IN THE COURT OF APPEALS OF IOWA

No. 8-181 / 07-1149
Filed July 16, 2008

**IN RE THE MARRIAGE OF JAY DOUGAN
AND JENNY DOUGAN**

**Upon the Petition of
JAY DOUGAN,**
Petitioner-Appellee,

**And Concerning
JENNY DOUGAN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Gary L. McMinimee, Judge.

Jenny Dougan appeals from the custody and property division provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Melissa A. Nine of Kaplan & Frese, L.L.P., Marshalltown, and J. M. Kamath, Nevada, for appellant.

Stephen M. Terrill of Terrill, Martens & Richardson Law Office, Ames, for appellee.

Heard by Vogel, P.J., Zimmer, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, J.

Jenny Dougan appeals from the custody and property division provisions of the decree dissolving the parties' marriage. We affirm the judgment of the district court as modified and remand.

I. Background Facts and Proceedings

Jay and Jenny Dougan were married in July 2001 after residing together for two years. They have two children: Trenton, born in 1999, and Kiley, born in 2005. Jay filed a petition for dissolution of marriage in September 2006. The petition came before the district court for trial in April 2007.

Jay has been employed as a diesel technician at Ziegler Caterpillar since 1999. Before his employment at Ziegler, he studied diesel technology at Des Moines Area Community College (DMACC). Jay stopped attending DMACC and began working at Ziegler after Jenny became pregnant with Trenton. He works from 4:30 p.m. until 1:00 a.m., Monday through Friday. His gross annual income is $42,208. He began contributing to a 401(k) retirement account through Ziegler in 2000. His 401(k) account was valued at $19,602 at the time of the trial.

Jenny was sixteen years old when Trenton was born. She quit school in the tenth grade and stayed at home with Trenton for approximately two years. She worked at a variety of jobs throughout the parties' marriage. At the time of trial, she was employed as a product service associate at Lowe's. She works from 8:00 a.m. until 5:00 p.m. Monday through Friday and earns approximately $10.57 per hour. She began contributing to a 401(k) retirement account through Lowe's in August 2006. Her 401(k) account was valued at $276 at the time of the trial.

Jay and Jenny separated in July 2006. Jenny initially remained in the marital home in Nevada, Iowa, with the children. In September 2006 she purchased a mobile home and began residing with the children in the same trailer court in Ames where her mother and Jay's parents lived. Jay's mother has provided daycare for the parties' children since they were born. Jay moved back into the marital home after Jenny moved to Ames with the children.

During the parties' marriage, Jenny cared for the children by herself on weekday mornings and evenings due to Jay's work schedule. She got the children ready in the mornings and dropped Kiley off at daycare and Trenton off at school before she went to work at 8:00 a.m. Jay would pick Trenton up from school and drop him off at daycare before he went to work at 4:30 p.m. Jenny picked the children up from daycare every evening after she was done working. She prepared dinner for them and put them to bed around 8:00 p.m. However, Jay's family testified that when Jay was home on the weekends, he was responsible for cooking, cleaning, laundry, and caring for the children.

Jay and his family described Jenny as impulsive, selfish, and immature. Jay testified that after they separated, Jenny began going out with friends on the weekends and leaving the children with her mother. He testified that Jenny's mother was in poor health, unemployed, and had recently been arrested for burglary. He suspected that Jenny's half-brother, who lived with her mother, used drugs. Jay testified that Jenny had dated several men since they separated. Trenton told Jay that he saw one of those men sleeping in Jenny's bed. During an argument about Jenny's dating habits, Jay testified that Jenny pushed him into a kitchen door. He further testified that Jenny threatened he

would "never see the kids again" on more than one occasion. He heard from acquaintances she was planning on moving with the children to Moline, Illinois, where her current boyfriend lived.

Jenny denied Jay's claims regarding her lifestyle following their separation and her plans to move to Illinois. She testified that although she had been planning to move to eastern Iowa, she was no longer going to do so. Though Jenny described herself as the primary caretaker of the children during their marriage, she acknowledged that Jay was a good parent when he was home. However, she testified that Jay was physically, sexually, and verbally abusive to her during their relationship. She was also concerned with the amount of alcohol he drank during their marriage. Jenny recounted one confrontation early in their relationship when Jay put his hands around her neck and held her against a wall to prevent her from leaving their residence with Trenton. Jay's mother recalled seeing a scratch on Jenny's neck after that incident, and she testified that Jay told her he had held Jenny against the wall to prevent her from leaving. The incident was not reported to the police.

Prior to the trial, the parties agreed the children should be placed in their joint legal custody but disputed the issues of physical care, visitation, and child support. The parties agreed Jay should retain the marital home, valued at $70,000, subject to a mortgage of $64,500. They also agreed Jenny should be awarded the mobile home, valued at $17,000, and the Saturn vehicle, valued at $3325, and the debt associated therewith. Finally, they agreed Jay should be awarded the parties' remaining vehicles: a 2004 Chevrolet minivan, valued at $12,265 with an outstanding loan of $19,000, and a 2002 Chevrolet Malibu,

valued at $6255 with an outstanding loan of $6500. They disagreed as to the division of the equity in the marital home, the 2006 tax refund of $2281, credit card debt, their retirement accounts, and several household items.

Following the trial, the district court entered a decree placing the children in the parties' joint legal custody and in Jay's physical care. The court ordered that Jenny was entitled to visitation with the children each weekday from 5:00 p.m. until 7:30 a.m. the next morning, the first weekend of each month from Friday at 5:00 p.m. until Sunday at 6:00 p.m., four weeks during the summer, and alternating holidays. Jenny was ordered to pay child support to Jay in the amount of $353.74 per month.

The court divided the parties' assets and debts according to the parties' agreement before trial. The court additionally awarded Jay the equity in the marital home, nine-fourteenths of his 401(k) account, the tax refund, an armoire Jay's relatives built for Kiley, a rocking chair his grandparents gave to Trenton, and the children's belongings in a tote. Jenny was awarded her 401(k) account and five-fourteenths of Jay's 401(k) account. Each party was ordered to pay his or her own credit card debt.

Jenny appeals. She claims the district court erred in placing physical care of the children with Jay and ordering her to pay child support. She further claims the property division is inequitable. Finally, she requests an award of appellate attorney fees.

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

Jenny claims the district court erred in placing physical care of the children with Jay because (1) the children are in her care for the majority of time under the "visitation" schedule set forth in the parties' decree and (2) she was primarily responsible for caring for the children while the parties were married. For the reasons that follow, we conclude that her claims have merit.

"When a district court dissolves a marriage involving a minor child, the court must determine who is to have legal custody of the child and who is to have physical care of the child." *In re Marriage of Hynick*, 727 N.W.2d 575, 578-79 (Iowa 2007). "'Legal custody' carries with it certain rights and responsibilities, including, but not limited to, 'decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.'" *Id.* at 579 (quoting Iowa Code section 598.1(3) (2005)). "Physical care," on the other hand, "'means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.'" *Id.* (quoting Iowa Code section 598.1(7)).

"If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent." *Id.* When joint physical care is not warranted, or as here, not requested, "the court must choose one parent to be the primary caretaker, awarding the other

parent visitation rights." *Id.* "Under this arrangement, the parent with primary physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child's routine care." *Id.*; *see also In re Marriage of Hansen*, 733 N.W.2d 683, 691 (Iowa 2007) ("The parent awarded physical care maintains the primary residence and has the right to determine the myriad of details associated with routine living, including such things as what clothes the children wear, when they go to bed, with whom they associate or date, etc."). "The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interest of the child." *Hynick*, 727 N.W.2d at 579. "Visitation time varies widely and can even approach an amount almost equal to the time spent with the caretaker parent." *Id.*

Here, the "visitation" time ordered by the district court for Jenny, the "noncaretaker" parent, significantly exceeds the amount of time the children spend with Jay, the "caretaker" parent. The children are in Jay's care only six to seven days per month, while they are in Jenny's care for the remaining twenty-three to twenty-four days per month. *See* Iowa Court Rule 9.9 (stating "days" for the purpose of calculating a parent's entitlement to an extraordinary visitation credit "means overnights spent caring for the child"). The court nevertheless determined "the best interest[s] of the children dictate that physical care of the children be placed with Jay" because "he has demonstrated more stability and consistency and is more likely to exercise good judgment in making routine care decisions." The court thus designated Jay as the physical care provider and ordered Jenny to pay child support, despite the fact that the children are in her

physical care for the majority of the time, in order to "plac[e] responsibility for the day to day decisions regarding routine care of Jay." We cannot agree with such an approach because under the visitation provisions of the decree,[1] it is actually Jenny, not Jay, who is responsible for "maintain[ing] the primary residence" for the children and deciding "the myriad of details associated with routine living." *Hansen*, 733 N.W.2d at 691; *see also* Iowa Code § 598.1(7) (defining "physical care"). We therefore conclude the court erred in conversely designating Jay as the children's physical care provider and ordering Jenny to pay child support.

We further conclude that it is in the children's best interests to be placed in Jenny's 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. *Hansen*, 733 N.W.2d at 695.

[1] We note that Jay did not cross-appeal from the visitation schedule set forth in the decree.

The factors of stability, continuity, and approximation of caregiving are entitled to "considerable weight" in determining "which caregiver should be awarded physical care." *Id.* at 700. 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.* at 696. The imposition of "a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest." *Id.* at 697. It is therefore a "desirable goal" for the parents' caregiving responsibilities "in the post-divorce world [to] be in rough proportion to that which predated the dissolution." *Id.* at 697.

We agree with Jenny that she was primarily responsible for the physical care of the children prior to the parties' dissolution. She stayed at home with Trenton for the first two years of his life. Once she began working, she was responsible for getting the children ready each morning and dropping them off at daycare and school due to Jay's work schedule during the week. She was also responsible for picking the children up from daycare and caring for them each night. The record does reveal that Jay, however, was primarily responsible for caring for the children on the weekends when he was not working. Thus, the district court's placement of the children in Jenny's care during the week and in Jay's care on the weekends appropriately approximates the parties' "historic pattern[ ] of caregiving." *Id*.

Although we acknowledge that stability, continuity, and approximation of caregiving are among the many factors to be considered in determining physical care, we do not find any circumstances present in this case that outweigh these

considerations. *Id.* (stating "there may be a strong case for changing the physical care relationship" "if a primary caregiver has abandoned responsibilities or had not been adequately performing . . . responsibilities because of alcohol or substance abuse"). Though Jenny may have exhibited some questionable behavior following the parties' separation, we do not feel that behavior negates her successful caregiving during the parties' marriage. She had been employed at a full-time job for approximately one year at the time of trial. She had also been residing in her own home, which was close to her mother and Jay's parents, since shortly after the parties separated. Although Jenny occasionally went out on the weekends with her friends, Jay does not allege, nor is there any evidence, that she in any way neglected the children or abused drugs or alcohol while doing so.

As the district court recognized, we are faced with the fortunate situation of two competent and loving parents, each of whom is capable of providing for their children's long-range best interests. We believe, however, it is in the children's best interests in this case to continue the predissolution physical care arrangement in order to preserve the greatest amount of stability for the children. *Hansen*, 733 N.W.2d at 696-97. Even though the children will not be in Jay's physical care, he will continue to play an important role in their lives. *See id.* at 702 ("A responsible, committed, nonresident parent, with good parenting skills, has the potential to engage in a high-quality relationship with his or her child and to positively impact the child's adjustment."). Because the district court ordered the parties to share joint legal custody, Jay will remain involved in major decision-making for his children. *Id.*

In light of the foregoing, we modify the dissolution decree to place the children in Jenny's physical care and remand this matter to the district court to establish Jay's child support obligation and visitation privileges. In order to promote the desirable level of physical contact, the court on remand should establish liberal visitation for Jay, which includes visitation every weekend, with the exception of the first weekend of each month, from Saturday at 7:30 a.m. until Monday at 7:30 a.m. and four weeks during the summer as had been provided for in the decree for Jenny. The alternating holiday visitation schedule set forth in the decree should remain in effect.

B. Property Division

We turn next to Jenny's claim that the property division is inequitable. 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). We look to the economic provisions of the decree as a whole in assessing the equity of the property division. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). The district court is afforded wide latitude, and we will disturb the property distribution only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

Jenny initially claims the district court's property distribution was inequitable because "in totality Jay was awarded approximately $801 in property not including the retirement funds or the personal household belongings," while she "was assigned her credit card debt in the total amount of $6000." We do not agree with Jenny's calculations. Excluding the parties' household goods[2] and retirement accounts, which we will address below, Jay received a negative net award of $4099, and Jenny received a negative net award of $2675.[3] We therefore reject Jenny's argument in this regard.

Jenny next claims the district court's division of Jay's 401(k) retirement account, which was valued at $19,602 as of December 2006,[4] was inequitable. The district court awarded Jay sixty-four percent of his retirement account, while Jenny was awarded thirty-six percent. Jenny argues she should have instead been awarded one-half of Jay's retirement account. We do not agree.

Iowa law characterizes pensions "as marital assets, subject to division in dissolution actions just as any other property." *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). The court's unequal distribution of Jay's 401(k)

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[2] The parties divided the majority of their household goods prior to trial. Neither the district court nor the parties assigned a value to those items or the disputed items divided by the court.

[3] Jay was awarded the marital residence, valued at $70,000 and subject to a mortgage of $64,500, a van with a negative net value of $6735, a car with a negative net value of $245, the $2281 tax refund, and his credit card debt totaling $4900. Jenny was awarded her mobile home, which had a loan equal to its value, a vehicle valued at $3325, and $6000 in credit card debt. $3000 of that credit card was for the vehicle she was awarded.

[4] Jenny also claims the court should have valued the retirement account as of the date of trial. *See Dean*, 642 N.W.2d at 323 (stating assets should be given their value as of the date of trial). However, it does not appear from our review of the record that there was any evidence presented to the court as to the value of the pension as of the date of trial. We therefore conclude the court's valuation was within the permissible range of evidence presented at trial. *Hansen*, 733 N.W.2d at 703.

account appears to be based on its recognition that Jay began contributing to the account before the parties were married. *See In re Marriage of Miller*, 452 N.W.2d 622, 624 (Iowa Ct. App. 1989) ("Frequently, property brought into a marriage is set aside to the party bringing it in."); *see also* Iowa Code § 598.21(5)(b) (stating the "property brought to the marriage by each party" is a factor to be considered in making an equitable distribution). In addition, the court awarded Jenny the entirety of her retirement account, which was valued at $276. We find this to be an equitable division given the circumstances presented in this case. *See In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852-53 (Iowa Ct. App. 1998) (setting forth factors to consider when determining an equitable division of property owned prior to marriage).

Finally, Jenny claims she should be awarded the armoire Jay's relatives built for Kiley. She testified at trial that "the armoire should go where Kiley goes." Jay did not disagree with this proposal at trial, nor does he disagree with it on appeal. We therefore modify the dissolution decree to award Jenny the armoire as Kiley is now in her physical care. Jay likewise does not quarrel with Jenny's request for one-half of Trenton's schoolwork that she placed in a tote for him as a keepsake. We thus further modify the decree to grant that request.

C. Appellate Attorney Fees

Jenny 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 parties' needs, ability to pay, and the relative merits of

the appeal. *Sullins*, 715 N.W.2d at 255. We award Jenny $1500 in appellate attorney fees in this case.

IV. Conclusion

We conclude the district court erred in designating Jay as the children's physical care provider and ordering Jenny to pay child support despite placing the children in her care for the majority of time under the visitation provisions of the decree. We additionally conclude that it is in the children's best interests to be placed in her physical care. The dissolution decree is therefore modified to place the children in Jenny's physical care. We remand for a determination of Jay's child support obligation and visitation privileges.

We further modify the parties' decree to award Jenny Kiley's armoire and one-half of Trenton's schoolwork that she placed in a tote for him as a keepsake. We reject her remaining claims regarding the court's property division. Finally, we award Jenny $1500 in appellate attorney fees. Costs on appeal are assessed equally to the parties.

AFFIRMED AS MODIFIED AND REMANDED.