

**IN THE COURT OF APPEALS OF IOWA**

No. 9-022 / 08-0591  
Filed March 11, 2009

**IN RE THE MARRIAGE OF DIANE RENEE O'REGAN  
AND DEAN THOMAS O'REGAN**

**Upon the Petition of  
DIANE RENEE O'REGAN,**  
Petitioner-Appellee,

**And Concerning  
DEAN THOMAS O'REGAN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Poweshiek County, Annette J. Scieszinski, Judge.

Dean O'Regan appeals from various provisions of the decree dissolving his marriage to Diane O'Regan. **AFFIRMED AS MODIFIED.**

Barry S. Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Bradley McCall of Brierly Charnetski, L.L.P., Grinnell, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

**DOYLE, J.**

Dean O'Regan appeals from various provisions of the decree dissolving his marriage to Diane O'Regan. He contends the district court erred in (1) the division of property, (2) the allocation of tax dependency exemptions, (3) not granting Dean unsupervised visitation with the parties' children, (4) the allocation of transportation costs for visitation, and (5) the amount awarded for Diane's attorney fees. Upon our de novo review, we affirm as modified.

***I. Background Facts and Proceedings.***

Dean and Diane were married on June 9, 1990. They have four children born of the marriage. Dean received an accounting degree from the University of Northern Iowa and later obtained his CPA designation. Dean worked in public accounting and then as a controller of a truck leasing company. In 2000 he began working for a recruiting company. Dean then started and continues to operate his own recruiting company. Diane received a degree in respiratory therapy. She worked full-time as a respiratory therapist until the birth of the parties' second child. She thereafter worked part-time during the marriage.

During the marriage, Dean was twice charged with domestic assault following incidents in 2000 and 2006. He pled guilty to simple assault after the first charge. He entered an *Alford* plea on the second charge and received a deferred judgment.

The parties separated in July 2006, and Diane moved with the children to South Dakota. On July 18, 2006, Diane filed a petition for dissolution of marriage. On July 31, 2006, the district court entered an order placing the parties' children in the immediate temporary physical custody of Diane.

In October 2006 Diane served requests for production of documents upon Dean. Diane requested information related to Dean's health care and treatment, as well as financial records, including tax returns, financial statements, and supporting documentation of income and expenses, and a financial affidavit as required by Iowa Code section 598.13 (2005). Ultimately, even after ordered to produce the requested documents by the district court, Dean failed to produce all of the documents requested by Diane, including many financial records. Dean's counsel at trial acknowledged that the documents requested by Diane were legitimate items for discovery in the case.

Following trial, the district court entered a decree of dissolution on March 24, 2008. Among other things, the court divided the parties' property, granted Dean supervised visitation with the parties' children initially, ordered that he pay the costs of transportation associated with the visitation, and allowed Dean to claim the two eldest children as dependants for tax exemptions and allowed Diane to claim the two youngest children. Additionally, the court awarded Diane attorney fees. The court determined that of Diane's counsel's \$25,185 bill, Diane should be responsible for the first \$3000. Having been previously ordered to pay \$9000 under temporary orders, the court ordered Dean to pay the balance of \$13,185.

Dean appeals.

## ***II. Scope and Standards of Review.***

In this equitable action, our review is de novo. Iowa R. App. P. 6.4. "In equity cases, especially when considering the credibility of witnesses, the court

gives weight to the fact findings of the district court, but is not bound by them.”  
Iowa R. App. P. 6.14(6)(g).

### ***III. Discussion.***

Dean contends the district court erred in (1) the division of property, (2) the allocation of tax dependency exemptions, (3) not granting Dean unsupervised visitation with the parties’ children, (4) the allocation of transportation costs for visitation, and (5) the amount awarded for Diane’s attorney fees. Upon our de novo review, we affirm as modified.

#### ***A. Division of Property.***

Dean first contends the district court erred in several respects in dividing the parties’ property. In Iowa “courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties.” *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005).

Upon our careful review of the district court’s decision, we find the decision concerning the division of property is well-reasoned and there is little we can add. We find the district court’s decision concerning the division of property is soundly based on equity. We therefore agree with the district court and affirm on this issue.

#### ***B. Tax Exemptions.***

Dean next argues the district court erred in allowing Diane to claim the two youngest children as income tax exemptions. He contends he should have been allowed to claim all of the children as dependents. Alternatively, he argues it was inequitable to allow Diane to claim the two youngest children as dependants.

Generally, the custodial parent receives the tax exemption for a minor child. See Iowa Ct. R. 9.6(4). The district court has the ability, however, to award tax exemptions to a non-custodial parent “to achieve an equitable resolution of the economic issues presented.” *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005).

The district court concluded that “it is just for the parents to each benefit from the dependent income-tax benefits, provided that support responsibilities have been timely satisfied.” We agree. Diane testified at the time of trial she planned to seek part-time employment consistent to her employment during the marriage, and the district court attributed to her the ability to earn \$25,000 annually. Diane was not awarded any alimony. Dean failed to comply with Diane’s discovery requests concerning his financial documentation, making it difficult to determine his true income. Nevertheless, the evidence establishes that Dean’s income is substantially higher than Diane’s earning capacity. Although we disagree that Dean should be allowed to claim all the children for tax exemption purposes, we do agree that it would be more equitable to allow him to claim more children than was allowed by the district court.

We therefore modify the decree to allow Dean to claim three children, and allow Diane to claim one child, until the oldest child can no longer be claimed. At that time, Dean is allowed to claim two children, and Diane is allowed to claim one. Thereafter, when only two children can be claimed, each party is allowed to claim one child. When there is only one child to be claimed, Dean is allowed to claim the child.

### **C. Visitation.**

Dean next contends the district court erred in not granting him unsupervised visitation with the children. The district court found that Dean's behavior, including his past abusive behavior toward Diane and his practice of entwining some of the children in negative discussions about their mother, made him unsuitable for traditional visitation and ordered that Dean's visits with the children initially be supervised at a family visitation center. Upon our de novo review, we agree with the assessment of the district court.

Liberal visitation rights are generally in the best interests of the children. See *In re Marriage of Kerber*, 433 N.W.2d 53, 54 (Iowa Ct. App. 1988); *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa Ct. App. 1987). The court shall order liberal visitation rights, where appropriate, that will assure the children the opportunity for the maximum continuing physical and emotional contact with both parents. Iowa Code § 598.41(1) (2005). While supervised visits may be necessary in the dissolution context to protect a child, they should be used sparingly.

Despite his plea of guilty to simple assault, Dean denies his past abuse of Diane. Although Dean entered an *Alford* plea to the domestic abuse charge in 2006, it is undisputed that at least two of the children were present during the incident and tied Diane's wrists.<sup>1</sup> Clearly this was not in the children's best interests. Moreover, Dean testified that he had not physically visited the children

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<sup>1</sup> Dean testified that he came to the family home, in violation of a no-contact order, at 3:30 in the morning "to get my kids so we could . . . try to get some help for [Diane]." Diane testified that Dean ordered the two eldest children to get towels and tie her up. Dean testified that the children decided themselves that they would tie Diane's hands with a towel because they did not want Diane to touch them.

in South Dakota because “I don’t trust that I wouldn’t be in more trouble for some concocted story if I went up there again.” Supervised visitation by a neutral third-party should alleviate his concerns. Finally, we note that Dean’s own expert recommended supervised visitation initially. For these reasons, we conclude the district court did not err in not granting Dean unsupervised visitation with the children initially.

***D. Transportation.***

Dean next contends the district court erred in its allocation of transportation costs for visitation. Dean argues it is inequitable to require him to provide all of the transportation for his visitation with the children. We agree and determine transportation costs should be shared. See *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa Ct. App. 1992). We therefore modify the decree to equally split the visitation transportation expenses between the parties.

***E. Attorney Fees.***

Finally, Dean contends the district court erred in the amount awarded to Diane for her attorney fees. Dean argues that “[w]hile some award of attorney fees was probably warranted given the discrepancy in income, ordering Dean to pay attorney fees for both parties was more punitive than equitable.” We disagree.

Iowa district courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). To overturn an award the complaining party must show that the district court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on

the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982).

Here, Dean repeatedly failed to comply with the court's orders concerning discovery requests. He did not complete a financial affidavit as required by Iowa Code section 598.13, and he did not produce the 2006 tax return until the day of trial, among other things. Although he had available the supporting documentation requested by Diane's counsel concerning the details of his claimed income and expenses listed on his business's profit and loss statements, he testified he did not produce it because "[i]t's a lot of work for no—I didn't see what the benefit was to it. What are you looking for?"

The district court found that, given all of the financial facts involved, it was reasonable and appropriate for Diane to contribute \$3000 towards her attorney fees and that Dean pay the remainder of her attorney fees. The court found that the demands placed upon Diane's counsel for case preparation and to adequately protect Diane's interests were extraordinary and that many of the atypical circumstances that caused charges to escalate were of Dean's doing, or within his prerogative to prevent. Additionally, the court found that Dean remained equipped with superior income-production ability. We concur with the district court's assessment. We therefore conclude the district court did not abuse its discretion in its award of attorney fees.



***F. Appellate Attorney Fees.***

Diane requests appellate attorney fees for her defense of this appeal. Appellate attorney fees are not a matter of right, but rather rest in the court's discretion. *Okland*, 699 N.W.2d at 270. We consider the needs of the party making the request, the ability of the other party to pay, and the relative merits of the appeal. *Id.* After considering these factors, we decline to award Diane appellate attorney fees.

***IV. Conclusion.***

After considering all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the decree dissolving the marriage between Dean and Diane, except for two particulars. We modify the decree to allow the parties to equitably share claiming the children as dependants for tax exemption purposes. Additionally, we modify the decree to equally split the visitation transportation expenses between the parties. The rest of the decree is affirmed in all respects. Costs of this appeal are assessed one-half to each party.

**AFFIRMED AS MODIFIED.**