IN THE COURT OF APPEALS OF IOWA

No. 3-456 / 12-2210
Filed August 7, 2013

IN RE THE MARRIAGE OF JENNIFER LYNN SCHOEPSKE AND NATE S. SCHOEPSKE

Upon the Petition of
JENNIFER LYNN SCHOEPSKE,
Petitioner-Appellee,

And Concerning
NATE S. SCHOEPSKE,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley John Harris, Judge.

Nate Schoepske appeals from custody and economic provisions of the decree dissolving his marriage to Jennifer Schoepske. **AFFIRMED AS MODIFIED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellant.

Kevin D. Engels of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Nate Schoepske contests custody and economic provisions of the decree dissolving his marriage to Jennifer Schoepske. He contends the district court erred in awarding Jennifer physical care of their three children. In the alternative, Nate contends he should receive more visitation and a recalculation of his income for child support purposes. Finally, he argues the property distribution was inequitable.

After considering the entire record, we find joint physical care is not in the children's best interests and agree Jennifer should be granted physical care. We also affirm the visitation and child-support provisions of the decree. As for the property distribution, we find the district court's division achieved equity, including its acceptance of the parties' agreement concerning Jennifer's student loan debt. We modify the decree only to correct a miscalculation of Nate's equalization payment.

I. Background Facts and Proceedings.

Nate and Jennifer married in July 2004. They have three children, who are now ages eight, six, and three. The parties cohabitated before the marriage and purchased a home together in Waterloo in 2001. At the time of the dissolution, the home was valued at $132,000. The parties owed $109,517 on the mortgage, which is paid in monthly installments of $862.[1]

[1] The couple also has a $3505 lien on the house remaining from a $4000 loan taken to repair flood damage sustained in 2007. The lien must be paid before the mortgage can be refinanced.

Jennifer was thirty-years old at the time of dissolution and in good health. She is employed as a financial analyst for a Waterloo hotel, typically working from 8:00 a.m. to 5:00 p.m. Monday through Friday. Two nights per month, Jennifer must work up to an hour later, but overall she enjoys flexibility in her schedule, which allows her to attend to the children's needs. Her annual salary at the time of dissolution was $53,000.

Before the marriage, Jennifer earned an accounting degree from the University of Northern Iowa. She earned credit toward a master's degree after marrying Nate, but needs about eighteen more hours to finish. Jennifer took out student loans to pay for her schooling. She estimates she borrowed $45,000. Of that amount, $23,000 went to tuition and education costs and the remainder paid living expenses. Jennifer used $6000 of her student loans to cover closing costs when the parties purchased their home. She still owed $37,808 on her student loans at the time of the dissolution trial, which she repays in monthly installments of $250.

Nate was thirty-four-years old at the time of dissolution. He is employed as a quality inspector at John Deere, where he has worked for six years. His work schedule has changed over the years,[2] but at the time of dissolution he worked three twelve-hour shifts per week—from 6:00 p.m. until 6:00 a.m. on Saturday, Sunday, and Monday. Nate was paid for forty hours of work at a rate of approximately twenty-one dollars per hour. John Deere also compensates him

[2] Nate testified he has some control over which shift he works depending on the type of job he bids for and his seniority in relation to the other employees bidding for the job.

with profit sharing and incentive pay. He earned $46,000 in 2010 and just over $59,000 in 2011. In the nine months leading up to trial, Nate earned $43,372.32.

Although Nate is in good health, he suffers from sleep apnea. This condition—coupled with his work schedule—left him tired, and on occasion he fell asleep while the children were alone in his care.[3] A few months before trial, Nate purchased a "C-Pap" device, which helps him sleep better, allowing him to feel more refreshed during the day.

Jennifer and Nate separated in November of 2011. On November 17, 2011, Jennifer filed a petition to dissolve the marriage. Jennifer remained in the marital home, and in January 2012 Nate moved into a three-bedroom home in Cedar Falls with his girlfriend and her seven-year-old daughter. Nate and his girlfriend share a bedroom, and when the parties' children are in Nate's care, they share a bedroom with his girlfriend's daughter. A basement bedroom is used by his girlfriend's son, with whom she has weekend visitation.

On March 7, 2012, the district court granted Jennifer temporary physical care of the children. Nate moved for the temporary order to be modified due to a change in his work schedule. The court modified the order on July 2, 2012, to grant the parties joint physical care, with the children in Nate's care from

[3] The children were never harmed while in Nate's care, but Jennifer asked her parents or Nate's sister to stop by and check on him when he was alone with the children. Jennifer's mother testified that on one occasion, she and her husband stopped by the house to check on Nate and found him asleep while his son had poker chips in his mouth and the girls played alone in their room. She testified that while Nate slept, she and her husband bathed the children and put them to bed. They stayed at the house until Jennifer returned home; Nate never awoke during the hour they were there.

Tuesday afternoon until 6:00 p.m. Friday or 2:00 p.m. Saturday in alternating weeks.

The court held trial on September 12, 2012. Much of the testimony focused on the children. In addition to the testimony about Nate falling asleep while the young children were alone in his care, Jennifer presented evidence about Nate's temper, including incidents where he punched holes through doors in their home. Just before the parties' separation, Jennifer locked herself in the bedroom, and Nate broke the trim around the doorframe trying to open the door. Jennifer and her mother also testified to incidents where Nate became frustrated or angry in front of the children.

In its October 5, 2012 decree, the court denied Nate's request for joint physical care and granted Jennifer physical care of the children. In doing so, the court cited Nate's "violent outbursts" and his "lack of understanding of the need of stability for his children"—contrasting Nate's approach to Jennifer's willingness to place the children's needs as a priority in her life. The court granted Nate visitation on the first, second, and fourth Fridays of each month until 4:00 p.m. on Saturday, and each Tuesday and Thursday from after school until 7:30 p.m. The court also granted Nate six weeks of visitation in the summer.

For the purpose of determining child support, the court found Nate's gross income to be $57,829 per year. Accordingly, Nate's child support obligation was set at $1040 per month, dropping to $900 per month when only two of the children are eligible and $632 per month when only one child is eligible.

Turning to the division of the couple's property and debt, the court awarded Jennifer the marital home, assigning her liability for the mortgage and lien against it. Jennifer also received her vehicle, an insurance policy, and her 401(k) account. The court assigned Jennifer the debt on her vehicle and student loan. The decree awarded Nate his personal property and vehicle, an insurance policy, and various financial accounts and pensions. The court assigned Nate the debt on his vehicle and various credit cards. After determining the net assets awarded Jennifer to be worth $3859 and the net assets awarded Nate to be worth $29,598, the court ordered Nate to pay Jennifer $12,870 to balance the equities.

On October 22, 2012, Nate moved to enlarge and amend. He requested joint physical care of the children or "at a minimum, at least two overnights during the week on Tuesday and Thursday nights." He asked the court to amend its findings to determine his annual salary is $51,000, and his child support be reduced to $985.71 per month, or $788.57 per month if he was granted extraordinary visitation. Finally, he argued all but $4461.75 of Jennifer's student loan debt was incurred before the marriage and asked the court to amend the decree in one of three ways: (1) consider one-half of the remaining student loan balance as marital debt and reduce the amount of the equalization payment Nate would make to Jennifer to $6385; (2) subtract the amount of the student loans that went for tuition and fees from the remaining debt and divide the remainder between the parties, which would reduce the amount of the equalization payment to $2693; (3) or consider the entire student loan debt pre-marital and order

Jennifer to pay Nate a $8210 equalization payment or obligate her to pay the parties' Veridian Visa debt of $10,185.

In response to Nate's motion to enlarge and amend, Jennifer agreed only one-half of her student loan debt should be considered marital debt and the amount of the equalization payment should be reduced to $6385. She resisted the other amendments and requested the court modify the decree to require Nate to pay the loan on his vehicle and the Veridian Visa debt within ninety days of the date the decree was entered.

On November 9, 2012, the district court entered its order modifying the decree. The court reduced the amount of Nate's equalization payment to $6385 as agreed upon by the parties, but otherwise denied the changes requested.

Nate filed a notice of appeal on December 10, 2012.

II. Scope and Standard of Review.

We review dissolution of marriage cases de novo. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). We review the entire record and adjudicate rights anew. *Id*. While we credit the district court's findings—particularly concerning witness veracity—we are not bound by them. *Id*. This deference acknowledges the district court has a firsthand opportunity to view the witnesses and hear the evidence. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

III. Physical Care.

Nate first challenges the physical care provisions of the decree. He argues a joint physical care arrangement is warranted.

In custody matters, our overriding concern is the best interests of the children. Iowa R. App. P. 6.904(3)(o). The goal is to assure the children "the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage." Iowa Code § 598.41(1)(a) (2011). We seek to place the children in the environment "most likely to bring them to health, both physically and mentally, and to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

In determining what custody arrangement is in the best interests of the children, we consider the factors in Iowa Code section 598.41(3). These include the suitability of each parent as a custodian, the parents' ability to communicate regarding the children's needs, the continuity of caregiving both before and after the parents' separation, each parents' ability to support the other's relationship with the children, the parents' geographic proximity, the safety of the children, and any history of domestic abuse. Iowa Code § 598.41(3). Because we base our decision on the facts of each case, precedent bears little value. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

The court may award joint physical care if requested by either parent. Iowa Code § 598.41(5)(a). In *Hansen*, our supreme court outlined specific factors to consider in deciding whether to grant such a request. 733 N.W.2d at 696-99. First, we must consider stability and continuity of caregiving and try to allocate custodial responsibility in a way that approximates the proportion of time each parent spent caretaking before separation. *Id.* at 696-97. Then we consider the ability of the parents to communicate and show mutual respect. *Id.*

at 698. The degree of conflict between the parents is another important factor in making a joint-physical-care determination. *Id.* Finally, we consider the degree to which the parties are in agreement on daily childrearing matters. *Id.* at 699. This list of factors is not exclusive, and our determination must reflect the particular circumstances at hand. *See id.* at 699-700.

Nate lobbies for joint physical care because both parents tended to the children on a daily basis during the marriage. We agree Nate is active in the children's lives, especially in more recent years, enjoying various activities with them and coaching the girls' t-ball team. But he did not provide the day-to-day caretaking Jennifer did. This is due, in part, to Nate's work schedule—when he worked second shift, he was not available in the evenings, and when he worked third shift, Nate slept during the day. Although the children attended daycare during the day, evidence showed Nate sometimes fell asleep when the children were alone in his care in the evening.[4] For this reason, the children attended daycare even when Nate was off work for two weeks during the holidays. In contrast, Jennifer has consistently worked daytime hours and has some flexibility to leave work if a child is sick or school dismisses for bad weather. Jennifer was also the parent who took the children to their doctor's appointments.

While overall the parties have been able to communicate when it comes to their children, the evidence shows a few breakdowns. For instance, Jennifer enrolled the girls in t-ball in Hudson, while Nate wanted to coach t-ball in Shell

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[4] As noted previously, Nate purchased a C-Pap machine a few months before trial and no evidence indicates he has fallen asleep while caring for the children since. But the evidence of him sleeping while in charge of the children is relevant in approximating the proportion of custodial time he spent with the children during the marriage.

Rock. A miscommunication about coaching forms in the summer of 2012 kept Nate from coaching, which he blames on Jennifer.

The parties' ability to remain civil in their interactions and show mutual respect also has been impaired at times. Jennifer testified regarding what she called "hate texts" exchanged between her and Nate. The children witnessed their parents' anger with each other, causing the children to fret over what information they should share about what occurred in the other parent's care. As is too often the case, the parties treated the dissolution proceedings as a custody battle to be won or lost.

After reviewing the factors outlined in *Hansen* and the circumstances of this case, we agree joint physical care would not serve the children's best interests. In addition to the above factors, Nate's unconventional work schedule impedes a joint-physical-care arrangement. Under Nate's proposals, custody exchanges would occur mid-week, rather than during the weekends, which would disrupt the children's school schedules. The children's grandmother testified that frequently switching homes during the school week made the children tired; "[t]hey need to go to bed at the same time, get up at the same time, and not worry[ ] about whether they have their stuff."

Nate, who lived in a rented house at the time of trial, testified he was looking for a new place to live within a fifteen-to-twenty-mile radius. His girlfriend testified she and Nate would like to move to the Waverly-Shell Rock area, which is farther away from Jennifer's home in Waterloo. The district court found Nate "believes the children should be removed from their current school and follow him

wherever he chooses to relocate." The court aptly determined Nate's view betrayed a "lack of understanding of the need to promote a stable relationship between the children and their mother."

Having decided shared care is not in the children's best interests, we must next choose which parent should be awarded physical care. *See id.* at 700. After reviewing the record and considering the factors outlined in section 598.41(3), we agree with the district court's assessment that Jennifer would be the better primary caregiver. While Nate is a capable parent, we hold the same concerns articulated by the district court about his temper and "violent outbursts." Jennifer has acted as the children's primary caretaker, and her job gives her greater ability to continue in this role with three school-aged children. She lives in the school district the two oldest children have been enrolled in and the only community they have known. Granting Jennifer physical care provides the children with continued stability. Accordingly, we affirm the portion of the decree granting physical care to Jennifer.

IV. Visitation.

Nate alternatively challenges the visitation provisions of the decree. The decree provides Nate overnight visitation with the children on three Fridays of each month, evening visits every Tuesday and Thursday, and six weeks of visitation in the summer. He argues that because he works weekends and is free from Tuesday through Friday, he should be granted additional mid-week visitation with the children, including overnight stays.

As in custody determinations, our governing concern in establishing visitation rights is the children's best interests. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994). Liberal visitation rights are in the children's best interests, *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991), as we look to afford the children the opportunity for "maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a).

Just as transferring custody of the children mid-week has been disruptive to their schedules, we find overnight visitation on weekdays would interfere with the children's routines during the school year—especially given the parties do not live in the same school district. Although Nate may have received more weekend visitation if he worked a traditional shift, the schedule set forth in the decree provides him the maximum visitation possible without undue disruption to the children's lives. Accordingly, we affirm.

V. Child Support.

Nate next challenges his child support obligation, asserting the district court erred in determining his gross income to be $57,829.

Before applying the child support guidelines, courts must determine the parents' income using the most reliable evidence presented. *In re Marriage of Hagerla*, 698 N.W.2d 329, 331 (Iowa Ct. App. 2005). "All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations." *Id.* at 332–33.

Nate argues his regular income is $45,907.16 per year. He arrives at this figure by using his $882.83 weekly pay stubs for the month of August 2012 as an average. Acknowledging he also receives profit-sharing and incentive payments at the end of the year, he estimates his gross yearly income to be $51,000.

In the nine months leading up to trial, Nate earned $43,372.32. By extrapolating his earnings for those nine months into a full year, we arrive at $57,829—the same figure used by the district court. Nate argues this amount is too high because it includes overtime pay he earned before his shift change in March 2012 precluded him from working overtime. Nate's employer offered him overtime, but he turned it down because it fell on days the children were in his care during the temporary shared care arrangement.

Trial testimony indicated Nate's work shift and available overtime earnings were subject to change. We find the district court determined Nate's income based on the most reliable evidence presented and see no reason to disturb its calculations. *See McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010). We affirm the provisions setting forth Nate's child support obligation.

V. Property Distribution.

Finally, Nate argues the property distribution is inequitable. Specifically, he faults the district court for treating Jennifer's student loan balance as marital debt, failing to award him equity in the home, and ordering him to make an equalization payment to Jennifer.

Iowa is an equitable-division state. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). But a property division may be equitable without

necessarily being equal. *Id*. The parties are entitled to "a just and equitable share of the property accumulated through their joint efforts." *Id*. "The determining factor is what is fair and equitable in each particular circumstance." *In re Marriage of Gensley*, 777 N.W.2d 705, 719 (Iowa Ct. App. 2009).

We consider the factors set forth in Iowa Code section 598.21(5) when determining if a distribution meets the equity standard. All property of the marriage that exists at the time of the divorce—other than gifts and inheritances to one spouse—is divisible property. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). We must first identify the assets held and debt owed by each party, both individually and jointly, before dividing the marital estate. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007). We value the property as of the date of trial. *Id.*

Nate now argues the district court erred in assigning one-half of Jennifer's student loan debt as marital property. But at trial, Nate specifically requested the court amend the decree to do so. In his motion pursuant to Iowa Rule of Civil Procedure 1.904(2), Nate asked the court to find "$18,904.00 of the remaining balance of $37,808.00 be 'credited' to [Jennifer] as a marital expense, and then find that [Nate] should only be responsible for half of this, or $9,452.00 and [Nate] is obligated to pay [Jennifer] an equalization payment of $6,835.00."[5] Jennifer agreed to this option in her response to the rule 1.904(2) motion, recognizing she had embraced that position in her pretrial stipulation. And the district court modified the decree accordingly.

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[5] Nate sought this relief as the first of three alternatives presented to the district court.

Jennifer argues Nate cannot challenge the amended decree on appeal, having requested the relief granted by the court. It is true a party may only appeal if the judgment is adverse. *See Wassom v. Sac County Fair Ass'n*, 313 N.W.2d 548, 550 (Iowa 1981). Moreover, a stipulation of settlement in a dissolution proceeding stands as a contract between the parties, which becomes final when it is accepted by the court. *In re Marriage of Butterfield*, 500 N.W.2d 95, 98 (Iowa Ct. App. 1993).

Nate responds that he was merely "set[ting] forth options" in his rule 904(2) motion, "[n]ot knowing how the Court would rule, and wanting to preserve other possible arguments." We appreciate that Nate's two other options were more favorable to him. And we realize the general rule is that a party may appeal a judgment that does not provide all the relief sought. *See* 4 C.J.S. Appeal & Error § 253 (2013). But under Iowa law, if a party poses his or her requests for relief in the alternative, and the court accepts one of the alternatives, the court's ruling is not adverse.[6] *See Dow v. McVey*, 156 N.W. 706, 707 (Iowa 1916) ("If two inconsistent prayers for relief be made, the court can properly grant but one, and, if it grants one, the plaintiffs can make no valid complaint because it denied the other.").

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[6] The Eleventh Circuit Court of Appeals addressed a similar issue in a case in which the parties agreed to provide the jury with three alternatives regarding interest calculations. *Georgetown Manor, Inc. v. Ethan Allen*, Inc., 991 F.2d 1533, 1540 (11th Cir. 1993). The court found Ethan Allen waived its challenge to the jury's election to use one of those three alternatives noting the "'cardinal rule' of appellate procedure 'that a party may not challenge as error a ruling or other trial proceeding invited by that party.'" *Id.* (quoting *Charter Co. v. United States,* 971 F.2d 1576, 1582 (11th Cir. 1992) (Johnson, J., concurring in part and dissenting in part)).

But even if Nate could challenge the relief he requested, we would find it equitable to consider one-half of Jennifer's outstanding student loan balance as marital debt when making the property distribution. Premarital property is not set aside like gifted or inherited property. Iowa Code § 598.21(5); *In re Marriage of Fennelly*, 737 N.W.2d 97, 104 (Iowa 2007) ("Property may be 'marital' or 'premarital,' but it is all subject to division except for gifts and inherited property."). But "[p]remarital property does not merge with and become marital property simply by virtue of the marriage." *In re Marriage of Wendell*, 598 N.W.2d 197, 199 (Iowa Ct. App. 1998).

Although Jennifer incurred only part of her student loan debt during the marriage, it is equitable to consider a portion of it as marital debt under the circumstances. In the years leading up to the marriage, Jennifer used the proceeds from her loans to pay the parties' expenses. With $6000 in loan proceeds going to the closing costs on the home and other proceeds going to household expenses, including mortgage payments, Jennifer's debt contributed to the equity in the marital home. Because the home—which was purchased before the marriage—is considered a marital asset, it is equitable to consider one-half of Jennifer's outstanding student loan balance as a marital debt.

We also find the property distribution is equitable overall. The property values assigned by the court are not in dispute. Nor is there any disagreement over who should be awarded which individual property. In the decree, the court tallied the parties' net assets—$3859 to Jennifer and $29,598 to Nate—and then balanced the equities by ordering Nate pay Jennifer $12,870, bringing both

parties' net assets to $16,728. If the court had awarded Nate $9500 in the home's equity as he requests—increasing his net award to $39,098 and decreasing Jennifer's to -$5641—the resulting $44,739 disparity would be balanced by the equalization payment, which would also be increased by $9500; each party would still leave the marriage with net assets totaling $16,728.

We do find one problem with the equalization payment as modified to reflect that only one-half of Jennifer's student loans were being considered marital debt. After granting Nate's motion to enlarge and amend, Jennifer receives $13,311 in net assets and Nate receives $20,146[7]—a difference of $6835. Nate requested the equalization payment be modified to $6835. Rather than balancing the equities, the $6835 equalization payment creates the same imbalance, only with Jennifer coming out ahead. To equalize the parties' bottom lines, Nate should pay Jennifer half of the difference in net assets—$3417.50. Accordingly, we modify the decree to correct this calculation error.

Costs of the appeal are assessed to Nate.

AFFIRMED AS MODIFIED.

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[7] The parties agreed one-half of Jennifer's $37,808 student loan debt ($18,904) should be considered marital property. Therefore, each party is responsible for $9452 of the martial portion of the debt. Adding back Nate's share to Jennifer's net asset calculation in the decree ($3859 + $9452) and subtracting it from Nate's net assets ($29,598 - $9452) brings us to these figures.