

IN THE COURT OF APPEALS OF IOWA

No. 0-916 / 10-1009
Filed February 9, 2011

**IN RE THE MARRIAGE OF WENDE SUSAN ELLIOTT AND JOSEPH ANSON
RUDE**

Upon the Petition of

WENDE SUSAN ELLIOTT,
Petitioner-Appellant,

And Concerning

JOSEPH ANSON RUDE,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Timothy J. Finn,
Judge.

Wende Susan Elliott Rude appeals challenging the custodial and
economic provisions of the decree dissolving her marriage to Joseph Anson
Rude. **AFFIRMED AS MODIFIED.**

Elizabeth Kellner-Nelson of Pendleton & Nelson PC, West Des Moines, for
appellant.

Catherine C. Dietz-Kilen of Harrison & Dietz-Kilen, P.L.C., Des Moines, for
appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Wende Susan Elliott Rude appeals from the decree dissolving her marriage to Joseph Anson Rude. She contends that she, not Joseph, should have been named primary custodian of their three children, and if not, that she should have either joint physical care or additional visitation. She also contends she should have additional property, more alimony and that we should order her name to be changed. She asks for appellate attorney fees, as does Joseph. We affirm.

I. SCOPE OF REVIEW. We review dissolution cases de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *Id.*; *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). Precedent is of little value as our determination must depend on the facts of the particular case. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995); *In re Marriage of Sparks*, 323 N.W.2d 264, 265 (Iowa Ct. App. 1982).

II. BACKGROUND FACTS. The parties were married in 1992. At the time of trial Wende was forty-two and Joseph fifty-one. They have two sons and a daughter who were at the time of hearing thirteen, eleven, and seven.

At the time of the marriage both parties were well-educated. Wende held a bachelor's degree from Princeton University and had taken graduate classes at the University of Michigan. Joseph had received a bachelor's degree from Iowa State University and a Masters from Suffolk University. During the marriage both

spouses have been involved at various times in several business ventures. Both have been active and involved parents and the family has utilized au pairs to assist with the care of the children. In the ten years prior to trial they consistently had live-in au pairs. At the time of the dissolution hearing Joseph was employed by Titan Machinery. He is evaluated on his work product and not the number of hours he works giving him flexibility. At the time of trial his annual salary was \$95,000 and he enjoyed a series of benefits including health, life and dental insurance, flex hours, and remote server access, which permitted him to work from home.

Wende at the time of trial worked as a consultant for an organic food show earning about \$2000 a month. She also has been accepted in the MFA program at Iowa State University where she is working towards a degree in "Creative Writing and the Environment." She has a teaching assistantship that pays her \$12,150 for nine months of work. Her work provides her with some flexibility.

Wende filed a petition for dissolution of marriage in April of 2009. She sought primary physical custody of the children. Joseph filed an answer on May 4, 2009. He stated that both parents were fit and proper persons to have temporary and permanent joint legal custody of the children, but that it is in the best interests of the children that they be placed in his temporary and permanent primary physical care subject to Wende's visitation right. In the alternative, he asserts that the children be placed in the joint physical care of the parties. On June 5, 2009, the district court awarded Wende temporary physical custody of the children and ordered Joseph to pay temporary child support and alimony. On

June 15, 2009 the court entered an order appointing Dr. Arthur Konar¹ as a child custody evaluator in the case. On January 14, 2010 Wende amended her petition to include an alternate request for joint physical custody. Trial was held in April of 2010. A number of witnesses testified including Konar, who opined that Joseph should have physical care. A decree was filed on June 2, 2010, dissolving the marriage and awarding Joseph primary physical custody of the children, granting Wende visitation, fixing alimony and child support and dividing the parties' property and debts.

III. CUSTODY AND VISITATION. Wende contends she should have physical care of the children or in the alternative she should have shared care or more visitations.

In making its custody decision the district court found that Wende is less supportive of the children's relationship with their father than Joseph is of hers and that Joseph's mental and emotional stability is healthier than Wende's. The district court found in observing the parties' demeanor while testifying that Wende seemed more guarded, unsure, and less open and honest than Joseph. Relying heavily on the testimony of Konar, the court said it believed that the children were not happy with the temporary situation where they live primarily with their mother. The court found that Wende has attempted to make Joseph look less qualified to serve as a parent. The court found to the best of its determination that Wende's

¹ Wende initially resisted the appointment of a custody investigator due to costs but it appears that she consented to Konar's appointment with Joseph assuming the cost. Konar is a licensed psychologist in private practice in Ames and Des Moines. He is the clinical director for Two Rivers Psychological Services and in that capacity he supervises a social worker primarily in her work on custody evaluations. He has performed a number of custody evaluations in Story, Polk, and Boone counties.

allegations that Joseph inappropriately slept with their daughter, stalks her and the children, and hog tied her and dragged her out of the house are not supported in the record by credible evidence and the allegations were utilized in an attempt to make Joseph look bad, Wende look better, and to portray herself as a victim in a marriage where she was not a victim.

Iowa law distinguishes custody from physical care. Custody concerns the legal rights and responsibilities toward the child, including decisions “affecting the child’s legal status, medical care, education, extracurricular activities, and religious instruction.” Iowa Code § 598.1(5) (2009). Physical care, on the other hand, is “the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.” *Id.* § 598.1(7). When considering the issue of physical care, the child’s best interest is the overriding consideration. We are guided by the factors set forth in Iowa Code section 598.41(3) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). If joint physical care is not appropriate, “the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007); *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007).

Wende argues she had been the children’s primary caregiver and she was the one who managed the household schedule and the child’s schedules. She advances that the children are bonded to her and view her as their primary caregiver. She contends that portions of Dr. Konar’s report were not verified. She questions whether Joseph really wants to be the primary custodian and that he is

not supportive of her position with the children. She claims that she has allowed the children additional time with Joseph, but Joseph has not returned the favor.

Joseph contends, and we agree, that we should defer to the trial court's detailed factual findings especially with respect to the credibility of witnesses.² See *Fennelly*, 737 N.W.2d at 101. Joseph also contends the district court made the correct decision in awarding him physical care. We look to *In re Marriage of Hansen*, 733 N.W.2d 683, 697-99 (Iowa 2007), where the court set out factors to be considered when addressing claims of shared care. Namely, the court looks at whether the parents respect each other, the level of conflict between the parents, the history of care giving, the ability of parents to communicate, and how they approach daily matters.

We do not believe the evidence supports Wende's contention that she has been the primary custodian of the children. The responsibility for the children's care has been shared by the parties, nannies, and au pairs. Wende has shown little respect for Joseph, attempting to belittle him in the eyes of the court and of the children. The parties' communications have been strained. We also reject Wende's claim that she should have physical care of the children. Joseph has shown, as the district court found, that he is the better parent. He has been engaged in the children's care. The children enjoy being in his custody. He has

² The district court made some pointed findings concerning Wende's credibility and said among other things:

On cross-examination she [Wende] refused to concede virtually any fact, even facts which were undisputed and not even detrimental to her custody claim. Wende made unreasonable accusations against her husband during the pendency of this action. She appears willing to say anything and make any accusations necessary against Joseph to try and enhance her chances for primary physical custody of the parties' children.

been supportive of Wende's place in the children's life and will continue to be so. His employment allows him to be available to the children.

We also reject Wende's claim that she should have more visitation. The district court provided her with visits every other weekend from 6 p.m. on Friday until Sunday at 6 p.m. Holidays and school breaks were shared and alternated. While there is a communication problem, they have been able to communicate on visits, appointments, and the children's activities.

IV. ECONOMIC PROVISION OF THE DECREE. Wende seeks a modification the economic provisions of the decree asking for additional property and alimony.

Iowa is an equitable division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.* Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The partners in the 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 Ct. 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. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The distribution of the property should be made in consideration of the criteria codified in section 598.21(5). See *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not

demanded. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007); *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009).

Wende requests an additional property award of \$5000 because Joseph was awarded a gun collection valued at \$5000 and \$5000 in farm tools. She also asks that Joseph be required to pay an alleged \$1483.50 to her parents. We have examined the property award and the alimony and find no reason to reverse the district court's decision on these issues. The district court allocated the personal residence, proceeds from the sale of farmland, credit card debt and pension rights and Wende was awarded temporary alimony of \$500 a month from July 1, 2010 through December 1, 2010.

We consider the property division and spousal support provisions together in determining their sufficiency. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009); *see also In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). We find no reasons to disturb the property division made by the district court.

An alimony or spousal support award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support and there also is a need for support. *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa Ct. App. 1992). Wende is well educated and has been successfully employed in various jobs during most of the marriage. She has two sources of monthly income and notes she has other possibilities for employment. Any further award of alimony is not justified.

V. NAME CHANGE. Wende contends the district court should have ordered her requested name change and returned her last name to Elliott. She contends she asked for it at trial but it was not granted. Section 598.37 allows the dissolution court to order a change of her name to conform to what appears on her birth certificate. She did not file a post-trial motion seeking relief on this issue but Joseph does not oppose this request. We find Wende can change her last name to Elliott and modify accordingly.

VI. Both parties request appellate attorney fees. Joseph was successful on appeal and did not challenge Wende's application to change her name. He should be awarded appellate attorney fees in the amount of \$2000. Court costs are taxed to Wende.

AFFIRMED AS MODIFIED.