IN THE COURT OF APPEALS OF IOWA

No. 9-685 / 08-1716
Filed December 17, 2009

IN RE THE MARRIAGE OF MICHELE L. JOHNSON AND JOHN T. JOHNSON

Upon the Petition of
MICHELE L. JOHNSON,
Petitioner-Appellant,

And Concerning
JOHN T. JOHNSON,
Respondent-Appellee

Appeal from the Iowa District Court for Dallas County, Arthur E. Gamble, Judge.

Michele Johnson appeals the physical care and property provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

R.A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf & Copeland, P.C., Jefferson, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

Michele Johnson appeals the physical care and property provisions of a dissolution decree.

I. Background Facts and Proceedings.

John and Michele Johnson married in August 1995. They had two children. Michele moved out of the family home in late 2007, taking the children with her. She filed a petition for dissolution of marriage shortly thereafter.

Michele initially agreed to let John see the children every other weekend and one night per week. John became dissatisfied with that arrangement and sought joint physical care pending trial. The district court granted John's application, and the children spent alternating weeks at each parent's house.

Before trial, both parties gave the court proposed decrees. After trial, the district court ordered John's attorney to prepare a decree. In the final decree, the court granted John physical care of the children, subject to liberal visitation with Michele. The court also divided the parties' property, awarding a 240-acre and a 40-acre farm to John, and ordering John to pay Michele $153,500.

On appeal, Michele claims the district court acted inequitably in (A) "adopting, nearly verbatim, the proposed findings of fact, conclusions of law and decree submitted by [John]"; (B) placing the children in John's physical care rather than in her physical care; and (C) dividing the property.

II. Analysis.

A. Decree.

At the close of trial, the district court stated:

> After awhile this afternoon I'm going to get together with the lawyers and I'm going to tell the parties or the lawyers what my decision is. The kids need to know where they're going to school next week and so I need to make a decision. There will probably not be any further record. I would state findings of fact for the record that we will use later to decide the case.
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> . . . So I'll make a decision after lunch and I'm going to work out the details of it with the lawyers. One of the two lawyers is going to prepare a decree and the case is going to be done.

No additional findings of fact were read into the record, but a calendar entry provided: "Trial held August 13 & 14, 2008. Ruling dictated to counsel in chambers. Attorney Copeland [John's attorney] will submit a proposed decree within 10 days to the undersigned judge at chambers in Des Moines."

Based on this record, Michele maintains that the court's "decision in this case is essentially the wholesale adoption of the proposed findings, conclusions and decree submitted by [John's] attorney."[1] As a result, she asserts "[t]here is no means by which an appellate court can ascertain the bases, factual or legal, for this Decree." *See Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 435 (Iowa 1984) (noting that one purpose for rules requiring trial courts to prepare detailed written decisions is so that "appellate courts can readily ascertain the specific factual and legal bases for the court's decision").

Courts have been cautioned about the verbatim adoption of the proposed findings and conclusions submitted by only one of the parties. *See Rubes v. Mega Life & Health Ins. Co.*, 642 N.W.2d 263, 266 (Iowa 2002); *In re Marriage of Siglin*, 555 N.W.2d 846, 848 (Iowa Ct. App. 1996). The district court did not engage in this practice here. As the court stated, school was to begin the week

[1] The proposed decree prepared by John following the trial is not part of the record.

after trial and, at the time of trial, the parents had yet to reach an agreement on which school the children would attend. Because this issue required immediate attention, the court did not take the case under advisement in order to write a decree but instead stated it would "work out the details of [the decree] with the lawyers" in chambers. The court subsequently "dictated [the ruling] to counsel in chambers." Both parties were represented by attorneys. These attorneys provided the court with proposed pre-trial decrees, were present when the court stated its plan of action, and apparently were present in chambers when the court dictated the decree. Under these circumstances, we are not persuaded that "the trial court delegate[d] to counsel its own responsibility to scrutinize the record, select apt principles of law, and fully articulate the bases for a sound, fair decision." *Kroblin*, 347 N.W.2d at 435.

In any event, any concern with the court's action is ameliorated by the fact that "we review the evidence anew, disconnected, ultimately, from the trial court findings." *Siglin*, 555 N.W.2d at 849.

B. Physical Care.

1. Joint Physical Care. Michele argues that the district court acted inequitably in rejecting joint physical care as an option. We begin by noting that Michele's position on joint physical care changed over time. At trial, she was opposed to this option, stating the temporary schedule was not working out. Her proposed decree only provided that she would be granted physical care and made no mention of joint physical care. Michele's opposition was a factor the trial court was authorized to consider. *See* Iowa Code § 598.41(3)(g) (2007)

(directing court to consider whether one or both spouses agree or are opposed to joint physical care).

On appeal, Michele requests joint physical care in the event she is not granted physical care. Despite her opposition to this alternative at trial, we will proceed to the merits.

Michele maintains the court's denial of joint physical care "is premised solely upon an assumption, with no basis in evidence, that [she] would not cooperate with a joint physical care arrangement," ignoring "the short, three month success of the joint physical care arrangement which was in place, and working, at the time of trial." She is correct that cooperation is critical to an effective joint physical care arrangement. *See In re Marriage of Hansen*, 733 N.W.2d 683, 698-99 (Iowa 2007). She is not correct that the parents fully cooperated in making joint decisions about the children.

As noted, a glaring example was the parents' inability to agree on which school the children should attend. Michele testified that she had not yet decided whether she would send the children to the Menlo elementary school the older child had been attending or to an elementary school in Dexter just a block from her new home. When asked, "[I]f you get custody are you promising the judge that you're going to send them to their old school in Menlo?" Michele replied with a nonanswer: "I am saying that they will go to—they will be in West Central Valley School District." John, on the other hand, enrolled the children in the Panora School District without informing Michele. In our view, this example alone is evidence supporting the district court's decision to reject joint physical care as an option. We will proceed to Michele's argument that she was entitled

to physical care of the children. *See id.* at 700 ("Once it is decided that joint physical care is not in the best interest of the children, the court must next choose which caregiver should be awarded physical care.").

2. Physical Care. The district court began this portion of the ruling by stating there was no concern "about the health or safety of the children in either home" and they would "be well-cared for by this family no matter what." We agree with these statements. Both parents were good parents, making the physical care decision at once easier and more difficult.

We turn to Michele's argument that the district court should have granted her physical care of the children in light of "her history as the primary caregiver in every facet of her children's lives." Not surprisingly, the parties' testimony on this point differed.

Michele stated that she handled most of the children's daily needs. In her words, "I would get the kids up, I would get them breakfast, I would get their clothes on, get their book bags ready, make sure they had all of their projects, homework, books ready to go out the door." She further testified that she picked the children up from daycare, took them home or to their extracurricular activities, made dinner, helped with their homework, gave them baths, and put them to bed. In her view, John "[v]ery rarely" assisted her with these routine daily activities.

John, on the other hand, testified that

> [we] would usually get [the children] up together. We would get them started to breakfast. Sometimes I would stay in with them. Sometimes I would go out and feed some calves and then come back in. I always started their car for them. Always made sure they were ready to go in the morning. And we shared that responsibility, except for maybe two weeks or three, spring and fall . . . .
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> . . . .

> . . . We did baths. We would read stories, usually say a prayer before we went to bed. . . . Either I'd help her pick up the table or I'd be outside with the kids. We shared that.

The district court resolved this contradictory testimony in favor of John, stating:

> Based on lack of Michele's credibility, her demeanor during her testimony and other many factors, this Court was convinced that if Michele was granted physical custody of the minor children, that not only would Michele be non-supportive of John's relationship with the children, but Michele would actually attempt to sever the close and loving relationship between John and the children and John's family members, all of whom reside in the immediate area and have always been very actively involved in the children's lives.

Because we find no reason to view the district court's ruling with a jaundiced eye, we defer to its credibility findings. *See In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (noting this court affords "considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses"). Additionally, we are persuaded by other evidence in the record that John played an active parenting role.

The elementary school principal at the older child's school, who testified on behalf of Michele, confirmed that school personnel called both parents if the children were ill or needed attention, and both came. When the principal was asked if she would describe John as a stable and dependable parent, she stated, "I think he cares about his kids. It's obvious the kids relate to him well, so your answer would be yes."

John's witnesses seconded this opinion. While John was a busy farmer and part-time car salesman, John's co-worker at the car dealership testified that

the job was sufficiently flexible that he could take time off for the children's activities. Additionally, John's father testified that John was an engaged parent and, when necessary, John's sister and her teenage daughters were "less than a half a mile from" John and could assist with the children's care.

Michele discounts the testimony of John's witnesses as biased, but the same could be said of some of her witnesses, such as her cousin and her friend of twenty-one years. In any event, these two individuals did not seriously undermine John's position that he actively cared for the children. For example, Michele's cousin simply labeled Michele as the primary caretaker because of her view that "women are more attentive of the children." And the only criticism of John voiced by Michele's friend was that he did not seem "overly emotional with the children" and stayed in the background at gatherings.

We recognize that the children's regular babysitter, who testified for Michele, labeled Michele as the primary caretaker. However, until the temporary custody order was entered, she had little occasion to see John, as she lived in the town where Michele worked and Michele was the parent who brought the children to daycare and picked them up. After the temporary joint physical care arrangement was implemented, the babysitter voiced no concerns about John other than to note that he was not used to the new routine of driving the children to her home during his week with them.

We conclude that John's active role in the children's lives militates in favor of the district court's decision to grant him physical care. In addition, we are convinced John's family support system is a factor in his favor, although Michele's parents were similarly involved with the children. The record is also

replete with evidence that the children were attached to the farm and the older child in particular was devoted to outdoor farm activities. Finally, the court took pains to afford Michele exceptionally liberal visitation, recognizing, as John did, that Michele was a devoted and caring mother.

For these reasons, we conclude the district court acted equitably in granting John physical care of the children.

C. Property Division.

Michele primarily challenges the district court's failure to (1) value and account for crops in the field, farm-related payments John expected to receive from the government, and cattle the parties owned at the time of the trial, (2) adopt a higher valuation for the 240-acre farm, and (3) order a higher cash payment. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa Ct. App. 1997) (stating that in order to make an equitable distribution of assets, "the court must identify and value the assets of the parties"). She also raises arguments concerning premarital property, improvements to the real estate, and valuation of farm equipment that we find unnecessary to address, as they would not materially alter the property division.

While the district court did not value certain items of property, the record is sufficient to assess the court's division on our de novo review. *See In re Marriage of Rhinehart*, 704 N.W.2d 677, 683 (Iowa 2005).

1. Crops in Field, Program Money, Cattle Herd. Michele maintains that the district court did not address "the division of the 28 grain contracts [John] introduced for pre-sold beans and corn totaling $84,034," agricultural program payments averaging $16,650 per year, and cattle brought into the marriage.

a. Crops in Field. The decree in this case was entered in August while the crops were still growing. The crops were part of the land, so when John was given the land he was also given the crop. *See In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979). *But see In re Marriage of Martin*, 436 N.W.2d 374, 376 (Iowa Ct. App. 1988) ("[T]he value of crops growing upon real estate owned by both parties may be considered as property separate from the value of the real estate."). Because John depended in part on income from the farm to pay his operating expenses, we believe the district court was justified in permitting him to keep the crop.[2] *See Conley*, 284 N.W.2d at 223.

b. Program Money. Michele maintains that she was entitled to half the government agricultural payments of "$16,650." While John listed as an asset "SEP" valued at $16,619.15 and indicated that this asset belonged to him, there is no indication that this is the government payment Michele was referring to. In the absence of further proof on this issue, we conclude this item was not subject to division.

c. Cattle. Michele next contends that the district court should have valued the cattle on the farm and awarded her the entire value "because there is no value for offspring of the bred cows." John argues his herd at the time of trial was only slightly larger than his herd at the time of his marriage, entitling him to offset one from the other.

[2] We disagree with Michele that the grain contracts needed to be assigned a value separate from the crops growing in the field. As John notes, the contracts were not additional assets but a reflection of advance sales of some of the crops in the field.

This argument presupposes that premarital property is not subject to division, a premise that is not viable. *See In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). As the court stated in *Sullins*,

> Importantly, "the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party."

Id. (citation omitted). For this reason, we conclude the cattle needed to be valued and included in the property distribution scheme.

John estimated that his herd was worth $35,450, but because he owed $23,003.93 to the bank for a livestock loan, the net value was $12,446.07. We include that sum in the property subject to division.

2. Farms. Michele's next claim concerns the farms. She first asserts that the district court undervalued both farms. The court accepted John's valuation of the 240-acre farm, finding it was worth $2200 per acre, "which included an amount for the buildings and house." Michele argues the court should have instead adopted her appraiser's agricultural land value of $2500 per acre and her appraiser's separate valuation of the residence and five acres at $77,500. We believe the court's valuation of the agricultural land on the 240-acre farm was within the permissible range of evidence and should not be disturbed on appeal. *See Hansen*, 733 N.W.2d at 703 ("Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence."). We agree with Michele, however, that the house and surrounding five acres should have been separately valued. Her appraiser assigned a value of $77,500. We accept this value.

The value for the agricultural land on the 240-acre farm should be $2200 per acre multiplied by 231.58 acres.[3] This total is $509,476. Adding $77,500 to this figure, we arrive at a final gross valuation for the 240-acre farm of $586,976. The parties still owed $181,201.59 for that land at the time of trial, resulting in a net value of $405,774.41.

We turn to the court's valuation of the 40-acre farm. The court found the land was worth $1600 per acre. The record reflects that John purchased the land from his uncle about a year before trial for $875 per acre, but that it was worth "[p]robably a thousand to twelve hundred." John testified the value of the land did not significantly increase in the year before trial. On our de novo review of the record, we find that the highest value placed on that piece of property was $1500 per acre. Because the $1600 figure is not in the record, we cannot conclude the court's valuation was within the permissible range of evidence. We adopt the $1500 per acre figure, multiply that sum by forty acres, and subtract the $31,229.56 mortgage to arrive at a net value of $28,770.44 for the 40-acre farm.

In valuing the farmland, the district court did not consider an additional $74,219.64 in other farm-related debts.[4] The net value of the two farms without

[3] John's appraiser indicated that, according to county records, the total acres in this parcel were not 240 but 231.58. It is unclear whether the 231.58 figure excludes the five acres surrounding the home. For purposes of this calculation, we will assume that it does and all of the 231.58 acres are comprised of agricultural land.

[4] We arrived at this figure by examining John's financial affidavit which, in addition to the debts still owed on the farmland itself, listed several other debts associated with the operation of the farm. We added $55,588.75 for a line of credit, $13,100.89 for a Morton building, and $5530 for "tiling and other." We excluded the livestock loan because that was separately considered in valuing the herd, as well as the debt on the baler, because the farm equipment was separately addressed by the district court. We also excluded the credit card debt because John did not point to evidence that it was farm-related.

those debts was $434,544.85. We deduct $74,219.64 from that figure to arrive at a total net farm value of $360,325.21.

3. Cash Payment. This brings us to the cash payment that the court ordered John to make to Michele. Michele complains that the district court should have awarded her one-half of all the property discussed above in the form of a greater cash equalization payment. She requests an additional payment of $239,375.

Iowa courts do not require an equal division or percentage distribution. *See In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). On our de novo review, we believe Michele is entitled to a greater cash payment but not in the amount she requests.

The evidence supports a greater cash payment because the marriage was fourteen years long, Michele assisted with the farm in the early years and actively contributed to the marriage and family, and the district court did not value certain assets. *See* Iowa Code § 598.21(5) (setting forth factors to be considered in equitable division of property).

On the other hand, Michele is not entitled to an additional $239,375 because she received approximately $48,403 in net assets in addition to the $153,500 cash payment, and she based her request for $239,375 on a higher value for certain agricultural land than the district court accepted.

Our valuation of the farmland was $360,325.21. We believe Michele is entitled to fifty percent of that value ($180,162.61), as well as fifty percent of the $12,446.07 value we assigned to the cattle ($6223.04). For this reason, we

award her an additional cash payment of $32,885.65, the difference between those amounts and the cash payment ordered by the court.

In requiring this additional payment, we note that John does not argue he would face adverse tax consequences in satisfying the property distribution. *Id.* Nor is there evidence that an increase in the cash payment to Michele would result in John's loss of the farm. *Cf. In re Marriage of Callenius*, 309 N.W.2d 510, 515 (Iowa 1981) ("We have previously recognized the reasonableness of a trial court awarding a farm to the spouse who operated it and in fixing the awards and schedule of payments to the other spouse without reaching equality so the farmer-spouse might retain ownership of the farm."). For these reasons, we modify the decree to provide for this additional payment.

D. Appellate Attorney Fees.

Michele requests an award of appellate attorney fees in the amount of $14,700. Appellate attorney fees are not a matter of right but rest in this court's discretion. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We grant Michele's request for appellate attorney fees and order John to pay her $2500 toward those fees.

III. Disposition.

We affirm the district court's decision to grant John physical care of the children. We modify the property division to afford Michele an additional $32,885.65, to be paid in two approximately equal installments over one year from the date of the issuance of procedendo. We order John to pay Michele $2500 in appellate attorney fees.

AFFIRMED AS MODIFIED.