IN THE COURT OF APPEALS OF IOWA

No. 2-608 / 11-1907
Filed September 19, 2012

IN RE THE MARRIAGE OF STACY J. DELAGARDELLE AND DANIEL M. DELAGARDELLE

Upon the Petition of

STACY J. DELAGARDELLE,
Petitioner-Appellant,

And Concerning

DANIEL M. DELAGARDELLE,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, Monica L. Ackley, Judge.

Stacy Delagardelle challenges the physical care, child support, and property distribution provisions of the decree dissolving her three-year marriage to Daniel Delagardelle. **AFFIRMED AS MODIFIED.**

Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellant.

David A. Roth of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

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

TABOR, J.

Stacy Delagardelle challenges the physical care, child support, and property distribution provisions of the decree dissolving her three-year marriage to Daniel Delagardelle. Stacy argues joint physical care is not in the best interests of their son and daughter, who are both preschoolers. She next contends the district court miscalculated Daniel's child support obligation by overlooking her payment of the children's health insurance costs. She also claims she is entitled to a more substantial equalization payment than was ordered by the court. Finally, the parties both seek attorney fees.

Keeping in mind the district court's credibility determination, we reject Stacy's contentions regarding physical care. We also affirm the property distribution ordered by the district court. Both parties agree the child support order should be amended. Accordingly, we affirm the decree as modified. We conclude the parties should be responsible for their own attorney fees.

I. Factual Background and Dissolution Proceedings

Stacy and Daniel married in April 2007. They have two children: a son born in 2008 and a daughter born in 2009. Stacy has some college education and has worked for eight years at Plumb Supply in Waterloo, where she earns approximately $34,000 per year. She carries the children on her health insurance plan at the cost of $231.92 per month. Daniel is a plumber who was self-employed at the time of the trial. He stipulated that his annual income is $55,000.

Daniel lives in Jesup and has extended family in Buchanan County. Stacy moved from Jesup to Waterloo and then to Waverly, where her boyfriend Andy resides. At the time of trial, Stacy was pregnant with Andy's child. The distance between Daniel's residence in Jesup and Stacy's apartment in Waverly is about forty miles.

Stacy filed a petition for dissolution on August 30, 2010. At that time, the parties adopted a joint parenting plan allowing the children to spend two days with one parent, two days with the other parent, then three days with one parent and three days with the other parent.

The district court heard the dissolution matter on September 28, 2011. On October 24, 2011, the court issued a decree dissolving the marriage. The decree granted the parties joint physical care over the children, continuing the arrangement that was currently in place until the oldest child started school in the fall of 2013. The court also ordered Daniel to make an equalization payment to Stacy in the amount of $16,346. The court calculated Daniel's child support at $259.82 per month. The decree held each party responsible for his or her own attorney fees.

Stacy filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), asserting the decree did not "set forth the supporting figures or the calculations to support how the court determined the amount of the equalization payment Daniel must pay to Stacy." She asked the district court to "supply specific information and calculations" to support its figures. The court denied the request and Stacy filed this appeal.

II. Standard of Review

We review dissolution matters de novo. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). Because the district court could hear and see the witnesses first hand, we give weight to its factual findings, but are not bound by them. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

III. Merits

A. Physical Care

The district court granted the parties joint physical care over their young children, explaining:

> The parties shall continue with their current shared physical care arrangement as they have proven the ability to do so without too much turmoil and difficulty. The court finds that the relationship between the parents and the children is strong, and therefore should continue in a shared-care arrangement in order to provide for continued development of a stronger bond between each of the parents and the children. This is most important considering the ages of the children.

The decree provided that when the older child reached kindergarten age, the parents would enroll him in a Buchanan County school. The physical care arrangement then would convert so that Daniel would have the children during the school week and Stacy would have them three of four weekends per month; the schedule would be reversed in the summer.

The district court found Stacy's testimony lacked credibility, "especially when she indicated one of her reasons for moving was due to [Daniel's] mother making it difficult for her to stay in Jesup."

Stacy argues on appeal the children's best interest would be served by placing physical care with her and allowing Daniel liberal visitation. She says the

court erred in ordering joint physical care for four reasons: (1) she was the children's primary caretaker during the marriage; (2) she and Daniel don't communicate well and he is verbally abusive; (3) a high degree of conflict exists between her and Daniel; and (4) she and Daniel do not agree on the children's daily routines. In the alternative, she contends that if we uphold the joint physical care arrangement, she should have the children during the times assigned to Daniel and Daniel should have the children during the periods assigned to her.

Stacy suggests the district court "took a punitive approach" in deciding the physical care arrangement. We disagree. We find the district court properly considered what post-divorce living arrangement was most conducive to the children's happiness and healthy development. *See In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

We will briefly address the *Hansen* factors identified by Stacy. First, we recognize the historical care-giving arrangement, or approximation, is an important consideration, but we don't believe it is "an overwhelming factor" mandating Stacy be awarded physical care of the children here. *See In re Marriage of Berning*, 745 N.W.2d 90, 93 (Iowa Ct. App. 2007). The approximation factor is less significant where the historically less-involved parent has proven to be a capable caregiver and the children have spent a considerable amount of time in daycare. *Id*. In the instant case, Daniel has shown himself to be a concerned and active father and the children have attended his cousin's daycare since they were infants.

On the issues of communication and conflict, we defer to the district court's conclusion the parties are capable of coordinating a joint physical care schedule. Stacy asserts on appeal she has been supportive of Daniel's relationship with the children and will continue to do so. Daniel likewise recognizes the importance of the children spending as much time as possible with their mother. While we are troubled by Daniel's demeaning and derogatory references to Stacy in front of the children, we trust he now understands the importance of showing respect for one another as they embark on many years of joint parenting. Finally, as for consistency in child rearing practices, both Daniel and Stacy testified to having many conversations concerning the children's school and living arrangements. Their trial testimony did not reveal any fundamental points of disagreement. *See Hansen*, 733 N.W.2d at 699 (conceding it would be "unrealistic" to suggest that parents must agree on "on all issues all of the time"). In our de novo review, we—like the district court—find the strongest possible connection with both parents offered by a joint physical care arrangement is in the best interests of these young children.

We also affirm the provision of the decree granting Daniel physical care of the children during the school week when their son is old enough to be enrolled in kindergarten. The district court cited Daniel's significant family ties to Jesup in designing a care arrangement that would feature enrollment in a Buchanan County school district. The proximity of extended family members is a viable consideration in custody and physical care decisions. *See In re Marriage of*

Burkle, 525 N.W.2d 439, 442 (Iowa Ct. App. 1994). Stacy offers no convincing reason to alter the physical care assignments in the decree.

B. Child Support

The parties agree Daniel's child support obligation should be amended to account for the health insurance Stacy provides for the children. The decree should be modified to order Daniel to pay $412.03 per month and neither party should be obligated to pay cash medical support. *See* Iowa Ct. R. 9.12(3).

C. Equalization Payment

Stacy asks us to increase Daniel's equalization payment from $16,346—as ordered by the district court—to $44,514.[1] She complains the district court erred in crediting Daniel with equity in the home he owned before the marriage. Daniel defends the property distribution as equitable.

Iowa is an "equitable distribution" jurisdiction when it comes to dividing the property of divorcing spouses. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our courts equitably divide all property owned by the parties at the time of divorce with the exception of gifts and inherited property. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007). The particular circumstances of each case drives what is equitable. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 683 (Iowa 2005); *see* Iowa Code § 598.21(5) (2011) (listing factors to be considered in property division). We do not aim for an equal distribution of property, but rather what is equitable given the circumstances of the marriage. *See In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995). "If a

[1] She alternatively seeks an equalization payment of $37,547, if her student loan debt is set aside.

marriage lasts only a short time, the claim of either party to the property owned by the other prior to the marriage . . . is minimal at best." *Id.* (awarding property based on the net value of each party before three-year marriage).

A premarital asset is not set aside like gifted property. *See In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996); *see also* Iowa Code § 598.21(5)(b). Instead, it is one factor to consider along with all other circumstances in determining the overall property division. *Miller*, 552 N.W.2d at 465. 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); *see also In re Marriage of Johnson*, 499 N.W.2d 326, 328 (Iowa Ct. App. 1993) ("Property brought into a marriage by one party need not necessarily divided.").

The district court emphasized the parties' marriage was "very short, having lasted less than three years." The court noted Daniel took on "over $219,000 worth of debt not only for his business but also for family spending", while Stacy "will walk away from the marriage owing her school debt and her credit card bill." The court found Daniel was "entitled to at least half of the equity he built up in the pre-marital home."

We decline to disturb the district court's property distribution or its determination that Daniel should make an equalization payment of $16,346. While a greater payment may have been justified following a longer marriage, the relative brevity of the relationship between Stacy and Daniel supports the district

court's determination. *See In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa 1979).

D. Attorney Fees

Stacy contests the district court's refusal to award attorney fees at the trial level. Both parties ask for attorney fees on appeal.

District courts enjoy considerable discretion in awarding attorney fees. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa Ct. App. 1994). The decision to award fees is based largely on the parties' respective abilities to pay. *Id*. While Daniel has a higher income than Stacy does, we cannot say the district court abused its discretion in declining to award Stacy attorney fees considering their other financial obligations.

We exercise our own discretion when determining whether to award appellate attorney fees. *Berning*, 745 N.W.2d at 94. We consider the needs of the party requesting the award, the other party's ability to pay, and whether the requesting party was obliged to defend the district court's decision on appeal. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App.1999). While Stacy's appeal placed Daniel in the position of defending the decree, we do not find his financial situation requires an award of attorney fees. Each party shall pay for their own legal representation.

Costs should be divided equally between the parties.

AFFIRMED AS MODIFIED.