IN THE COURT OF APPEALS OF IOWA

No. 2-1100 / 12-1227
Filed March 13, 2013

IN RE THE MARRIAGE OF GLENDA R. LOVRIEN AND KEITH ALAN LOVRIEN

Upon the Petition of
GLENDA R. LOVRIEN,
Petitioner-Appellee,

And Concerning
KEITH ALAN LOVRIEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Butler County, Christopher C. Foy, Judge.

Keith Lovrien appeals from the child custody and economic provisions of the decree dissolving his marriage to Glenda Lovrien. **AFFIRMED.**

John J. Hines of Dutton, Braun, Staack, Hellman, P.L.C., Waterloo, for appellant.

Karen Thalacker of Gallagher, Langlas & Gallagher, P.C., Waverly, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Keith Lovrien appeals from the child custody and economic provisions of the decree dissolving his marriage to Glenda Lovrien. He contends he should be granted physical care of the parties' minor children. He also contends the property distribution is inequitable. Finally, Keith contends the court erred in awarding Glenda trial attorney fees. Glenda requests an award of her appellate attorney fees.

Because Glenda has shown a greater ability to minister to the children's best interests, we find the district court properly granted her physical care of the children. We also find the property distribution is equitable. While we affirm the district court's award of trial attorney fees, we decline to award Glenda her appellate attorney fees.

I. Background Facts and Proceedings.

Keith and Glenda were married on July 17, 1982. They have four children: Megan, born in 1988; Danica, born in 1992; Mason, born in 1995; and Adam, born in 1999.

In 1983, the parties moved to Minnesota and lived in the Minneapolis area. Keith worked as a computer programmer. Glenda completed a two-year program and became a certified radiologic technician. Glenda was a full-time homemaker from 1996 until June of 2009.

In 1988, the parties purchased eighty acres of farmland in Butler County, and began growing corn and soybeans. Keith returned to Iowa on the weekends and performed the field work. In 1999, the family moved to Iowa after purchasing

an eighteen-acre farmstead in Butler County. Keith continued working as a computer programmer in the Minneapolis area, working there three to five days per week, depending on the job. Keith stopped working as a computer programmer in 2008 and began living in Iowa full-time.

Over the years, the parties continued to purchase farmland. At the time of the dissolution, they owned approximately 910 acres of farmland in Butler and Floyd Counties.

Glenda maintains that Keith was verbally abusive to her during the marriage. On March 20, 2009, an argument between Keith and Glenda escalated and Keith punched Glenda in the face three times. Keith was arrested for domestic abuse assault and pled guilty to serious misdemeanor assault. Glenda filed a petition seeking relief from domestic abuse pursuant to Iowa Code section 236.3 (2009). On April 8, 2009, the parties agreed to a protective order; Glenda was given physical care of the children and remained on the farmstead, while Keith moved to an apartment in Nashua and received regular visitation with the children. The order also provided Keith was only to be on the farmstead when necessary to perform work and was prohibited from having direct contact with Glenda. The order was formally cancelled on October 31, 2011.

In August 2011, Glenda and the children moved to a home in Clarksville. At that time, Keith returned to the farmstead.

On February 5, 2010, Glenda filed a petition to dissolve the parties' marriage. A hearing was held in November 2011. On May 31, 2012, the district court entered the decree dissolving the marriage. It granted Glenda physical

care of the parties' two minor children subject to Keith's visitation rights. As to the marital property, the court awarded Keith roughly half of the real estate, including the farmstead, as well as several vehicles. Glenda was awarded the other half of the real estate, several investment and retirement accounts, and her vehicle. The court divided the grain in storage between the parties. The court calculated the net worth awarded to Keith to be $3,381,847 and the net worth of property awarded to Glenda to be $3,049,127. Finally, it awarded Glenda $10,000 in trial attorney fees.

Both parties filed post-trial motions asking the court to revisit its fact findings and modify its ruling. The court denied the motions. Keith filed a timely notice of appeal.

II. Scope and Standard of Review.

We review dissolution cases de novo. *In re Marriage of Becker*, 756 N.W.2d 822, 824 (Iowa 2008). We give weight to the district court's findings of fact, although we are not bound by them. *Id.*

III. Child Custody.

Keith first contends the district court erred in granting physical care of the parties' minor children to Glenda. He argues he can provide the children with the environment that will most likely bring them to healthy physical, mental, and social maturity.

The best interest of the children is our standard for deciding child custody. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999). Our objective is to place the children in the environment most likely to

bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. In considering what custody arrangement is in the best interest of the children, we consider the statutory factors found in Iowa Code § 598.41(3) (2009). All these factors bear upon the "first and governing consideration" as to what will be in the best long-term interest of the child. *In re Marriage of Vrban,* 359 N.W.2d 420, 424 (Iowa 1984).

In addition to the statutory factors, we consider the factors identified in *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974) in determining the award of physical care. *In re Marriage of Will,* 489 N.W.2d 394, 398 (Iowa 1992). These factors are:

> 1. The characteristics of each child, including age, maturity, mental and physical health.
> 2. The emotional, social, moral, material, and educational needs of the child.
> 3. The characteristics of each parent, including age, character, stability, mental and physical health.
> 4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
> 5. The interpersonal relationship between the child and each parent.
> 6. The interpersonal relationship between the child and its siblings.
> 7. The effect on the child of continuing or disrupting an existing custodial status.
> 8. The nature of each proposed environment, including its stability and wholesomeness.
> 9. The preference of the child, if the child is of sufficient age and maturity.
> 10. The report and recommendation of the attorney for the child or other independent investigator.
> 11. Available alternatives.
> 12. Any other relevant matter the evidence in a particular case may disclose.

Winter, 223 N.W.2d at 166-67.

Keith argues he should be granted physical care of the children, citing difficulties in Glenda's admittedly strained relationship with their two adult children and what he refers to as "serious lapses in Glenda's parental supervision and control." The latter refers to Glenda's alleged drinking problem. Glenda claims Keith mischaracterized her use of alcohol. The court was free to choose which party's testimony it believed. Furthermore, Glenda testified she stopped using alcohol in July of 2011 and there is no evidence to the contrary. We find the evidence at trial reveals no present concerns about Glenda's alcohol use.

Glenda cites to Keith's domestic abuse as an impediment to his ability to parent the children. Because of the "ravaging and long-term consequences" domestic abuse can have on children, this court has recognized it as a factor in determining which parent should be granted child custody. *In re Marriage of Daniels*, 568 N.W.2d 51, 54-55 (Iowa Ct. App. 1997). Spousal abuse discloses a serious character flaw in the batterer and an equally serious parenting flaw. *Id.* at 55.

> Consequently, we believe evidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances even foreclose an award of primary care to a spouse who batters. Domestic abuse is, in every respect, dramatically opposed to a child's best interests.

Id. Keith admits to striking Glenda in the face three times in March 2009 when he became angry with her. As a result, criminal charges were filed against Keith, Glenda filed a petition for relief from domestic abuse, and a protective order was issued for a two-and-a-half-year period.

In addition to the March 2009 incident, there was evidence of Keith losing his temper on other occasions. On one occasion, he broke Glenda's cell phone after he broke a cup holder in the car and she threatened to call 911. On another occasion, he shoved Glenda while arguing with one of their daughters. Glenda was also knocked to the ground when Keith was in a physical altercation with one of their sons. Glenda also asserts Keith was verbally abusive toward her during the marriage. After his arrest in March 2009, Keith completed a batterer's education program and sought counseling. The parties' oldest daughter, Megan, testified that Keith is now "a completely different person. . . . He's very in control now."

The district court did not discuss the allegations of Glenda's alcohol abuse or Keith's domestic abuse in concluding Glenda was the party more capable of parenting the boys and meeting their emotional, mental, and social needs. The court found that while both parties are capable of parenting the boys and providing for their physical needs, Glenda is the more nurturing parent. The court noted that Glenda had been their primary caregiver all of their lives and that Keith had spent a good part of their lives living outside the home. The court stated, "Both parties described the boys in generally positive terms, which reflects positively on the care and supervision provided by Glenda. Glenda has done a good job raising the boys to this point."

We agree with the district court's assessment of the evidence. Although Keith disputes the court's finding that he did not always reside with the family, the evidence shows that the boys have spent more time in Glenda's care than in

Keith's given his commuting for out-of-state work and the April 2009 protective order. Accepting the testimony presented that Glenda has stopped using alcohol and Keith has changed his behavior following the March 2009 altercation, we find Glenda is the parent better able to bring the boys to healthy physical, mental, and social maturity.

IV. Property Distribution.

Keith also contends the district court erred in dividing the parties' property. Specifically, he argues the court should have set aside certain farmland for the children. He also argues the equal split of the 2011 crop was unjust and constituted a substantial windfall to Glenda. Keith argues the division of the farmland was inequitable and allows Glenda to share in the increase in the net worth of property to which she made no contribution. Finally, he argues the 20,000 shares of ethanol stock and the retirement accounts should be split equally between the parties.

Iowa is an equitable division state. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). Equitable division does not necessarily mean equal division of each asset, although an equal division of assets accumulated during the marriage is frequently considered fair. *Id.* The issue the court must consider in each case is what is fair and equitable under the circumstances. *Id.* "The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts." *Id.*

In distributing the property, we consider the criteria set forth in Iowa Code section 598.21(5). One of these factors is "[a]ny written agreement made by the

parties concerning property distribution." Iowa Code § 598.21(5)(k). While a settlement agreement in a dissolution of marriage case is a contract between the parties, it only becomes a final contract when accepted and approved by the court. *In re Marriage of Hansen*, 465 N.W.2d 906, 908 (Iowa Ct. App. 1990). The court is not bound by the parties' agreement as to how their property should be distributed. *In re Marriage of Huffman*, 453 N.W.2d 246, 249 (Iowa Ct. App. 1990). The court must determine "whether the provisions upon which the parties have agreed constitute an appropriate and legally approved method of disposing of the contested issues." *In re Marriage of Morris*, 810 N.W.2d 880, 886 (Iowa 2012). If the stipulation is unfair or contrary to law, the court has the authority to reject it. *Id.*

Keith argues the district court erred in failing to set aside farmland for the children. At trial, he testified that he and Glenda had set aside money for the children in a savings account, and then used that money to buy property. He testified the parties' intended to use the income generated from the farmland as a means of funding the children's college education, and then the land would go to the children. He admitted the land was never titled in the children's names.

Glenda testified that she and Keith discussed putting a parcel of land in the children's names and using the money generated from it to fund the children's college education, but that it was never done. She testified that the money from the land funded some—but not all—of Megan's college education, but not Danica's. She did not recall agreeing to pass the property to the children,

nor did she remember what parcel of property they discussed using for this purpose.

The district court did not make any findings regarding farmland being set aside for the children. In his post-trial motion, Keith asked the court to make fact findings regarding whether the parties intended 146 acres in section 26 of Pleasant Grove Township to be set aside to the children, and to set aside this property in the decree. The district court denied the motion.

We find Keith failed to prove the parties' purchased farmland for the children. Accordingly, we decline to amend the decree to set aside 146 acres of farmland from the property distribution.

Keith also asserts the district court erred in dividing the 2011 crop between the parties. He proposed he be awarded all of the remaining crop to pay upcoming and ongoing farm expenses, as well as income taxes. He asked that any remaining grain be retained by him as reimbursement for his labor and maintaining the overall farm operation for the 2012 crop year. Instead, the court estimated how many bushels of soybean and corn crop were harvested in 2011, assigned a bushel price, and awarded each party one-half of the crop. Given that the overall property distribution favors Keith, we find the court's award of half of the 2011 crop to Glenda to be equitable.

Keith next argues the district court erred in awarding Glenda half of the parties' farmland. He requests that instead he provide Glenda with a cash buyout for her interest in the land, valued at one-half the net equity in the land in 2009. Keith complains that the divorce would have been finalized in 2009 if

Glenda had not successfully appealed the district court's order requiring she participate in marital counseling; in the intervening years, the farmland's value increased. Keith asserts Glenda should not benefit from that fortuitous increase, since she did not contribute to it. In the alternative, Keith proposes transferring Glenda 200 acres of farmland valued at approximately $1.3 million.

The parties' property should be given value as of the date of trial. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007). Although there is evidence to suggest the value of the property increased significantly during the parties' separation, this increase was not due to improvements made to the land by Keith, but rather to economic circumstances. The parties acquired the property during the marriage, and as such, Glenda is entitled to an equitable share of it.

Finally, Keith argues the district court should have split the parties' ethanol stock and retirement accounts equally, rather than awarding Glenda all of the retirement accounts and dividing only the parties' Vangard IRA and Cenex retirement pension. We find the district court's distribution of these accounts is equitable. The Vanguard IRA is a sizeable asset, with each party receiving one-half its value, in the amount of $117,810. Additionally, the parties received equal shares of the Cenex retirement pension. Although Glenda was awarded several other accounts valued at approximately $36,462 and the stock valued at $20,000, the total property distribution favors Keith by more than $330,000.

V. Trial Attorney Fees.

Keith contends the district court erred in awarding Glenda $10,000 for her trial attorney fees. We review the district court's award or denial of trial attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). An award of attorney fees depends upon the relative needs and abilities of the parties. *In re Marriage of Fish*, 350 N.W.2d 226, 231 (Iowa Ct. App. 1984). In addition, the fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997)

Glenda accrued over $20,000 in trial attorney fees and requested the court direct Keith to pay $15,000 of those fees. The court awarded her $10,000 in attorney fees, finding:

> Keith had nearly unfettered control over the income generated by the farm operation for the last three years. During this time, the direct payments he made to Glenda were fairly modest. Although he feigned ignorance on the subject, the Court believes that Keith used income from the farm operation to pay all of the fees charged by his attorney. In the opinion of the Court, it is only fair that Keith assist Glenda with the payment of her attorney fees.

Given Keith's superior position to pay, we find no abuse of discretion. The award of trial attorney fees is affirmed.

VI. Appellate Attorney Fees.

Finally, we consider Glenda's request for an award of her appellate attorney fees. An award of appellate attorney fees is not a matter of right but

rests within our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

We decline to award Glenda her appellate attorney fees.

AFFIRMED.