Procedures. Conciliation procedures are waived as they would not preserve the marriage.

3. Custody and Physical Care. The Petitioner and the Respondent shall have joint legal custody K [REDACTED] and C [REDACTED]. Primary physical care of the children shall be with the Petitioner. Transfer of physical care of the children from the Respondent to the Petitioner shall take place no later than June 30, 2001.

4. Visitation. The Respondent shall have liberal visitation with the children as the parties may agree. In any event, the Respondent shall have the following minimum periods of visitation:

- A. Every other weekend from after school on Friday to 8:00 p.m. (10:00 p.m. during school vacations) on Sunday commencing on the first weekend following the entry of the Decree.
- B. Every Wednesday from after school until 8:00 p.m. (10:00 p.m. during school vacations) commencing on the first Wednesday following the entry of the Decree.
- C. The Respondent shall have six weeks of summer visitation. This visitation shall take place during the period commonly designated as school summer vacation and shall not include the week immediately following or the week immediately preceding the school year. During each of these summer visitations, the Petitioner shall have the children with him during the same times and on the same rotation as the Respondent has visitation. The Respondent shall give the Petitioner written notice of the weeks she wishes to have summer visitation on or before May 1 of each year. The Respondent shall give the Petitioner written notice of her summer visitation intentions in the year 2001 no later than June 25, 2001.
- D. In even-numbered years, the Respondent shall have visitation on Labor Day weekend from after school on Friday until Monday at 8:00 p.m.; Halloween from after school to 9:00 p.m.; Thanksgiving

Day from after school the preceding Wednesday to 8:00 p.m.; Christmas vacation from after school the last day of school to 9:00 a.m. Christmas Day. During odd-numbered years, the same days and times are reserved for the Petitioner.

- E. In each odd-numbered year, the Respondent shall have visitation on Easter weekend from the preceding Friday after school until Easter Sunday evening at 8:00 p.m.; Memorial Day weekend from Friday after school until the following Monday at 8:00 p.m.; July 4 from 12:00 noon until 9:00 a.m. on July 5; Christmas vacation from 9:00 a.m. Christmas Day until school starts again. During even-numbered years, the same days and times are reserved for the Petitioner.
- F. The Petitioner shall have the children with him every Father's Day from 9:00 a.m. to 8:00 p.m.
- G. The Respondent shall have the children with her every Mother's Day from 9:00 a.m. to 8:00 p.m.
- H. Those days reserved for the parties as described in the above subparagraphs shall take precedence over any regular weekend and summer visitation set forth elsewhere in the Decree.
- I. The Respondent shall have such other and further visitation as the parties may agree.

5. Child Support. The Respondent shall pay child support for the two minor children in the amount of \$363.00 per month pursuant to the Iowa Child Support Guidelines. In the event only one child is entitled to child support, the monthly payment shall be \$273.00. Child support payments shall be made on the 1st day of each month commencing July 1, 2001.

Support is to be paid to the Linn County Clerk of the District Court, P.O. Box 1468, Cedar Rapids, Iowa, 52406-1468, or to the Collection Services Center of the Department of Human Services if the person(s) obligated to pay support are so notified by that Department

Immediate withholding of income for payment of support is hereby authorized pursuant to Iowa Code Section 252D.8.

If support payments are not paid as ordered herein and become delinquent in an amount equal to the payment for one month, the District Court, or Child Support Recovery Unit, may order an assignment of income sufficient to pay the support obligation. The amount of the assignment of income shall not exceed the amount specified in 15 U.S.C., Section 1673(b).

Child support payments shall terminate when a child has reached the age of 18 or graduates from high school, whichever shall occur later, or if a child is still in high school, the support shall terminate when the child either graduates from high school or reaches age 19, whichever occurs sooner. Child support shall also terminate in the event that a child marries, dies or becomes self-supporting, whichever event occurs first at which time the payment for that child shall cease.

6. Health Insurance. The Petitioner shall maintain health and dental insurance for the children through his place of employment for so long as the children are entitled to child support. The Petitioner shall pay the first \$250.00 of uninsured medical and dental expenses each calendar year for each child with the balance of uninsured medical and dental expenses each year to be paid 53% by the Petitioner and 47% by the Respondent.

7. College Education Expenses. If either of the children desires to seek post-secondary education, both parties will discuss and determine what will be their respective shares of these expenses based on their respective financial resources and the needs of the children at that time. If the parties are unable to agree, either party may make application to the district court for determination of this issue.

8. Tax Exemptions. The Petitioner shall be entitled to claim the dependency exemption for C [REDACTED] for state and federal income tax purposes. The Respondent shall be entitled to claim the dependency exemption for K [REDACTED] for state and federal income and tax purposes provided she is current in the payment of her child support for the calendar year for which the exemption is claimed. Each party shall cooperate in signing necessary forms to facilitate the claim for exemptions no later than January 15 for each year.

9. Alimony. Neither party shall pay alimony to the other now or hereafter.

10. Real Estate. The Petitioner shall receive the real estate located at

[REDACTED] Iowa. The Respondent shall refinance the home as soon as possible and in any event within 120 days of this Decree, removing the Respondent's name from the mortgage and paying the Respondent \$10,974.84 as a cash property settlement from the proceeds of the refinancing.

11. Personal Property. The Petitioner shall receive the 1986 Ford Mustang and the 1984 Silverado pickup truck. The Respondent shall receive the 1994 GMC Safari van.

12. Debts.

A. The Petitioner shall be responsible for the following debt and hold the Respondent harmless therefrom: VISA-AOL credit card.

B. The Respondent shall be responsible for the following debts and hold the Petitioner harmless therefrom: her student loan and the DUPACO credit card.

13. Pensions. The Petitioner shall receive his IPERS pension and the Respondent shall receive her 401(k) account.

14. Execution of Necessary Documents. Within sixty days after the filing of this Decree, each party shall execute any necessary documents to transfer the ownership of any property required to be transferred or sold by this Decree.

15. Attorney Fees. Each party shall be responsible for the payment of his or her own attorney fees.

16. Court Costs. Court costs shall be paid one-half by each party.


Clerk to notify.

Dated: June 18, 2001.

D. S. Russell

[REDACTED], JUDGE
[REDACTED] JUDICIAL DISTRICT OF IOWA

MAILED/DELIVERED ON 6-19-01
BY 14 TO: *Frank Nisley*
Mark Beckman

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2002 Iowa App. LEXIS 460, *

IN RE THE MARRIAGE OF HUSBAND and WIFE Upon the Petition of
HUSBAND Petitioner-Appellee, And Concerning WIFE Respondent-
 Appellant.

No. 2-033 / 01-1026

COURT OF APPEALS OF IOWA

2002 Iowa App. LEXIS 460

May 15, 2002, Filed

NOTICE: [*1] NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

PRIOR HISTORY: Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge. Respondent appeals from the custody provisions of the decree dissolving the parties' marriage.

DISPOSITION: Affirmed.

COUNSEL: Robert L. Day of Day & Hellmer, Dubuque, for appellant.

Frank J. Nidey of Nidey & Peterson, Cedar Rapids, for appellee.

JUDGES: Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

OPINIONBY: EISENHAUER

OPINION:

EISENHAUER, J.

WIFE appeals from the custody provisions of the decree dissolving the parties' marriage. She contends the district court erred in awarding physical care of the parties' minor children to HUSBAND. HUSBAND requests he be awarded his appellate attorney fees.

HUSBAND AND WIFE were married in 1988. They have two minor children. HUSBAND also has an adult child from a previous relationship. HUSBAND filed a dissolution petition in September 2000. [*2] Following trial, the court entered its decree awarding joint legal custody and physical care of the children to HUSBAND. WIFE appeals, challenging the award of physical care. She claims the trial court did not adequately weigh the evidence of domestic abuse by HUSBAND and its impact on the children. We review these claims de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

The primary consideration in determining an award of child custody is the best interests of the child. Iowa R. App. P. 6.14(6)(o) n1 . The court's objective is to place children in the environment most likely to bring them to healthy physical, mental, and social maturity. See *Murphy*, 592 N.W.2d at 683. Here, the trial court found both parties to be loving parents. However, the court found WIFE to be less mature in her approach to raising the children, less stable in her employment, and more dependent on family assistance in caring for the children. As a result, the court awarded the children's physical care to HUSBAND. Upon de novo review of the record, we find no error in awarding HUSBAND physical care of the children. In her testimony, WIFE ACCUSED HUSBAND of [*3] being physically abusive towards her. HUSBAND denied this, claiming instead that both parties took part in the violence. The trial court had the opportunity to have the parties and their witnesses before it. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). It found that at least two of the incidents involved violent actions by each party against the other. It concluded that neither party had a history of abusing the children. We find the trial court adequately considered the allegations of domestic abuse and find no reason to disagree with the trial court's assessment on this issue. Accordingly, we affirm.


----- Footnotes -----

n1 Former Iowa Rule of Appellate Procedure 14(f)(15).

----- End Footnotes -----

HUSBAND requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right but rest within the sound discretion of the reviewing court. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). We decline to award HUSBAND this appellate attorney fees. [*4]

AFFIRMED.

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