IN THE COURT OF APPEALS OF IOWA

No. 3-519 / 12-1822
Filed July 10, 2013

**IN RE THE MARRIAGE OF JEFFREY M. BARENDT
AND STEPHANIE M. BARENDT**

**Upon the Petition of
JEFFREY M. BARENDT,**
Petitioner-Appellee/ Cross-Appellant,

**And Concerning
STEPHANIE M. BARENDT,**
Respondent-Appellant/ Cross-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Stephanie M. Barendt appeals and Jeffrey M. Barendt cross-appeals the decree issued by the district court dissolving their marriage. **AFFIRMED**.

John S. Moeller of John S. Moeller, P.C., Sioux City, for appellant.

Sabrina L. Sayler, of Crary, Huff, Ringgenberg, Hartnett & Storm, P.C., Sioux City, for appellee.

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

DOYLE, P.J.

Stephanie Barendt appeals and Jeffrey Barendt cross-appeals the economic and custodial provisions of a decree dissolving their marriage. Stephanie contends the district court erred in granting the parties joint physical custody of their children. Jeff asserts the court erred in: (1) imputing income to him for child support purposes based on the court's determination of his "earning capacity," (2) determining money the parties received from Stephanie's parents was a marital debt and not a gift, (3) determining his tax obligation was a marital debt, and (4) valuing the parties' real estate. Upon our review, we affirm.

I. Scope and Standards of Review.

We review dissolution of marriage cases de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). We decide the issues raised anew, but we do so with the realization that the district court possessed the advantage of listening to and observing firsthand the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Finally, we note that because we base our decision on the unique facts of each case, precedent is of little value. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

II. Background Facts and Proceedings.

Jeff and Stephanie were married in 2007. They have two children, born in 2004 and 2007. The parties separated in July 2011, and Jeff filed a petition for

dissolution of marriage in August 2011. The court entered a temporary order thereafter giving the parties joint custody and shared care of the children.

Trial was held in April 2012. Jeff was thirty-six years old, and was employed full-time with a home improvement store, where he had worked since 2000. Prior to the parties' separation, Jeff held a supervisory position at the store and worked many hours. He also received some bonus pay in that position. After the parties separated, Jeff stepped down from that position and took a non-supervisory position at the store, cutting back his hours so that he had more flexibility in his schedule to spend more time with the children.

Stephanie was thirty-four years old. During the parties' marriage, Stephanie worked part-time as a collection representative. She moved to a full-time position after the parties' separation. The children were often cared for by their maternal grandparents when the parents were working, and the grandparents are very involved in the children's lives.

In August 2012, the district court entered its decree dissolving the parties' marriage. The court concluded that although there was animosity between the parents, it was in the children's best interests that the parents have joint custody and shared care. The court found Jeff's gross annual income was $39,893, and it determined Jeff's monthly child support obligation to be $100. Additionally, the court, in distributing the parties' marital assets and debts, found the parties' home should be valued at $65,000, monies given to the parties by Stephanie's parents should be a marital debt for which Stephanie was responsible, and Jeff's IRS obligation was not a marital debt.

Thereafter, the parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2) to amend and enlarge the district court's decree. The court denied both parties' requests in all but one respect relevant here. The court agreed with Stephanie's argument that Jeff's child support obligation should be increased from $100 per month to $200 per month based upon his earning capacity rather than his actual earnings because of his chosen self-demotion.

Stephanie now appeals, and Jeff cross-appeals.[1]

III. Discussion.

A. Physical Care.

In matters of child custody, the first and governing consideration of the court is the best interest of the children. Iowa R. App. P. 6.904(3)(o). The Iowa Code provides a nonexclusive list of factors to be considered in determining a custodial arrangement that is in the best interest of a child. Iowa Code § 598.41(3) (2011); *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). Four additional non-exclusive factors are to be considered in awarding joint physical care. *Hansen*, 733 N.W.2d at 697.

Stephanie contends the district court should not have given the parties joint physical care, but instead should have placed the physical care of the children with her. She notes the district court relied upon the child's therapist's opinion that shared care was in that child's best interests, but she argues that opinion did not take into account the nonexclusive list of factors found in *Hansen*, specifically that she was the children's primary caretaker during the marriage,

[1] We note an all too frequently observed error: failure to place a witness's name at the top of each appendix page where that witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(c).

she and Jeff do not communicate well, and a high degree of conflict exists between her and Jeff.

Although we find the district court did take into account the *Hansen* factors in deciding the parties should share care of their children, we briefly address the *Hansen* factors identified by Stephanie. First, we recognize the historical care-giving arrangement, or approximation, is an important consideration. However, our de novo review of the record supports the court's conclusion that both parents were equally involved with the children's care, getting them to various appointments, and also generally keeping the household running. Moreover, in the instant case, Jeff has shown himself to be a concerned and active father. We do not find that the approximation factor weighs in favor of Stephanie over Jeff.

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. The court explained:

> This court has become increasingly more comfortable with joint physical care as an award in custody disputes. Where parents show the intangible ability to overcome their differences despite what they may say or profess about their ability to get along with the other parent, the court gives serious consideration to joint physical care as an option. It is refreshing when both parents express a desire to be an involved parent and demonstrate their desire by their actions. This is to be encouraged and fostered. Raising children alone without the help and cooperation of the other parent is a monumental task for most people. Accordingly, when faced with an opportunity where joint physical care has a real chance to work for a family unit now facing dissolution, the court will give serious consideration of such an arrangement. That is the case here.

The court found the parties had communication problems, but pointed out that throughout the dissolution proceedings, the parties had effectively shared care of

the children. The court also recognized the efforts the parents will have to exert to make the shared care arrangement work: "[I]it will take both parties' commitment to their children to put aside their differences and work together to co-parent their children into adulthood. This court believes Jeff and Steph can do this if their focus is on their children over themselves." The court further explained that

> Under these circumstances and the evidence presented, . . . joint physical custody of the children is in fact workable given the commitment by two responsible adults to the welfare of their two children and placing their children's interests above their own. The court is confident the parties can in fact do this and do so successfully.

We agree with the district court's conclusion.

In this case, it is clear both parties love and care for the children, and both parents are willing and able to serve as care providers for the children. It is readily apparent these parents will be involved in each other's lives for many years, given the ages of their children, no matter the physical care arrangement. We remind the parents that "[e]ven though [they] are not required to be friends, they owe it to [their] child[ren] to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. One might well question the suitability as custodian of any parent unable to meet these minimum requirements." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005).

Finally, 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. The eldest child's therapist testified about the child's depression and anxiety concerning the

parents' divorce. Although distress during such proceedings is not unusual, the therapist testified about the child's struggles to please both parents because the parents continued to put the child in the middle of their conflict. However, the therapist testified that the child had made much progress as the parents began to communicate more effectively and work with the therapist. Most importantly, the therapist opined the child's best interests would be served by a shared care arrangement.

Upon our de novo review of the record and considering the factors pertinent to joint physical care, we find no reason to disturb the district court's award of shared physical care of the parties' children. This court expects the parties will follow through with the current court-ordered parenting schedule and facilitate a healthy and nurturing environment for their children. It is time for the parents to put their children first and work together as grownups for the best interests of everyone. We affirm the physical care decision of the district court.

B. Child Support.

On his cross-appeal, Jeff contends the district court erred in amending its decree to increase his child support obligation to $200 per month, based upon his earning capacity. We do not agree.

"Both parents have a legal obligation to support their children, not necessarily equally but in accordance with his or her ability to pay." *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996). Parents must give their children's needs high priority and be willing to make reasonable sacrifices to assure their care. *In re Marriage of Fidone*, 462 N.W.2d 710, 712 (Iowa Ct. App. 1990). All income that is not anomalous, uncertain, or speculative should be

included when determining a party's child support obligation. *See In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992).

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *Flattery*, 537 N.W.2d at 803. However, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id.*; *see also* Iowa Ct. R. 9.11(4).

The district court found that Jeff

> did reduce his income recently but he presented that it was directly related to the need to parent his children and be with them more. While those reasons have merit and seem to be fact based instead of just an attempt to avoid income so as to avoid further the impact on a potential child support obligation, [Jeff] does seem to have the better opportunity to control his income earnings at his place of employment. Now, given the joint physical custody provisions of the decree, [Jeff] has the opportunity to increase both his work hours and earning capacity when he does not have the children and consequently is not parenting them full-time as he was before the decree was entered. Accordingly, [Jeff's] income earning capacity is greater than [Stephanie's] and his access to income is now greater given the parenting schedule. An adjustment or deviation from the guidelines is appropriate to do justice between the parties and for the benefit of the children.

Upon our de novo review, we agree with the district court that a substantial injustice would result to Stephanie and the children if Jeff's actual earnings were used to determine his child support obligation, rather than imputing his earning capacity. Jeff has chosen to cut his schedule back to spend more time with the children. While that is commendable, the reduction of his income is self-inflicted or voluntary. We find the district court's determination that Jeff's earning capacity rather than his actual earning should be used to

determine his support obligation was within the permissible range of the evidence and, as a result, find the determination should not be disturbed. We therefore affirm on this issue.

C. Valuation of the Marital Residence.

Jeff next argues the district court erred in assigning a value to the martial residence of $65,000, and not a lower valuation. We "ordinarily defer to the [district] court when valuations are accompanied by supporting credibility findings or corroborating evidence." *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); *see also Hansen*, 733 N.W.2d at 703. A district court's valuation will generally "not be disturbed when it is within the range of permissible evidence." *In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987). Stated another way, we afford the district court considerable latitude in its property distribution determination pursuant to the statutorily enumerated factors, and disturb its finding only when the award is inequitable. *In re Marriage of Anliker*, 694 N.W.2d 535, 542 (Iowa 2005).

Here, the district court explained in great detail how it arrived at the $65,000 valuation:

> [Stephanie] values the marital home at $70,000 and it is assessed at $71,500. Jeff asserts it is only worth $55,000 as there is work that must be done on the property that affects its current sale value in the current market. Jeff's value reveals that the mortgage on the property is higher than what Jeff places as a value on the property, [and] Jeff presented the testimony of a real estate agent as to the market value of the residence and that forms the basis of Jeff's stated value of $55,000. The repairs that need to be done are primarily cosmetic and could be done for reasonable cost. Jeff's [real estate agent] . . . indicated that if the improvements were done as indicated in her written report that the house then would be worth between $69,000 and $72,000. The cost of the repairs noted by [the agent] could not be more than $5,000. Based upon this, the

> court finds the property should be valued at $65,000 for purposes of the property division.

Although our review is de novo, we will defer to the trial court when its valuations are accompanied with corroborating evidence, as is the case here. We find the valuation of the residence assigned by the district court to be within the permissible range of evidence, and therefore decline Jeff's request that we disturb it. *See In re Marriage of McDermott*, 827 N.W.2d 671, 679 (Iowa 2013).

D. Marital Debt Allocation.

Jeff's remaining arguments concern the district court's distribution of debts. He first argues the money provided to the parties by Stephanie's parents was given as gifts, not loans, and the money was therefore not a marital debt. Additionally, he argues the court should have included his tax obligation in the marital debt allocation, asserting the amount of his tax obligation was higher as a result of Stephanie's lack of cooperation in filing their taxes. We note the allocation of marital debts between the parties is as integral a part of the property division as is the apportionment of marital assets, *see In re Marriage of Sullins*, 715 N.W.2d 242, 251 (Iowa 2006), and the allocation of those debts is therefore a part in the property division. *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996).

Upon our de novo review, we find no reason to disturb the district court's debt determinations. Implicit in this ruling is the conclusion the court, as the trier of fact, found Jeff's assertions concerning the two debts less credible than that of Stephanie and her parents. Stephanie's parents testified that although some money given to the parties was given as gifts in certain circumstances, the

money in question here was given as loans. Stephanie herself characterized the money as loans. Conversely, Jeff's testimony concerning the money was less forthcoming. When asked if it was his contention the money was given to the parties as a gift, his response was, "Yes. I don't recall ever signing any loan agreements with them . . . ." He admitted that he understood he was not required to sign something for the money to be given as a loan, but explained "if I go to McDonald's and my mom buys me a hamburger, I don't expect to pay her back." Concerning Jeff's tax obligation, he testified he had a calculation prepared that he would have owed the IRS significantly less money had he and Stephanie filed their taxes as "married filing jointly." However he admitted he had "guesstimated" the amount of money Stephanie made, stating he "had no idea" how much she made and that he used "[k]ind of rough math" in arriving at his figure. Accordingly, we affirm the district court's determinations concerning the debts. Costs on appeal are assessed one-half to each party.

IV. Conclusion.

For the foregoing reasons, we affirm the district court's decree dissolving the parties' marriage in all respects.

AFFIRMED.