IN THE COURT OF APPEALS OF IOWA

No. 9-034 / 08-1294
Filed March 26, 2009

IN RE THE MARRIAGE OF STACI R. NIENKARK AND ALAN L. NIENKARK

Upon the Petition of

STACI R. NIENKARK,
Petitioner-Appellee/Cross-Appellant,

And Concerning

ALAN L. NIENKARK,
Respondent-Appellant/Cross-Appellee,

Appeal from the Iowa District Court for Jackson County, C.H. Pelton, Judge.

Respondent appeals the physical custody and property distribution provisions of the decree dissolving his marriage to petitioner. **AFFIRMED AS MODIFIED.**

Jamie A. Splinter of Splinter Law Office, and Denis D. Faber, Jr. of Faber Law Office, Dubuque, for appellant.

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Alan Nienkark appeals from the decree dissolving his marriage to Staci Nienkark. He contends (1) the district court should have provided for joint physical care of the parties' two children, and (2) the property division was not equitable. Staci Nienkark cross-appeals contending the district court gave Alan excessive visitation. We affirm as modified.

SCOPE OF REVIEW. Equity proceedings, such as issues that arise in dissolution actions, are reviewed de novo on appeal. Iowa R. App. P. 6.4; *see In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004).

BACKGROUND. Staci, born in 1967, and Alan, born in 1956, were married in 1998. The parties have two adopted children, a son born in 1998 and a daughter born in 2002. The children first came to live with the couple as foster children. The younger child was adopted in May of 2007, about a month before Staci left the family home.

Staci has an eleventh grade education and at the time of the dissolution had two jobs. She worked from 7 a.m. to 3:30 p.m. five days a week in manufacturing. The job at times required her to start work at 5 a.m. and work Saturday mornings. She also worked as a waitress on Saturday night, going to the restaurant at 3 p.m. and returning home about 10:30 p.m.

Alan graduated from high school, worked for the railroad and in 1977 took over his family's dairy farm operation. He is a dairy and grain farmer. He owns no land of his own but leases three tracts of farmland. He lives on and farms a 160-acre tract which belongs to his mother. There is a barn on the property that

generally houses between twenty-six and forty cows, which he milks in the morning and evening. He shares milk revenues with his mother as rent for this tract. He also is on a crop-share arrangement on an additional tract of 174 acres belonging to his mother and a 240-acre tract owned by a neighbor. His schedule is directed by a need to milk the dairy cows in the morning and evening. He also raises row crops on some of the land and works one and a half days a week at the local sale barn.

The parties separated in the summer of 2007 and since September of that year have been exercising shared care of the children on an agreed upon week-to-week schedule. The children's adoptions were subsidized and the parties receive medical care for the children and $500 a month from the Iowa Department of Human Services for each child. They have been sharing that subsidy.

The parties resolved certain issues and submitted others to the district court. They agreed to have joint custody of the children. Staci sought primary physical care while Alan wanted joint physical care. The parties also disagreed on certain financial issues.

CUSTODY. The district court found both parties fine parents who love their children, and who have the capacity and interest to provide for all of the children's essential needs. The court found them to have different strengths and weaknesses. The court found they lived in a relatively close geographic proximity and that they both recognize the other parent's relationship with the children is important and that the children will suffer if they do not have regular

contact with both parents. The court found Staci was the long-term primary care giver and to continue this was to provide the most stability and continuity. The district court placed the children in the parties' joint custody and granted Staci physical care. Alan was given visitation every week starting when school dismisses on Friday and continuing until 10 a.m. on Sunday. In addition Alan was given visitation on his birthday, Father's Day, and rotating holidays, including New Year's Day, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas Eve, Christmas, and New Year's Eve. Alan received visitation on the children's birthdays in odd numbered years and Staci in even numbered years. Alan was also to have visitation during the first half of the school's spring and winter breaks in odd numbered years and the second half of the breaks in even numbered years. He was to have visitation for two two-week intervals during summer break.

Alan contends the parties should have joint physical care. Staci contends the custody determination made by the district court should be affirmed but Alan should have less visitation, and his visits should be every other weekend and one overnight visit a week.

When considering issues of child custody we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value with respect to custodial issues, and this

court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

Joint physical care is a relatively new concept. *See In re Marriage of Hansen*, 733 N.W.2d 683, 690-92 (Iowa 2007) (discussing at length its history in Iowa). Joint physical care should not be granted if it is not in the best interest of the child or children. *See* Iowa Code § 598.41(5)(a) (2007).[1] Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child. *Hansen*, 733 N.W.2d at 695. The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity. *Id.* at 695-96; *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995); *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

The district court found that granting primary care to Staci was in the best interest of the children but did not make a specific finding that awarding the parties joint physical care was *not* in the best interest of the children.[2] The court specifically found:

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[1] Iowa Code section 598.41(5) provides in relevant part:

> 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. . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care *is not in the best interest of the child.*

(Emphasis supplied.)

[2] The question the legislature has directed the court specifically to answer is whether joint physical care *is not* in the children's best interest. Iowa Code § 598.41(5)(a). However, the court in *In re Marriage of Hansen*, 733 N.W.2d at 695-99, appears to indicate courts should apply the best interest test.

> In further determining the best interest of the children as between two suitable parents, the court finds that Staci's long-term primary care giving of the children if continued is more likely to provide them the most stability and continuity. Staci and Alan have lost mutual respect for each other.
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> . . .
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> Thus, the court finds that it is in the children's long-term best interest to be placed in the parties' joint custody and in Staci's physical care for all of the reasons above described.

The test to determine which parent should have primary physical care is similar to but different than making a determination of whether joint care is not in the child's best interest. In making a determination of whether there should be joint care we are not weighing the qualities of one parent against the other to determine who is better. We assess instead the positive and negative factors of each parent and the relationship they have with each other and the time they have spent with the children. We then focus on what is better or best for the children. *See Hansen*, 733 N.W.2d at 696-700 (listing factors to consider, including among other things, each parent's ability to be a caregiver, to communicate with the other, and susceptibility to conflict). In doing so, we try to determine how their combined presence in the children's lives will affect the children's well-being and whether the children will be better with their parents equally sharing their care or if it is in their interest to spend more time in one parent's custody than the other. *See id.*; Iowa Code § 598.41(5)(a) (stating that the court, prior to awarding joint physical care, may require the parents to submit a joint parenting plan addressing how they will make decisions that affect the child and how the parents plan to handle disagreements that affect the child).

The district court specifically found (1) both Alan and Staci are good and caring parents, (2) each has positive and negative qualities the other does not have, (3) both have good relationships with the children, (4) they live in close geographic proximity to each other, and (5) both recognize the other parent's relationship with the children is important. On our de novo review, we agree with these findings which are factors that would support a conclusion that joint physical care is in the children's interest and that it will duplicate, in part, the relationship the children had with each parent prior to their parents' separation. We also believe the evidence supports a finding that both parents have common goals for their children. In saying this we recognize they are not in total agreement on everything. Staci argues that the parties have disagreement about the children's extracurricular activities and that Alan favors his daughter and is not patient with their son.[3]

The district court expressed its concern that the parents do not communicate particularly well with each other and while their dialogue could be better, they have managed to make a shared care arrangement work satisfactorily for the one and one-half years they have been separated.

We do not believe the evidence supports the district court's finding that Staci, prior to the parties' separation, was the primary care parent. The children have been cared for by both parents. Staci went to work early in the morning and Alan was left to getting their son on the bus and their daughter to day care. Staci was more available to the children after school. Staci spent time with the children early in the day on Saturday, but was not available to them in the late

[3] She admits that she may favor their son.

afternoon and evening. These children have done well because while both parents work outside the home and the children spend considerable time in school, at day care, or in the care of their grandmothers, the parents both have a strong relationship with the children and both have assumed substantial responsibility, though not necessarily equal responsibility, for the children's care and have remained a substantial influence in their children's lives. The joint physical care plan that the parties have successfully executed since their separation approximated in a reasonable way the past care giving of the parents. Long-term, successful, joint care is a significant factor in considering the viability of joint physical care after divorce. *Hansen*, 733 N.W.2d at 697 (citing *In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005)). Furthermore, because the parents now live and plan to live in close geographic proximity to each other, the parenting plan will allow the children to attend the same school and associate with the same peers in whichever home they are residing.

The district court has given Alan substantial visitation indicating the district court's opinion that the children should spend more time with their father as the noncustodial parent than is usual in most cases. Staci contends the visitation schedule given is not in the children's interest and disrupts the children's activities with their friends. She contends, at the least, the visitation should be modified to end on Saturday evening so she can take the children to Sunday morning church as the children's interests are served with religious instruction. Alan disputes this is in the children's interests, arguing that one of the reasons for the court's giving him Saturday nights is that Staci works Saturday nights and

there are no reasons for the children to be in the care of a nonparent when he is ready to care for them. Alan supports Staci having a major part in their children's lives. Staci appears less willing to share. A shared care arrangement will assure that both parents continue to have an influential part in the children's lives. We modify the district court on this issue and provide that the parties should have joint physical care and should rotate the children every week. We also modify the order as to the $12,000 yearly adoption subsidy the parties receive from the Department of Human Services to provide it shall go one-half to each party which is in accord with their pretrial stipulation.

PROPERTY DIVISION. In the case of *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002), we set forth the court's considerations when distributing assets in a dissolution. Before making an equitable distribution of assets in a dissolution, 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. *Dean*, 642 N.W.2d at 323 (citations omitted). The assets should then be given their value as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994). The assets and liabilities should then be equitably, not necessarily equally, divided after considering the criteria delineated in Iowa Code section 598.21(5) (Supp. 2007). In general, the division of property is based upon each marriage partner's right to a just and equitable share of the property accumulated as a result of their joint efforts. *Dean*, 642 N.W.2d at 323.

The court found the parties had a net worth of $221,469, that each had brought property worth $8000 into the marriage, and that Alan had an inheritance of $3000 that should be set aside to him. The court divided the $221,469, less Alan's inheritance, equally and came to the conclusion that each spouse should receive $109,235 in value. The court found Staci was receiving property worth $47,836 and that Alan owed her an equalization payment of $61,399. The court ordered Alan to pay Staci $30,000 within sixty days and the balance of the amount to be paid at the rate of $4000 in principal annually, beginning a year from the filing of the decree, plus interest at five percent per year on the unpaid balance.

Following trial Alan filed a motion to amend or modify findings of facts and conclusions of law in the decree pursuant to Iowa Rule of Civil Procedure 1.904(2). He contended that he only received $750 worth of hay and $24,750 worth of corn rather than the $1350 worth of hay and $37,940 worth of corn the district court determined he received. He asked the court to correct and show his net worth at $156,843, leaving the equalization payment to be made to Staci at $53,004, not the $61,399 ordered by the district court. He asked that it be paid at $4000 a year with interest at five percent per annum. The district court declined to change the property division or the equalization payment because it noted its findings were based on the parties' stipulated values.

Alan contends on appeal that the parties' stipulation was correct as to the bales of hay he had at the time of the parties' settlement conference but by the time of trial some hay had been fed, thus decreasing the number of bales he had

then. He further contends that the stipulation indicted he had 2500 more bushels of corn than he did. The district court did not err in accepting values of assets stipulated to by the parties.[4]

Alan for the first time contends on appeal that the dairy barn[5] he built and paid for on his mother's land is a permanent structure which should be considered a part of the realty owned by his mother and should not have been considered an asset of the parties. Alan also makes several other challenges to valuations. He contends the district court incorrectly fixed the value of the property he brought to the marriage at $8000 when it should have been $44,300. He also challenges the $300 the district court placed on an old truck. He argues that these changes should be made and that Staci should be required to pay him an equalization payment of $11,646.50. The principle that appellate courts will not review issues that were not first presented to and decided by the district court is an elemental one. *Bill Grunder's Sons Const., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004); *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 167 (Iowa 2003).

> [I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

DeVoss v. State, 648 N.W.2d 56, 60 (Iowa 2002) (quoting 5 Am.Jur.2d *Appellate Review* § 690, at 360-61 (1995)).

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[4] Alan admitted signing the stipulation but contended he did not read it.
[5] The barn was given to him in the property division.

> Trial courts must be afforded the opportunity to avoid or correct error in judicial proceedings. Similarly, appellate courts must be provided with an adequate record in reviewing errors purportedly committed during trial. This perforce requires that counsel make timely and sufficient motions or objections upon which trial judges may rule. Absent such actions, an appellate court has nothing to review.

Id. (citation omitted).

These challenges either were not preserved for review or were within the range of evidence. A trial court's valuation will not be disturbed when it is within the range of evidence. *See In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987). Moreover, appellate courts defer to a trial court's valuations when accompanied by supporting credibility findings or corroborating evidence. *In re Marriage of Keener*, 728 N.W.2d 188, 194 (Iowa 2007); *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). We affirm the property division in its entirety.

APPELLATE ATTORNEY FEES. Alan requests $6000 in appellate attorney fees and Staci requests $3000 in appellate attorney fees. Appellate attorney fees are not awarded as a matter of right. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We have the discretion to award appellate attorney fees and in doing so; we consider each parties' need, ability to pay, and the merits of the appeal. *Id.* We order each party to pay his or her own attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.