IN THE COURT OF APPEALS OF IOWA

No. 7-553 / 06-1937
Filed November 15, 2007

IN RE THE MARRIAGE OF RAYMOND RALPH BERTRAND AND CHRISTINA CAROL BERTRAND

Upon the Petition of
RAYMOND RALPH BERTRAND,
Petitioner-Appellant,

And Concerning
CHRISTINA CAROL BERTRAND,
Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Paul R. Huscher, Judge.

Raymond Bertrand appeals from the custody, property division, and spousal support provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

J.D. Hartung of Hartung & Schroeder, Des Moines, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Raymond Bertrand (Ray) appeals from the custody, property division, and spousal support provisions of the decree dissolving the parties' marriage. We affirm the custody and property division provisions of the dissolution decree and modify the decree to eliminate the award of spousal support to Christina Bertrand.

I. Background Facts and Proceedings.

Ray and Christina were married in September 1995. Their twin daughters, Emma and Rachel, were born in April 2000, and their son, Jack, was born in September 2005. Ray filed a petition for dissolution of marriage in January 2006 seeking joint legal custody and physical care of the parties' minor children in addition to a division of the parties' property and debts. The petition came before the district court for trial in October 2006.

At the time of trial, Ray was thirty-five years old, in good health, and employed as a funeral director. He met Christina in 1994 while attending mortuary school in Kansas City, Kansas. After Ray completed mortuary school, the parties moved to Knoxville, Iowa, so Ray could begin working for Bybee & Davis Funeral Home, Inc., which was owned and operated by his mother and stepfather.

Ray purchased Bybee & Davis from his mother and stepfather in January 2000 through a stock redemption agreement secured by the corporation's stock. Bybee & Davis is a closely held corporation with Ray as the sole shareholder, officer, and director. The corporation owns the Bybee & Davis Funeral Home in Knoxville and the Mason Funeral Home located in Pleasantville. Ray operates

both funeral homes. His income for fiscal year 2005 was $82,403.50. In addition to his annual salary, the corporation paid for the parties' vehicles, cell phone, health insurance, and some meal and entertainment expenses.

Christina was also thirty-five years old and in good health at the time of the trial. She has a degree in nursing from Mercy School of Nursing, but she is not a licensed nurse. While attending nursing school, Christina worked at Mercy Hospital in the perinatal unit. Upon obtaining her nursing degree, she worked as a "float nurse" at Pella Regional Health Center until she became pregnant with the twins. The parties then decided Christina would stay at home with their children. During their marriage, Ray worked "pretty significant hours," including evenings, weekends, and "middle of the night calls." Christina was therefore primarily responsible for the care of the children, and Ray "was there when he could be there."

The parties separated after an incident in December 2005 when Ray alleges Christina "strangled" him in the presence of their then three-month old son, Jack. Christina admitted to reacting "in a way that was not appropriate," testifying she put her "hands around him." Ray took pictures following the incident, which depict a small cut on his neck. He reported the matter to the police, but no criminal charges resulted. Soon thereafter, Ray moved out of the marital home and into a duplex the parties owned located across the street from the funeral home in Knoxville.

The district court entered a temporary order in January 2006 placing the children in the parties' joint legal custody and in Christina's physical care. Ray

was granted visitation with the children every other weekend and two nights per week.

In June 2006 Christina decided to move to Kansas City with the children to be closer to her mother and brother. She obtained a job as an administrative assistant for a physician at the University of Kansas Medical Center earning fifteen dollars per hour plus benefits. Christina rented a house approximately seven minutes away from her mother, who agreed to provide daycare for the children at no cost. She notified Ray of her intention to move to Kansas City in mid-June.

Upon learning of Christina's impending move, Ray filed a motion requesting the temporary order be modified to place physical care of the children with him and an injunction issue requiring "both parties to maintain the current residency of the parties' minor children" while the action was pending. The district court denied his request and entered an "Amended Order on Temporary Matters," which alternated physical care of the children between the parties on a weekly basis for the remainder of the summer. Christina moved to Kansas City with the children on July 1, 2006.

A trial confined to the issue of custody was scheduled for August 2006 "because a determination of which parent was to receive primary care of the three children affected which school the twins would attend for first grade." The remaining issues were to be resolved in a subsequent trial. The parties appeared for trial on the issue of custody on August 9, 2006. However, the district court became concerned that "legal problems could exist if the court ruled on the custody issue prior to the dissolution being heard." The court accordingly

set all issues for trial in October 2006 and modified the temporary order to place the children in each parent's care on an alternating two-week basis. In order to prevent her daughters from having to switch schools every two weeks, Christina moved back to Knoxville into the duplex owned by the parties. She negotiated a leave of absence from her employment at the University of Kansas and continued to pay monthly rent on her home in Kansas City.

Following a four-day trial, the district court entered a decree placing the children in the parties' joint legal custody and in Christina's physical care. The court ordered that Ray was entitled to visitation with the children every other weekend, alternating holidays, and six weeks during the summer. Ray was ordered to pay child support to Christina in the amount of $1605.52 per month. The court awarded the marital home, valued at $130,000, and the duplex, valued at $195,000, to Ray. The court also awarded Ray his entire interest in Bybee & Davis, which was valued at $531,250, and his stock in Evader Corporation, valued at $1380. Finally, Ray was awarded an EMC life insurance policy with an approximate value of $5500.

Christina was awarded an "Auto-Owners SEP-IRA," valued at $16,000. The court awarded each party the "personal property currently in his or her possession," noting the evidence indicated Christina "received the majority of the furniture." The court did not "attempt[ ] to place a specific value on household goods." The court ordered Ray to pay Christina an equalization payment of $270,000, "payable at the rate of $30,000.00 per year." The court further ordered Ray to pay Christina $750 per month for twenty-four months as spousal support.

Ray appeals. He claims the district court erred in failing to place the children in his physical care. He further claims the property division is inequitable because the district court incorrectly valued the business, real estate, and furniture. Ray also claims the equalization payment schedule is inequitable because he cannot afford the annual payments. Finally, he claims the district court erred in awarding Christina spousal support.

II. Scope and Standards of Review.

We review dissolution cases de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Merits.

A. Physical Care.

"When considering the issue of physical care, the child's best interest is the overriding consideration." *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in Iowa Code section 598.41(3) (Supp. 2005) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Among the factors to be considered are whether each parent would be a suitable custodian for the children, whether both parents have actively cared for the children before and since the separation, the nature of each proposed environment, and the effect on the children of continuing or disrupting an existing custodial status. *See* Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place the children in the environment most likely to

bring them to healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). With these principles in mind, we conclude the district court was correct in placing the children's physical care with Christina.

The record demonstrates Ray and Christina are dedicated, loving, and capable parents. Where, as here, the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. "[S]tability and continuity of caregiving are important factors" in cases such as this. *Id*. at 696. These factors tend to favor a parent who, prior to the parties' separation, was primarily responsible for the physical care of the minor children. *Id.*

The parties agree Christina was primarily responsible for the physical care of the children prior to their separation. She stayed at home with the children from the time they were born and was responsible for their routine day-to-day care. She was described at trial as an involved and active parent. She enrolled and transported her daughters to dance classes, gymnastics, swimming lessons, and music classes. Christina also engaged in a variety of activities with the children, such as taking them to the pool, zoo, and park, scheduling "play-dates" at friends' houses, and taking them on weekly library trips. She communicated "very regularly" with her daughters' kindergarten teachers, and she was responsible for taking the children to the doctor. The children's pediatrician noted Ray attended an exam for Jack in January 2006, "which was slightly atypical" because he had "never been to well child exams with his child or during prenatal visits" in the past.

Ray admittedly became more involved with the children following the parties' separation. He testified at trial he would be able to confine his work hours to 8:00 a.m. until 3:30 p.m. if the children were placed in his physical care. He stated he could rely on his assistant, Rick Kingery, who has worked for him since 2003, to handle evening visitations and late-night calls when the children are in his care. However, we agree with the district court "that looking at the conduct of the parties just during the period of time that this matter has been pending is not a good indication of what will take place in the future."

Ray argues placing the children in Christina's physical care is not in their best interests because she does not support his relationship with the children as evidenced by her move to Kansas City. Although "[g]eographical proximity is a desirable feature of joint custody because it enhances the opportunity for access between the children and the parent who does not maintain their primary residence," it is not "an indispensable component." *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983). There is no evidence in the record that Christina's move to Kansas City is motivated by a desire to undermine Ray's relationship with the children. Instead, Christina testified the "number one factor" in her decision to move to Kansas City was her "support system." She stated her "mom was willing to make herself available to me and to my children. And hands down, you know, I can't beat that."

It is clear that Christina's move to Kansas City will limit the children's contact with their father and it will require an adjustment by the children. However, "[t]hese are negative factors that inhere in any long-distance move" by a parent. *Id.* at 160. We agree with the district court's observation that the

"children are at a very young age. They will develop new friends . . . the move will [not] be terribly traumatic for them." As our supreme court recognized, "No move is easy, even for adults. Some emotional trauma can be expected whenever children are removed from familiar to unfamiliar surroundings." *Id.* But this does not "prevent parents from moving generally." *Id.*; *see also In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa Ct. App. 1990) ("[S]tability can be nurtured as much by leaving children with the same custodial parent as by leaving them in the same neighborhood.").

Furthermore, we do not agree with Ray that Christina is "a woman that placed her needs above her children's." The evidence reveals the opposite. The district court's August 2006 order requiring the parties to alternate physical care of the children on a biweekly basis would have resulted in Emma and Rachel attending school in both Kansas City and Knoxville. Christina testified she did not think it was in her daughters' best interests to "start school in Kansas City for a week, and then when it was [Ray's] turn, that they would come to Iowa and start school here." She accordingly negotiated a leave of absence from her job in Kansas City and moved back to Knoxville while this matter was pending.

Ray also argues placing the children in Christina's care is not in their best interests due to her "anger issues" as evidenced by the December 2005 incident.[1] We agree with the district court this was an "isolated incident" that

[1] The only other evidence Ray points to as demonstrating Christina's "anger issues" are "concerns" raised by witnesses regarding "Christina's form of discipline for the children." Ray's mother testified Christina's "mode of discipline was mainly . . . a lot of threat, but there wasn't a lot of action." Ray's secretary testified she observed Christina with the children the morning of the trial and noticed she was "kind of impatient with them." We do not believe this evidence supports Ray's proposition that Christina has "anger issues."

occurred "in the midst of these proceedings, the parties' marriage having substantially deteriorated at that point." While we do not minimize the seriousness of the incident, *see In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997), we do not believe this single event, which happened during a stressful time in the parties' lives, speaks to Christina's ability to effectively minister to the children's well-being and provide them with a nurturing and stable environment. The record assures us this was an isolated occurrence that does not warrant denial of physical care to an otherwise deserving parent. *See In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997) (stating the court should "weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed").

In this type of case, where either party would be a suitable parent, the district court's evaluation of the parties is particularly helpful. *See In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). Upon our de novo review, we agree with the district court that it is in the best interests of the children to place their physical care with Christina. We accordingly affirm the district court's decision in this regard.

B. Property Division.

In allocating the parties' assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *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; rather, the decisive factor is what is fair and equitable in each particular case. *Id.* In determining what division would be equitable, courts are guided by the criteria set forth in Iowa Code section

598.21(5). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). Before making an equitable division of assets, the court must determine "all assets held in the name of either or both parties as well as the debts owed by either or both." *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002). The assets should then be given their value as of the date of trial. *Id.*

Ray argues the district court's property division is inequitable because the court incorrectly valued the marital home, duplex, and furniture. "Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence." *Hansen*, 733 N.W.2d at 703. We generally defer to the trial court when valuations are supported by accompanying credibility findings or corroborating evidence. *Id.*

Both parties offered appraisals as to the value of the marital home. Ray's appraisal valued the home at $120,000 while Christina's appraisal valued it at $137,000. The district court considered both appraisals and a comparable sale in concluding the "market value of the home is $130,000." The district court valued the duplex located across the street from the Bybee & Davis Funeral Home at $195,000, which was its purchase price, instead of its appraised value of $186,700. The court reasoned, "Although the appraisal . . . found a market value of $186,700.00, [Ray] testified that he was willing to pay a premium because the purchase provided some control over the neighborhood in which the funeral home is located." The court concluded the duplex should be valued at the purchase price because Ray's "control over the neighborhood" would continue to be an asset to him. Finally, the district court did not attempt to "place a specific value on household goods, noting only that both parties place an

approximate value of $10,000 on these items."[2] In so doing, the court recognized, "there is little market for high-end used furniture." We find the values placed on the marital residence, duplex, and furniture by the district court were within the permissible range of evidence and supported by corroborating evidence. *See id.* Therefore, we will not disturb the valuations on appeal.

Ray next argues the district court did not consider the tax consequences he would incur when ordering him to pay Christina the equalization payment. Iowa Code section 598.21(5)(j) directs the court to consider the "tax consequences to each party" when making an equitable division of property. *See also In re Marriage of Keener*, 728 N.W.2d 188, 198 (Iowa 2007). However, in *Friedman*, 466 N.W.2d 689, 691 (Iowa 1991), our supreme court declined to consider tax consequences on the sale of corporate stock because there was no evidence a sale was pending or contemplated. The court in *Friedman* reasoned "where there is no evidence to support a discounting based on a sale and the trial court has not ordered a sale, the effect of considering income tax consequences on a sale" diminishes the value of the asset to the nonowning spouse. *In re Marriage of Friedman*, 466 N.W.2d at 691. But, we have taken income tax consequences into consideration when assessing the equities of a property division where payment of a lump sum of cash to a spouse will in all probability require liquidation of capital assets. *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989).

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[2] The record shows the financial affidavit submitted by Christina valued the household contents at $10,000, while the financial affidavit submitted by Ray before trial valued them at $3,000. However, at trial Ray increased his estimate of the value of the household contents to $35,000.

The key to these and other cases is that where a sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate. *See id.* Where a sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. *See Friedman*, 466 N.W.2d at 691. Ray argues the court ordered a "de facto stock sale" because the "only source of money to pay Christina is from Bybee." However, there is no evidence in the record that a sale or liquidation of Bybee & Davis was ordered, is necessary to effectuate the property division, or is relatively certain to occur within the reasonably foreseeable future. Moreover, Ray does not argue such a sale was ordered, necessary, or relatively certain to occur.

The district court acknowledged, "There is no indicator that [Ray] intends to sell the stock, and the division of property herein is structured in such a way that the equalization judgment can be satisfied without requiring a sale." Bybee & Davis showed a preliminary profit of $114,725.93 for fiscal year 2005. Fred Compardo, a business analyst specializing in the valuation of funeral homes, testified Bybee & Davis had "about 30 or $40,000 of available cash flow that could service" debt. Thus, Compardo's testimony established Ray, as the sole shareholder, officer, and director of Bybee & Davis, could afford to pay himself an additional $30,000 to $40,000 per year. The record also shows the corporation loaned Ray approximately $30,000 in 2006, which he used for legal fees and to purchase furniture. The court accordingly declined to make a reduction for the tax consequences of a sale and ordered the equalization payment to be paid in annual installments of $30,000.

In light of the foregoing, we agree with the district court that consideration of the tax consequences of a sale of Bybee & Davis stock was not appropriate because there is no evidence in the record that such a sale was necessary or relatively certain to occur. We also agree with the district court's order requiring Ray to pay the cash equalization payment to Christina in annual installments of $30,000.

C. Spousal Support.

An award of spousal support is used as a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). It is a discretionary award, dependent upon factors such as the length of the marriage, each party's age and earning capacity, the ability of the spouse seeking support to become self-sufficient, and the relative need for support. Iowa Code § 598.21A; *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). The property division and an award of spousal support should be considered together in evaluating the individual sufficiency of each. *In re Marriage of Earsa*, 480 N.W.2d 84, 85 (Iowa Ct. App. 1991).

In this case, the district court awarded Christina $750 per month for twenty-four months in "rehabilitative alimony" due to the "immediate circumstances" of the parties, which required Christina to incur expenses for obtaining a vehicle and "moving back to Kansas City." The purpose of rehabilitative spousal support is to support "an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting."

Olson, 705 N.W.2d at 316. We find that purpose would not be served in this case.

Christina is thirty-five years old, in good health, and has a degree in nursing. The evidence demonstrates she does not need a period of time to become self-supporting as she has already secured a job earning fifteen dollars per hour plus benefits. The evidence further reveals Christina does not appear to have any present plans to become a licensed nurse. While she testified it was her "ultimate intention" to take the nursing board exams, she also indicated she was satisfied with her job "at this point in time" due to the hours and flexibility it offers. Moreover, Christina was awarded a $270,000 cash equalization payment. We find under the circumstances presented in this case that an award of rehabilitative spousal support is not appropriate. We therefore modify the decree to eliminate the award of spousal support to Christina.

D. Appellate Attorney Fees.

Christina requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *Id*. After considering these factors, we award Christina $2500 in appellate attorney fees.

IV. Conclusion.

Upon our de novo review of the record, we find it is in the children's best interests to be placed in the physical care of Christina. We further find the values placed on the parties' interest in Bybee & Davis, real estate, and furniture were

within the permissible range of evidence and supported by corroborating evidence. Therefore, we will not disturb these valuations on appeal. We agree with the district court that consideration of the tax consequences of a sale of Bybee & Davis stock was not appropriate in this case because there is no evidence in the record that such a sale was necessary or relatively certain to occur. We also agree with the district court's order requiring Ray to pay the equalization payment to Christina in annual installments of $30,000. However, we find under the circumstances presented in this case that an award of rehabilitative spousal support is not appropriate. We therefore modify the decree to eliminate the award of spousal support to Christina. The remainder of the decree is affirmed. We award Christina $2500 in appellate attorney fees. Costs on appeal are assessed to Ray.

AFFIRMED AS MODIFIED.