IN THE COURT OF APPEALS OF IOWA

No. 0-135 / 09-1390
Filed April 21, 2010

**IN RE THE MARRIAGE OF CONNIE SUE TREIMER
AND RODNEY GEORGE TREIMER**

**Upon the Petition of
CONNIE SUE TREIMER,**
Petitioner-Appellant,

**And Concerning
RODNEY GEORGE TREIMER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Marlita A. Greve, Judge.

The petitioner appeals from a decree entered following the dissolution of her marriage to the respondent. **AFFIRMED AS MODIFIED.**

James W. Affeldt of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

J. Michael Siering of Metcalf, Conlon & Siering, P.L.C., Muscatine, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Connie Treimer appeals from a decree entered following the dissolution of her marriage to Rodney Treimer. On appeal, she argues the district court should have granted her physical care of the parties' youngest child, should have made a division of property that resulted in her receiving a larger equalization payment, and also should have made available the transcript of the youngest child's *in camera* testimony. We agree with the district court's resolution of the first and third issues, but modify the property settlement.

I. Background Facts and Proceedings.

Connie and Rodney are now forty-three and fifty-two respectively. They were married in August 1997. Each of them had children from previous marriages. They also had one daughter together before they were married—Jena (born in 1992). In addition, during their marriage, Connie and Rodney had a son, August (born in 1999).

When the parties married, Connie did not have any assets except for some furniture items, but had accrued $25,000 in debt for attorney fees from her previous divorce. Rodney paid off this debt either shortly before or after the parties' marriage.

Rodney had farmed for numerous years. He brought his farming business, Treimer Industries, Inc., into the marriage. The farm corporation does not own any land, but owns cattle, crops, equipment, and machinery. Rodney continues to farm today in the Durant area.

In 1998 Rodney's father died and left the family farmland to Rodney and his three siblings. The farmland was appraised in 1999 at $837,430, with

Rodney's one-fourth share valued at $209,357.50. In 2000 Rodney purchased the other three-fourths from his siblings for $600,000.

Connie helped on the farm until sometime in 2001. In 2002 Connie began working outside of the home as a waitress at Grandma's Kitchen. At that time, Rodney became responsible for more of the household duties.

In March 2005, Connie moved out of the parties' home, taking Jena and August with her. She stayed in her mother's home for six months, but then moved into the Davenport home of John Beavers, whom she had met while working at Grandma's Kitchen. At Beavers's home, Jena and August slept in the living room on couches. There is a television that stays on in the living room all night, although Jena testified that it does not interfere with her or August's sleep.

After the parties separated, Connie gradually quit working. She did not work at all in 2008 or 2009. Connie later testified that she does not pay any bills, but lives on child support payments and food stamps.

Although Beavers's home is in Davenport, August continues to go to the Durant schools. Jena attends high school in Davenport.

In February 2006, Connie filed a petition for dissolution of marriage. The parties attempted to reach a settlement agreement and engaged in negotiations. In August 2007, Rodney filed a motion requesting that the district court enforce a settlement agreement between the parties. A hearing was held, after which the district court found an oral settlement agreement had been made. The district court entered an order enforcing the parties' settlement agreement and entering a decree of dissolution in October 2007. Connie appealed. On appeal, this court reversed the district court's enforcement of the alleged settlement agreement, but

affirmed the dissolution of marriage. *In re Marriage of Treimer*, No. 8-342 (Iowa Ct. App. May 14, 2008). The case was remanded for a trial on the remaining issues.

A trial was held in February and March 2009. On May 4, 2009, the district court entered a dissolution decree. The court awarded Connie and Rodney joint legal custody of Jena and August, with Connie having physical care of Jena and Rodney having physical care of August, subject to the other parent's visitation.[1] Additionally, the court divided the parties' property. As part of the distribution, Rodney was ordered to pay $62,750 to Connie.

Connie appeals. She argues that she should have been granted physical care of August, that Rodney's equalization payment to her should be increased to approximately $200,000, and that the court should have allowed access to the transcript of its interview of August.

II. Standard of Review.

We review the provisions of a dissolution decree de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("[The district court] is greatly helped in making a wise decision about the parties by listening to them and watching them in person. In contrast, appellate courts must rely on the printed record in evaluating the

[1] The parties agreed that Jena, who had only one year of high school left in Davenport, should remain in the physical care of her mother. They disagreed as to the appropriate physical care arrangement for August.

evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented."). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *Sullins*, 715 N.W.2d at 247 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)).

III. Child Custody.

Connie asserts that she should have been granted physical care of August. In making a physical care determination, the best interests of the child are the principal consideration. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2005), as well as factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *Id*. The ultimate objective of a physical care decision is to place the child in an environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

Connie asserts the district court did not give enough weight to the fact that she was August's primary caregiver after the separation[2] and put too much weight on its concerns regarding her parenting. Upon our review, we find the district court carefully considered the appropriate factors in making its award.

[2] Connie also argues that Rodney was willing to agree to her having physical care of August both in the 2006 temporary custody order and in the 2007 proposed settlement agreement that Rodney attempted to enforce. Rodney has moved to strike Connie's briefing to the extent that it relies on the unconsummated settlement. *See* Iowa R. Evid. 5.408. Rodney further argues that Connie cannot now raise the settlement agreement as it was not raised at trial. We generally agree with Rodney's arguments and therefore decline to consider the settlement agreement. However, even if we did consider it, it would not alter our conclusion that Rodney is the more appropriate choice for physical care of August.

Although Connie was August's primary caregiver after the parties separated in 2005, Rodney was an active father and exercised extensive visitation with August. At times, Rodney exercised visitation with August on Monday and Wednesday evenings as well as every weekend. However, before trial Connie informed Rodney that she wanted to strictly follow the temporary custody order. She also threatened to remove August from his school in Durant near Rodney's home.

There was significant testimony regarding Connie's anger issues and the district court found that Connie had a "violent temper and physical aggressiveness." For instance, in one incident described at trial, Connie saw a family member, with whom she was unhappy, driving on the opposite side of the road. Connie drove her car across the center line toward him. According to the family member, Connie ran his car off the road. At the time, Jena was in Connie's car.[3] Other members of Connie's family also testified to physical altercations initiated by Connie. There was testimony that Connie grabbed and shook August when she was mad at him.

While Connie's status as the post-separation primary caregiver of August is entitled to consideration,[4] we agree with the district court that this factor is outweighed by the significant evidence in the record that Rodney would offer a more stable living environment for August. As the court put it:

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[3] Connie herself testified: "Q. You swerved over into their lane of travel? A. Not totally in. Just back and forth to get their attention so we could talk."

[4] The record shows that both Connie and Rodney devoted substantial time to August's care before the two of them separated. Also, August still attends the schools in Durant, where Rodney lives, rather than in Davenport, where Connie has been living. In short, considerations of stability and continuity support the decision to award physical care of August to Rodney. *See Hansen*, 733 N.W.2d at 696-97.

> These incidents show [Connie] loses any ability to exercise good judgment during these fits of anger even when her children are present. Connie has also stopped working and is making no effort to support herself or her children. The manner in which she has behaved and lived these past few years show an irresponsible, violent and unpredictable nature.

Connie also refers to an occasion where Rodney was cited for denial of critical care of August. When August was six years old, Rodney left him alone in the house one morning while he went outside and performed some farm chores. We agree with the district court's overall assessment of this incident. As the court pointed out, it occurred several years ago, and Rodney took parenting classes. Like the district court, we do not believe this incident outweighs the other considerations in the record favoring Rodney as the physical care parent.

In summary, giving deference to the district court's ability to evaluate the demeanor and credibility of the trial witnesses, we uphold its determination to award physical care of August to Rodney.

IV. Property Division.

Connie next argues that the district court erred in valuing the three-fourths interest in the farm that Rodney purchased from his siblings in 2000 and, thus, should have ordered Rodney to make a larger equalization payment to her. "Under our statutory distribution scheme, the first task in dividing property is to determine the property subject to division." *Fennelly*, 737 N.W.2d at 102. Generally, all property that exists at the time of the dissolution, other than gifts or inheritances to one spouse, is divisible property. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). The next task is to divide the property in an equitable manner according to the factors enumerated in Iowa Code section

598.21 and other relevant factors. *Id*. "Although an equal division is not required, it is generally recognized that equality is often most equitable." *Fennelly*, 737 N.W.2d at 102.

In the present case, the district court found that, in certain respects, the three-fourths interest in the farmland that was purchased during the marriage in 2000 should be treated as if it were premarital property. The court initially explained:

> Rodney was going to inherit this property and would have bought it from his siblings whether he was married to Connie, to someone else or was single at the time. It would be reasonable for the Court to consider this entire farmland Rodney's alone as premarital property, but the Court finds that would not be fair to Connie who did contribute to this marriage in the early years by helping on the farm and in the last few years before their separation with their homemaking duties and work outside the home.

However, after indicating it "would not be fair to Connie" to treat the farmland as premarital property, the court went on to deny Connie the benefit of any *appreciation* in the value of the farmland during the parties' marriage:

> The Court finds the appreciation in the value of the farmland from 1999 until the parties' separation in March 2005 was due to mere fortuitous circumstances of inflation and/or market appreciation. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). This increase was not due to the efforts of the parties. *Id*. Even though this was not technically premarital property, the Court finds the law governing appreciation of a premarital asset's valuation should be used due to the unique facts of this case. Thus, an equitable property division of the appreciated value of the property should be a function of the tangible contributions of each party and not the mere existence of the marital relationship. *Id.*

Thus, the district court valued the three-fourths interest in the farm based upon the 1999 appraisal (3/4 of $837,430 = $628,072.50) plus the value of a grain bin subsequently added to the land ($50,000) for a total value of $678,072.50. This

total amount was reduced by the outstanding loans ($552,579.71). Hence, the equity in the land to be divided was $125,492.50. Connie was awarded half of that value or $62,746.25. The court denied Connie any credit for subsequent appreciation in value of this three-fourths interest during the marriage.

Connie does not argue that the overall methodology of calculating the amount to be paid to her was incorrect, but rather maintains that the value of the three-fourths interest in the farmland should not have been based upon its value at the time of the purchase. We agree. The farmland was not a gift or inheritance. *See Sullins*, 715 N.W.2d at 247 (stating that all property of the marriage, with the exception of gifts or inheritance to one spouse, is divisible property). It was purchased during the marriage, with both parties' names on the mortgage, and is a marital asset. The case of *In re Marriage of Lattig*, 318 N.W.2d 811, 813 (Iowa Ct. App. 1982), cited by the district court, involves appreciated property purchased *before* the marriage, not during it. We do not believe the district court acted appropriately when it denied Connie any share of the appreciation in what was indisputably marital property, simply because either (1) Rodney would have purchased that property anyway or (2) the appreciation was "fortuitous." Even as regards appreciation of premarital property, the supreme court has said, "Nor do we find it appropriate when dividing property to emphasize how each asset appreciated—fortuitously versus laboriously—when the parties have been married for nearly fifteen years." *Fennelly*, 737 N.W.2d at 104. We believe the same observation applies with even greater force to appreciation of marital property. In sum, because the three-fourths interest in the

farmland was unquestionably marital property, Connie should have shared in its increase in value during the parties' marriage.

Next, we must determine the correct valuation of this three-fourths interest in the farmland. Connie argues that instead of using a 1999/2000 value for the farmland, the court should have relied on a March 2006 appraisal that results in a $1,272,500 total value. This date is approximately one year after the parties separated, but only one month after Connie petitioned for dissolution of marriage and over a year before the decree of dissolution was entered.[5] Connie proposes the following calculations:

- Three-fourths of the value of the farm (3/4 of $1,272,500 = $954,375)
- Minus the debt ($954,375 - $552,580 = $401,795)
- Divided by half ($401,795/2 = $200,897.50).

We find that relying on the March 2006 appraisal is equitable, especially as there was no evidence as to the value of the land in 2005, and Rodney's only alternative valuation date is 1999/2000.

Rodney asserts that even if the farmland is valued at $1,272,500, this should be reduced by the costs of a potential sale ($60,000) and capital gains tax that would be payable upon sale ($90,000), making the actual value $1,122,500. Although these are costs that Rodney might have to bear if he sold the land, there was no evidence that Rodney planned on selling the farm. Rather, Rodney has every intention of continuing to farm. *See In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991) ("In the case at bar, the problem with considering

[5] Connie also introduced into evidence a December 2007 appraisal that valued the farm at $1,728,000, but she does not presently argue that this figure should be used for property settlement purposes.

tax consequences . . . is that there was no evidence that a sale was pending or even contemplated."). Accordingly, we decline to accept Rodney's argument.

Rodney also points out that the district court's property division failed to give him credit for $30,000 in post-separation payments to Connie and an $11,000 inheritance. However, the district court explained those determinations. Its explanations are supported by the record. Hence, those matters are not grounds for leaving the erroneous treatment of the farmland appreciation uncorrected.

Lastly, Rodney argues that Connie's calculation understates the relevant farm debt by approximately $20,000, and thus overstates the farm equity by the same amount. Rodney notes that in early 2006, the grain bin portion of the loan was actually $36,320, whereas in calculating the overall farm debt the district court relied on a $15,444 figure, which was the outstanding balance as of trial in 2009. We agree with Rodney that to be consistent, a 2006 financial picture of the farm should be used throughout. This means that we reduce the equalization payment by one-half the difference between $36,320 and $15,444, or $10,438, making the total payment $190,459.50 rather than $200,897.50.

Accordingly, we generally sustain Connie's arguments with respect to the property division, and hold that the equalization payment should have been $190,459.50 rather than $62,746.25. The court's order provides that "Rodney shall pay Connie $8,000 plus interest at the statutory rate on March 1 and November 1 until the $62,750 is paid in full with the exception the payments for 2009 shall be due on June 1, 2009 and November 1, 2009." We modify this to

provide that the semi-annual payments shall be $15,000 plus interest at the statutory rate until the total principal sum of $190,459.50 is paid in full.

V. Sealed Testimony.

Finally, Connie asserts that the district court erred in sealing the transcript of its confidential interview with August. During the dissolution hearing, Connie's attorney stated that he would "like to call August Treimer to testify in chambers just with the judge and the attorneys." The district court explained that with a child of August's age, it usually interviewed the child in chambers, along with a court reporter, but without the parties' attorneys. The child would be able to tell the judge anything and the judge would not disclose anything the child said, unless some aspect of its decision was based on the child's testimony. Connie did not object to the procedure, but actually agreed to it. Connie cannot consent to the procedure and then complain about it on appeal. We find this issue is not preserved. *See, e.g.*, *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.").

VI. Appellate Attorney Fees.

Connie requests appellate attorney fees in the amount of $10,000. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). In our discretion, considering the parties' incomes, and the degree of success achieved by Connie on appeal, we decline to award Connie any appellate attorney fees. However, costs on appeal are assessed to Rodney.

VII. Conclusion.

We affirm the district court grant of physical care of August to Rodney. However, we modify the property division to increase the payment from Rodney to Connie from $62,750 to $190,459.50, payable in semi-annual installments of $15,000 plus interest. We find Connie has waived any objection to the sealed testimony. Finally, we decline to award Connie appellate attorney fees and assess costs on appeal to Rodney.

AFFIRMED AS MODIFIED.