IN THE COURT OF APPEALS OF IOWA

No. 2-910 / 12-0502
Filed November 29, 2012

IN RE THE MARRIAGE OF JERRY LEE TOWNSEND AND MAUREEN MICHAELA TOWNSEND

Upon the Petition of

JERRY LEE TOWNSEND,
Petitioner-Appellee,

And Concerning

MAUREEN MICHAELA TOWNSEND,
Respondent-Appellant.

Appeal from the Iowa District Court for Iowa County, Paul D. Miller, Judge.

Maureen Michaela Townsend appeals economic and physical care provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Natalie H. Cronk of Law Office of Natalie H. Cronk, Iowa City, for appellant.

John C. Wagner of John C. Wagner Law Offices, P.C., Amana, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Maureen Michaela Townsend appeals economic and physical care provisions of a dissolution decree. She alleges the trial court ordered an inequitable division of the parties' marital and premarital assets and further erred by awarding physical care of William Townsend, minor child, to Jerry Townsend. Because we conclude the property distribution was equitable but permit Maureen the right to reside in the family home temporarily, and the trial court did not err by awarding physical care of William to Jerry, we affirm as modified.

I. Background Facts and Proceedings.

Maureen and Jerry entered a relationship in 1995 after Jerry, then a part-time realtor,[1] assisted Maureen with the purchase of a home. Maureen has been employed as a nurse at the VA hospital in Iowa City since 1988.[2] Jerry graduated from high school, but has no other post-high school education or training other than that which was required to obtain his real estate license.

Maureen had a child, Alex Mims, from a prior marriage. In 1996, she adopted her daughter Tonya. In November of that year, she also gave birth to the parties' biological son, William.

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[1] Jerry has been unemployed outside the home since 2003. He was the primary caretaker for the children from 2003 until the parties' separation. Jerry had a real estate broker's license in the past, but it is currently inactive. He also managed land he acquired with his brother and did some construction work, prior to 2003. Jerry claims he performed maintenance work on the parties' properties; but, evidence of record suggests that the properties were allowed to deteriorate to the extent that they required costly repairs.

[2] She had an associate's degree in nursing when the parties married and obtained her BSN during the course of the marriage. Her 2010 earnings were $62,053.

Four minor children are the subject of this action: William, age nineteen; Anna, age fifteen; Robert, age thirteen; and Michael, age ten. Anna, Robert, and Michael began living with the parties in 2003 and were formally adopted in 2005.

Anna, Robert, and Michael are biological siblings, and each has special needs. Anna has post-traumatic stress disorder. Robert has a conduct disorder and depression. Michael may experience effects from fetal alcohol syndrome and is hyperactive. The parties receive stipends totaling $2500 per month for the care of the special needs children.[3]

William was diagnosed with autism when he was three years old. He also has a neurological problem making fine motor skills very difficult for him. However, at the time of trial, he maintained a 3.7 grade point average in school and participated in football.

In 1998, Maureen, her two children, and William moved to North English to live with Jerry on the "Q Avenue" property where he had been residing rent-free. All legal documentation demonstrates that the property was owned by Michael Townsend, Jerry's brother. However, Jerry contends that he and his brother purchased the property together in 1988 and they each contributed $5000 to purchase the land.[4] Jerry's name was not on the title, deed, or loan documentation because that was his preference.[5] Jerry and Michael farmed the

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[3] At the time of trial, Robert was placed at a residential treatment facility due to his anger issues. The majority of the stipend provided for his care is re-directed to the treatment facility.

[4] The men purchased two farms totaling 260 acres. The 95-acre property was purchased in 1987. The "Q Avenue"165-acre property was purchased in 1988.

[5] Evidence also demonstrates that Jerry had poor credit and outstanding judgments which may have deterred him from seeking financing.

land for two years before Jerry enrolled the farm in the Conservation Reserve Program (CRP). Michael testified that he and Jerry were "equal partners" and that the work Jerry did to keep the farm in the CRP was substantial.

After Maureen and the children moved to the property, Jerry and Maureen sought to purchase the 165-acre farm. Jerry was unable to finance property due to his poor credit and lack of income, and did not wish to have property in his name. Thus, Maureen purchased the property from Michael.[6]

Maureen assumed or paid off a $48,000 loan on the property and paid Michael $30,000 in cash, for a total consideration nearly equal to the 1988 purchase price of $80,000. However, Michael testified that he would not have sold the property for that price if he did not believe he was selling it to his brother.[7] Jerry contends the $30,000 payment came from commingled funds placed in Maureen's bank account.[8]

The parties married in September 2003 and separated in April 2009.[9] At trial, Maureen estimated the value of the "Q Avenue" property at $390,000, with a total encumbrance of $156,870.[10]

From the time the land was transferred to Maureen through trial, the CRP payments were $15,600 per year, while the mortgages and real estate taxes

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[6] Michael retained the 95-acre property.

[7] There is no evidence in the record to establish a market valuation at the time of the 1999 transfer from Michael to Maureen.

[8] We acknowledge the source of the $78,000 in funds is disputed and the evidence is not crystal clear. Some testimony suggests the funds were derived from loan proceeds.

[9] Jerry left the marital home and moved into a mobile home situated on the trailer park the parties' owned.

[10] During the course of the marriage, the parties built a home on the land; however, the home burned down in 2005. Insurance proceeds from the loss were applied against the indebtedness on the land.

totaled $22,400 per year. Maureen applied the CRP payments to the mortgage payments and taxes, and often took out loans to satisfy the obligations on the property. After trial, the CRP payments were scheduled to increase to $26,000 per year and the debt obligation was set to decrease by $4000 per year due to a lower interest rate on the mortgages. Thus, instead of a $6800 deficit, the land will produce a $7600 profit per year.

Maureen purchased and owned four rental properties before the parties married. The four properties have a combined estimated value of $91,000 and a consolidated loan encumbrance against them in the amount of $57,146. The district court awarded all four properties to Maureen subject to existing loans. Jerry inherited a property that he currently rents to a tenant, located at 13827 Highway 149, South English, which was properly set aside by the district court and is not in dispute.

Maureen claims the five properties, including the “Q Avenue” property, which were purchased before the parties married, should be considered premarital assets and awarded to her. Jerry disputes the characterization of the “Q Avenue” property as acquired exclusively by Maureen. He claims he was a partial owner of the property prior to the transfer and that the purchase was not an arm’s length transaction. Rather, Jerry asserts exclusive ownership of the farm was obtained at the 1988 purchase price because of his relationship with his brother and because he was already a partial owner of the land.

Maureen also acquired a trailer park valued at $35,000[11] from Jerry's brother, Michael Townsend, in 2006. Jerry allegedly paid the purchase price when the real estate was acquired by Michael Townsend in 1989. Jerry then performed labor and improvements on the property. It generates eighty-five dollars per month in lot rent and $300 per month for rent of a mobile home. The rent from this property and the property in South English that Jerry inherited are the sole sources of his income since the parties' separation.

Jerry entered property management agreements with Grimm Real Estate for the properties acquired by Maureen. Maureen alleges these agreements were entered without her knowledge or consent. When she sought to modify the arrangements or inquire after the properties, she alleges the company refused to communicate with her. Earnings of about $7700 from the properties were distributed to Jerry; however, he contends that he deposited the majority of these funds into Maureen's bank account. While Maureen denies Grimm Real Estate's authority to manage her properties, she took no action to end the arrangement.

Maureen has a thrift savings plan through her employer, which was valued at $42,049 on the date of marriage, subject to a $14,374 loan balance. The most recent value of the plan provided established a value of $74,280 with outstanding loans of $19,037. Jerry contends Maureen withdrew $77,000 from the fund between 2008 and 2011 and that he did not receive any of the funds from the withdrawals. Jerry also claims he did not receive any of the parties' federal tax refunds from 2009 or 2010, totaling $17,740.

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[11] There is no existing mortgage on the property.

The district court found that Jerry was a co-equal partner in the "Q Avenue" land; the transfer from Michael to Maureen was not an arm's length transaction; and the title was placed in Maureen's name due to potential judgments against Jerry, his lack of credit, and inability to obtain financing. The court awarded the "Q Avenue" property to Jerry, ordered him to assume the mortgages and refinance the property within ninety days of the decree so that he could make a $100,000 equalization payment to Maureen. The court also awarded the trailer park to Jerry. He was not required to reimburse Maureen for any payments he received from Grimm Real Estate.

The court awarded Maureen the remaining four properties, subject to the existing loans. In addition to the $100,000 equalization payment, she was awarded her thrift savings plan account and was not required to reimburse Jerry for the tax refunds she received for the years 2009 and 2010 or for any distributions she received from the thrift savings plan.

Each party was awarded a vehicle, the tangible personal property in their possession, their individual bank accounts, and life insurance policies insuring their own lives or owned by them. Maureen was awarded the farm animals and Jerry was awarded all of the property and equipment on Duwa's list.[12] Neither party was ordered to pay spousal support.

On May 3, 2010, the district court entered an order to establish that Maureen would provide physical care and Jerry would have a right to liberal

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[12] Personal property and equipment was itemized in an auction list by Duwa's Auction Service, LLC. The estimated value of the animals was $2225. The estimated value of the listed property and equipment was approximately $26,000.

visitation. The court further ordered Jerry to pay seventy-five dollars per month in child support.

After the parties separated, Jerry did not exercise regular visitation, but at times during the week a child dropped in on him, and he provided care when Maureen was unable to provide their supervision. He had paid no child support by the time of trial. He also had not recently attended IEP meetings for his children, did not know the names of their current teachers, could not name William's pediatrician or dentist, and had difficulty identifying some of the children's disorders and medications. Jerry contends his failure to attend school meetings was at least in part due to a lack of notice of when the meetings would take place. To Jerry's credit, he attended all school conferences and took the children to all of their medical and dental appointments prior to the parties' separation.

Both parties have demonstrated substance abuse issues. Jerry has multiple convictions for driving while barred and operating while intoxicated. It will be many years before he is able to regain his full driving privileges. Jerry underwent intensive outpatient alcohol treatment in 2007. He contends that by the time of trial he had refrained from drinking alcohol in the presence of the children for at least two years.

Multiple witnesses testified to Maureen's practice of consuming several alcoholic beverages in the evenings after work. Her eldest son, with whom she has a strained relationship, and who had been out of the family home for eight years by the time of trial, testified that Maureen's drinking would occur early in

the morning on days when she did not work. The children were temporarily removed from Maureen's care in 2010 after law enforcement and the Department of Human Services responded to an anonymous call that Maureen was drinking to excess and unable to care for the children. A child abuse finding was confirmed, but Maureen was removed from the child abuse registry after appealing the finding. There was also evidence that the children frequently must fend for themselves while in Maureen's care. Maureen denies having an alcohol problem.

Both parties also have other health concerns. Jerry had a heart attack in 2003 and suffers from depression. Maureen has had two thyroid surgeries, abdominal surgery, thyroid cancer, neck surgery, and also suffers from depression.

At trial, William testified that while he loved both of his parents, he preferred to live with Jerry because he did not want to risk having to leave his school should Maureen decide to move and because he felt Jerry provided more structure.

The district court awarded the parties joint legal custody of all minor children. The court awarded physical care for Anna, Robert, and Michael to Maureen. The court awarded physical care of William to Jerry. The child support guidelines would require Maureen to pay $747 per month in child support to Jerry. However, Jerry requested that the court deviate from the guidelines and not require Maureen to pay support. The court obliged, ordering that neither party pay support, citing the "special circumstances" of the case and an effort to

effect justice between the parties. Maureen was ordered to provide health and dental coverage for the children. She was also ordered to pay the first $250 of uncovered medical expenses per calendar year, per child.

Maureen filed a lengthy motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge, expand, and modify the court's findings of fact and conclusions of law. Jerry resisted the motion. The court denied Maureen's motion with the exception of her request to change her name to Maureen Michaela Mims, which was granted.

On appeal, Maureen contends the district court made an inequitable property division by (1) failing to exclude the Q Avenue property from distribution as a pre-marital asset; (2) failing to award her half of the marital assets identified on Duwa's auction list; and (3) failing to rule on the issue of reimbursement of proceeds from the rental of her pre-marital real estate, which were distributed to Jerry. She further contends the district court erred in its determination that awarding physical care of William to Jerry was in William's best interest, claiming (1) William should not be separated from his siblings, (2) Maureen is a more suitable parent, (3) there are no cogent reasons to remove William from Maureen's care, and (4) awarding physical care to Maureen will not alter Jerry's current relationship with William nor hinder it in the future.

II. Scope and Standard of Review.

An action for dissolution of marriage is an equitable proceeding, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). In equity cases, we give weight to the fact findings

of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(g). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We disturb the trial court's ruling only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

III. Property Division.

Under our statutory distribution scheme, the first task in dividing property is to determine the property subject to division and the proper valuations to be assigned to the property. *Fennelly*, 737 N.W.2d at 102; *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). The second task is division of that property in an equitable manner according to the enumerated factors in Iowa Code section 598.21(5) (2009). *See Fennelly*, 737 N.W.2d at 102. Ultimately, what constitutes an equitable distribution depends upon the circumstances of each case. *In re Marriage of Hansen*, 733 N.W.2d 683, 702 (Iowa 2007).

The district court should not separate a premarital asset from the divisible estate and automatically award it to the spouse who owned it prior to the marriage. *Fennelly*, 737 N.W.2d at 102. Rather, property brought into the marriage by a party is merely a factor among many to be considered under section 598.21(5). *Schriner*, 695 N.W.2d at 496. "[T]his factor may justify full credit, but does not require it." *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). Other factors under section 598.21(5) include the length of the marriage, contributions of each party to the marriage, the age and health of

the parties, each party's earning capacity, and any other factor the court may determine to be relevant to any given case. *See Fennelly*, 737 N.W.2d at 102.

Maureen contends the Q Avenue property should be deemed her premarital asset because all legal documentation demonstrates that it was transferred from Michael Townsend and his wife to Maureen, individually, approximately four years before the parties' marriage.[13] However, Michael and Jerry testified that they were equal partners in ownership prior to the transfer to Maureen. Jerry lived on the property prior to his relationship with Maureen. He farmed the property, enrolled it in the CRP, and did what was necessary to keep the land eligible for the program.

We conclude the evidence supports the district court's conclusion that the transaction between Michael and Maureen was not at arm's length, but occurred only as a result of the parties' relationship, and the terms of the purchase agreement were influenced by Jerry's familial and business relationships with Michael. Maureen would not have been able to obtain the land but for her relationship with Jerry—Michael testified that he would not have sold the land to another buyer, especially not for the price he paid ten years earlier. Similarly, Jerry would not have been able to purchase Michael's portion of the land without Maureen's credit and resources.

While the marriage lasted less than six years to the point of separation, the parties' relationship lasted nearly fourteen years; they first met in 1993 and

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[13] Upon transfer in 1999, Maureen and Jerry had been in a relationship for approximately four years. Their biological child William was two years old. They had been living together on the property for approximately a year.

began living together in 1996. CRP payments and loans were used to pay for the majority of the land obligations. Jerry did not earn income to contribute to the mortgages and taxes on the land, but he was the primary caretaker of the children until he left the marital home in 2009, and made sure the land stayed qualified for the CRP payments. Under these facts, we conclude the "Q Avenue" property was properly included in the divisible estate and was properly awarded to Jerry.

As noted by the district court in its ruling on her motion to enlarge, Maureen's remaining claims of error with respect to the property division are misguided as they fail to consider the equitable distribution of assets as a whole. Maureen argues that the district court erred in awarding all of the property on Duwa's auction list to Jerry and not specifically addressing Maureen's request for reimbursement of rental proceeds distributed to Jerry. However, the Duwa auction list of property includes a substantial amount of construction and farm equipment that was Jerry's premarital property. There was also evidence that Jerry ultimately deposited the rental proceeds in Maureen's bank account. Even if Jerry did not make the deposits as he claimed, the district court did not require Maureen to reimburse Jerry for the tax refunds she received totaling over $17,000, nor was she required to reimburse Jerry for any of the $77,000 in distributions she received from the thrift savings plan, a portion of which was marital property. Perhaps most significant, Maureen was awarded an equalization award in the amount of $100,000 without any tax consequences to her, whereas Jerry will face tax consequences should he sell the farmland at a

gain. In our de novo review, we find that the overall distribution of assets was equitable.

However, Maureen and the children have resided in the home on the Q Avenue property since 1999. Jerry has a residence in a mobile home. As noted by Maureen, Iowa Code section 598.21(5) provides that in dividing property, the court shall consider awarding "the right to live in the family home for a reasonable period to the party having custody of the children." We believe Maureen and the children in her physical care should be afforded the opportunity to reside in the family home for a period of two years from the entry of the decree, if practical, and she has not already moved. However, she shall not be afforded this opportunity if the Q Avenue property has been sold, or refinanced as provided in the decree, or if Maureen has received her equalization payment. Maureen's period of occupancy of the family home will end two years from the date of the decree, or upon the effective date of the sale or refinance of the property, or upon her receipt of her equalization payment.

IV. Physical Care of William.

The primary consideration in determining the placement of a child is his or her long-term best interests. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The court is guided by the factors set forth in Iowa Code section 598.41(3), *see Hansen*, 733 N.W.2d at 696 (stating the custodial factors in section 598.41(3) apply equally to physical care determinations), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974).

a. Preference of child.

Our case law stakes out a middle ground when considering the preference of a child to live with one parent over the other—the preference is relevant, but not controlling. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979) (holding that the custody preference of minor children, especially when they show a high level of maturity, "cannot be ignored"). Factors to be considered in determining what custody arrangement is best for a minor child include "[w]hether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity." Iowa Code §598.41(3)(f).

At the time of trial, William was almost sixteen years old. In November 2012 he will turn seventeen. While the preference William expressed did not rise to the level of "strong opposition" to living with his mother, he expressed a clear preference to live with his father. William reasoned that he was doing well at his current school and he believed his father was more likely to remain in the school district than his mother. He also expressed love for both of his parents and a belief that they were both good people, but he felt his father provided more structure.

Given William's age, difficulties could arise if we were to order him to live with his mother, contrary to his expressed wishes. Because the trial judge had the advantage of hearing William's testimony and watching his demeanor in the courtroom, we give deference to the court's factual findings regarding the veracity and strength of William's stated parental preference.

Moreover, there is no evidence that placement with Jerry for physical care would be detrimental to William's relationship with Maureen. Neither parent has demonstrated interference with the other parent's relationship with the children. At the time of trial, the parties lived in close physical proximity to each other, minimizing the difficulty of visitation with the non-custodial parent and siblings.

b. Separation of siblings.

We acknowledge the presumption in our law against separating siblings through split physical care. *In re Marriage of Will*, 489 N.W.2d 394, 397-98 (Iowa 1992) ("Only in rare cases is split custody or physical care appropriate."). Separating siblings is generally disfavored "because it deprives children of the benefit of constant association with one another." *Id*. at 398. However, if compelling reasons demonstrate that separation may better promote the long-range interests of the children, a departure from the rule may be indicated. *Id*.

We first note that at the time of trial, Robert was living at a residential treatment facility, so his relationship with William is not impacted by William's placement with Jerry. Next, due to William's age, his placement with Jerry would only impact his association with Anna and Michael for—at most—one year. Moreover, if the parties continue to reside in close proximity, contact with siblings can be maintained. Finally, William's preference for placement with his father presents a compelling reason to award split physical care.

c. Suitability of parents.

Both Maureen and Jerry have health concerns, including depression and alcohol problems, as outlined above. We give deference to the district court's

superior ability to assess credibility of the many witnesses that testified to the strengths and weaknesses of Maureen and Jerry's parenting skills, given its opportunity to observe the witnesses first-hand. The court found both parties suitable parents for their minor children. Moreover, until separation, Jerry served as the children's primary caretaker.

We do have a real concern regarding the alcohol use of both parents. Each party needs to realize that any failure to provide adequate care or supervision of their children due to alcohol abuse may support a modification of physical care or provide the State with a basis to intercede and perhaps remove a child or the children from their care. Other than this joint vice, we find no benefit to reciting the pros and cons of each party's parenting skills or deficits. In our de novo review, we decline to disturb the judgment of the district court in its award of physical care of William.

V. Conclusion.

Because we conclude the property distribution was equitable except as it relates to awarding Maureen the right to reside in the family home temporarily, and the award of physical care of William was not contrary to the child's interest, we affirm as modified. Costs are assessed to Maureen.

AFFIRMED AS MODIFIED.