

IN THE COURT OF APPEALS OF IOWA

No. 0-357 / 09-1652
Filed June 30, 2010

**IN RE THE MARRIAGE OF JODI JEAN FITZGERALD
AND KEVIN GERARD FITZGERALD**

**Upon the Petition of
JODI JEAN FITZGERALD,**
Petitioner-Appellee,

**And Concerning
KEVIN GERARD FITZGERALD,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

Kevin Fitzgerald appeals from the economic and child custody provisions
of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Zoshua Z Zeutenhorst of Elverson, Vasey & Peterson, L.L.P., Des Moines,
for appellant.

Diane L. Dornburg of Carney & Appleby, P.L.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Kevin Fitzgerald appeals from the economic and child custody provisions of the parties' dissolution decree. We affirm as modified.

I. Background Facts & Proceedings.

In 1998, both Kevin and Jodi were working for Data Transmission Network, a weather data company. They met during a sales training meeting while Jodi was married to another man. Jodi moved to New York where Kevin was living and they were married in 1999 following the birth of their son, Brian.¹

The family moved to Iowa shortly after Brian was born. The move to Iowa was at Jodi's behest. Kevin agreed to the move after Jodi agreed that he could pursue a career in stand up comedy, a career that can take ten years to excel.

In Iowa, Kevin and Jodi both worked temporarily for Farm Bureau after obtaining their insurance and investment licensing. Jodi went to work for Principal Financial Group in July 2000. Kevin also began working at Principal later that year. While working at Farm Bureau and Principal, their incomes were similar. Jodi continued to work for Principal and received promotions and income increases. By 2008, she was earning about \$74,500.

In 2001, Kevin left his job at Principal and pursued his career as a stand up comedian. He spent several months in New York assisting a friend with a business venture during which time Jodi sent money to support him. Caitlin was born to the couple in 2004. When at home, Kevin performed many household chores and provided for the children's care, although the children also went to

¹ The boy's name is Anthony Brian, but the couple referred to him as Brian, as will we.

daycare. Kevin would be gone for weeks at a time pursuing comedy work, and during those periods Jodi was the sole caregiver for the children. Kevin took the children to New York each summer for extended visits with his family, and Jodi would join them there for perhaps a week. In 2005, Kevin cut back on his travel and was away from home about twenty nights. For approximately eight to twelve months, he emceed at a local comedy club and sold t-shirts. In 2006, he traveled more doing comedy and was away from home between forty-five and sixty nights. In 2007, Kevin “traveled a little more than we were comfortable with” and was away from home approximately seventy-five to ninety nights. Kevin’s income from stand up comedy has been sporadic and involved substantial expenses. The most he has earned as a comedian was in 2007 when he earned \$8000. Jodi’s income has supported the family and Kevin’s comedy career.

In early 2008, Jodi informed Kevin she wanted a divorce; however, Kevin continued to live in the family home. In April, the two attempted reconciliation, taking a trip to Florida with thoughts of relocating there. There was no reconciliation, and in May 2008, Kevin went to New York with Caitlin, with the intention that Brian would join him for the summer and the children would return to Iowa at the end of the summer. On June 1 Jodi took Brian to Indiana to meet Kevin’s brother, who then drove with Brian to New York to join Kevin. Kevin moved in with his mother.

Brian was diagnosed with attention deficit and hyperactivity disorder (ADHD) when he was in second grade. In third grade he was placed on medication to assist with his hyperactivity.

When Brian arrived in New York, where he was to stay for several weeks, he did not have an adequate supply of his ADHD medication. Kevin was unable to refill the prescription without having Brian being seen by a physician and that proved to be quite difficult. Kevin decided to take Brian off the medication, which was an unpleasant experience for Brian. Kevin placed Brian on a special diet and had him seen by a neuropsychologist and a therapist.

On June 6, 2008, Jodi flew to Texas for an interview with JPMorgan Chase and was offered a job. On June 9 Jodi wrote to Kevin outlining her proposals related to their divorce, including alternatives related to where the children would reside. She informed Kevin that she was leaving that weekend for Texas to start training.

On June 11 Shaun Patman, a man Jodi had been communicating with on-line, came to Iowa to meet her in person. By the beginning of July, Jodi was pregnant.

Jodi was assigned to various locations in Texas during training, eventually being permanently assigned to a branch office in Odessa, Texas, where Shaun lived.

In August 2008, Kevin filed an action pro se in New York for custody of the children. By agreement, Kevin enrolled Brian and Caitlin in schools in New York. In September, Jodi filed this dissolution action in Iowa. Jodi challenged New York's jurisdiction, and that action was dismissed on November 16.

Kevin and Jodi agreed the children would go to Texas over the winter school break to visit Jodi and were set to return to New York on January 3, 2009. The children met Shaun and were informed they were going to have a new

sibling. Just hours before Kevin was to pick the children up at the airport on January 3, Jodi e-mailed Kevin that the children were going to stay in Texas. She enrolled them in school, and Brian was placed back on ADHD medication.

On January 15, 2009, the Iowa district court appointed Angela Gruber-Gardner as guardian ad litem (GAL) for the children. On February 27 the GAL submitted a report to the court outlining the materials she had read and reviewed, as well as the persons she had interviewed. She concluded,

Although it is a very close call, applying the [*In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974)] factors to the instant case demonstrates Kevin should be awarded physical care of the children. [Brian] is a ten-year-old boy with ADHD. Caitlin is a four-year-old girl with no known health concerns. Both parties exhibit the ability to meet the emotional, social, moral, material and educational needs of the children. The educators in New York and Texas reported that the children interact well with others, are well-adjusted, polite, respectful and on target with educational goals. In addition, the children have solid relationships with both parents, and a solid relationship with each other. . . . [T]he children should not be separated.

The GAL stated the “case turns upon the characteristics of each parent, the nature of each proposed environment and the ability of one parent to support the other’s relationship with the children.” She noted Jodi’s “sudden relationship with Shaun” and found “Jodi’s actions over Christmas break draw into question whether she acted in the children’s best interest.”

On March 3, 2009, the district court granted temporary physical care to Jodi. Kevin was to have four weeks of summer visitation prior to the trial date.

Trial was held on July 21 through 24, 2009. The GAL submitted a supplemental report in which she had changed her recommendation.

Kevin’s anger issues have surfaced since the hearing on temporary matters. Kevin got into an argument with Jodi and Shaun while the

children were present. According to [Brian], Kevin yelled and cursed at Jodi and Shaun. Jodi and Shaun maintained their composure during this incident and attempted to calm Kevin down. [Brian] reported a hotel worker asked Kevin to leave because Kevin was yelling.

Kevin's anger is further demonstrated in viewing his reaction when he learned [Brian] talked to me about the incident. First, Kevin confronted [Brian] about the conversation. Kevin then got angry with [Brian] and kicked the area around [Brian's] chair. [Brian] was frightened by Kevin's reaction.

Kevin's reaction indicated he is not capable of promoting a relationship with Jodi. Kevin told [Brian] his mother tried to "manufacture crisis" by bringing Shaun to the hotel. Kevin told [Brian] the reason Jodi brought Shaun to the hotel was to help her court case because it caused him to react in the manner he did. . . . Kevin does not seem to appreciate that he placed [Brian] in the middle. Kevin claimed he made the statements to inform [Brian] of the situation created by his mother.

The undersigned recognizes her recommendation has changed since the hearing on temporary matters. Jodi's conduct in her personal life remains a concern as discussed in the [earlier report.] Jodi has been with Shaun for a short period of time and it is difficult to ascertain what the future will bring. However, the children have done well in her household, developed a relationship with Shaun and have not been subject to the level of negativity Kevin has demonstrated.

The GAL testified that prior to the temporary hearing, she had been informed that Kevin had anger issues, but she had not verified that characteristic until after the hearing on temporary matters. She testified that initially she felt this was a close case, but that Kevin's behavior and negativity had made her decision "a little easier."

On August 24, 2009, the district court filed the decree of dissolution in which the court awarded Jodi physical care of the children, rejected Kevin's claims that Jodi had dissipated marital assets, and denied Kevin's request for rehabilitative alimony. The court found that application of the child support

guidelines would be unjust and waived Kevin's child support obligation.² However, the court imposed all of the children's transportation costs incurred in the exercise of visitation upon Kevin.

Kevin now appeals. He argues the court erred in: (1) its division of assets and liabilities, (2) failing to award him rehabilitative alimony, and (3) not awarding him attorney fees. He also argues the court erred in awarding Jodi physical care. He asks for an award of appellate attorney fees. We will address each argument in turn, providing further facts when relevant.

II. Scope and Standard of Review.

We review dissolution cases de novo. Iowa R. App. P. 6.907 (2009). "Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of witnesses." *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007) (citation omitted). Our determination necessarily depends on the facts of the particular case and, consequently, precedent is of little value. *Id.* We approach our review from a gender-neutral position. *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002).

² Although the record does not reflect it, appellant's counsel at oral argument noted, and appellee's counsel conceded, that the district court adopted almost verbatim, Jodi's proposed findings of fact and conclusions of law. Our courts have highly discouraged the practice of adopting verbatim the proposed findings and conclusions submitted by one of the parties. *In re Integrated Res. Life Ins. Co.*, 562 N.W.2d 179, 181 (Iowa 1997); *In re Marriage of Siglin*, 555 N.W.2d 846, 848 (Iowa Ct. App. 1996). We recognize legitimate concerns as to the extent of the judge's actual input into the process when adopting a proposed decree verbatim, but these concerns do not necessarily mean the decision was not a product of independent judicial judgment. *Siglin*, 555 N.W.2d at 848. In any event, our review in this case is de novo, and we therefore proceed to a discussion of the merits of the present appeal.

III. Discussion.

A. *Distribution of assets.* In a dissolution of marriage, the court makes an equitable distribution of “all property, except inherited property or gifts” after considering numerous statutory factors, including the length of the marriage, contributions of each party to the marriage, the age and health of the parties, each party’s earning capacity, and any other factor the court may determine to be relevant to any given case. Iowa Code § 598.21(5) (2009); see *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). 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.

“Equitable distribution” essentially means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties.

Schriener, 695 N.W.2d at 496.

In dividing marital property, we generally consider the net worth of the parties at the time of the trial. *Dean*, 642 N.W.2d at 323. However, Kevin contends the appropriate date for determining net worth in this instance is the date of separation, not the date of the dissolution hearing.

Kevin contends that Jodi dissipated marital assets, for which he should be reimbursed. Specifically, he argues Jodi withdrew approximately \$25,500 from her IRA between the time they separated and the date of trial, which she used for attorney fees and expenses, and which should be attributable to her in determining an equitable distribution. Jodi responds that the money was used to pay family expenses, attorney fees for custody cases in two states, moving

expenses for both Kevin and her, and transportation expenses for the children and her for visitation. She testified that marital funds paid for Kevin's moving expenses during this time period, and she paid Kevin in excess of \$7000 support during the separation, and continued to pay for his insurance, other personal expenses, and debts. She states she was "simply meeting the financial needs of the family, as she has done throughout the marriage."

We have previously held dissipation of assets is a proper consideration when dividing property. In determining whether dissipation has occurred, courts must decide "(1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." The first issue is an evidentiary matter and may be resolved on the basis of whether the spending spouse can show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence. The second issue requires the consideration of many factors, including

(1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.

Fennelly, 737 N.W.2d at 104-05 (citations omitted). Courts may also consider "[w]hether the dissipating party intended to hide, deplete, or divert the marital asset." *Id.* (quoting *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 952 (Ind. Ct. App. 2006), and citing *In re Marriage of Cerven*, 335 N.W.2d 143, 146 (Iowa 1983) (holding property transferred by a spouse to avoid support obligation may be considered on the issue of property distribution as well as alimony)).

The trial court found "[t]here was no evidence that Jodi dissipated any marital assets." In support of this conclusion, the court stated that "[a]ll assets at

issue were acquired with or attributable to Jodi's income without any financial contribution from Kevin." The trial court also concluded that "[a]ll assets should be valued as of the date of the divorce. . . ."

We disagree with the rationale of the trial court because the factors the court must consider in fixing a property award refer to the contributions each spouse makes to the marriage, not the source of the income. See Iowa Code § 598.21(5). As we have previously summarized:

The partners in a marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." We consider property division and alimony together in evaluating their individual sufficiency. The Iowa courts do not require an equal division or percentage distribution. The determining factor is what is fair and equitable in each particular circumstance.

In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991) (citations omitted).

Notwithstanding, with the exception of the payment of attorney fees, we conclude there is substantial evidence to conclude that the monies used by Jodi were for family expenditures and as such, do not amount to dissipation of assets. See *Fennelly*, 737 N.W.2d at 104. The moneys were used to pay for moving both parties to their new locations and transportation to visit the children.

The exception relates to the fact that Jodi spent \$13,500 for payment of her attorney fees. Because marital assets were used to pay her attorney fees, in effect, Kevin has been required to pay one-half of her attorney fees. In light of the parties' disparate incomes, we find this to be unjust. Thus, we find Jodi should pay one-half of the \$13,500 to Kevin.

We otherwise find no reason to disturb the trial court's finding that the parties' assets should be valued at the time of trial and the distribution of those assets.

B. Alimony. Kevin contends the trial court erred in not awarding him rehabilitative alimony.

Spousal support is provided for under Iowa Code section 598.21A. Whether spousal support is justified is dependent on the facts of each case. See *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Entitlement to spousal support is not an absolute right. *Id.* Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and re-training. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). The goal of rehabilitative alimony is self-sufficiency. *Id.*

For eight of the ten years of the parties' marriage, Kevin pursued a career as a stand up comedian. This career choice was agreed upon by Jodi as a part of the family agreement to move to Iowa. There is no dispute that Kevin was an economically dependent spouse. He readily admits he "cannot be self-supporting as a stand-up comedian." Kevin requests an award of rehabilitative alimony of \$1000 per month for thirty-six months.

The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21A(1). These factors include: (1) the length of the marriage, (2) the age and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of each party at the time of dissolution action is commenced, (5) the earning capacity of the party seeking alimony, and (6) the feasibility of the party seeking maintenance becoming self-

supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A(1)(a)–(f). As noted, we look not only at the parties' earnings but also at their earning capacity. See *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). If both parties are in reasonable health, as here, they need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for support. See *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988).

Kevin's work as a stockbroker and investment counselor was eight or more years ago. He has worked in sales. He has attended three years of college and obtained an associate of arts degree in criminal justice. However, he testified he had no intention of using that degree. Rather, he has plans to attain an education degree, which may take up to three years to obtain.

Upon our de novo review, we conclude Jodi should pay \$500 per month in rehabilitative alimony for a period of twelve months. During this time period, Kevin can substantially complete his work to obtain a college degree and procure other employment to become financially independent from Jodi.

C. Trial attorney fees. Kevin asserts that he should have been awarded trial attorney fees. The district court found each party should be responsible for his or her own attorney fees. An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We find no abuse of discretion.

D. Physical care of children.

Iowa law distinguishes custody from physical care. Custody concerns the legal rights and responsibilities toward the child, including decisions “affecting the child’s legal status, medical care, education, extracurricular activities, and religious instruction.” Physical care, on the other hand, is “the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.” When considering the issue of physical care, the child’s best interest is the overriding consideration. We are guided by the factors set forth in Iowa Code section 598.41(3) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). If joint physical care is not appropriate, “the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights.”

Fennelly, 737 N.W.2d at 100-01 (citations omitted).

The GAL made an extensive review of the filings in this case; interviewed the children, the parents, Shaun Patman (Jodi’s fiancé), teachers, and counselors; and submitted two reports, one on temporary matters, and one for trial. She testified:

I think what makes this case difficult is that both children are pretty resilient in terms that they can be in New York and do well, they can be in Texas and do well. Their peers like them. Their teachers like them. People think they are bright and well-mannered, they are well-behaved kids. That the divorce is starting to take a toll on Brian because he’s feeling like he’s caught up in the middle. I think that Jodi has parented the kids well. I think that Kevin has parented the kids well, with the exception of the comments that were made recently. You know, my feeling was that neither party has acted in a great manner. Given the situation that Jodi brought to the table earlier on, and then Kevin’s interactions recently with the children, I didn’t feel either party had made wise choices regarding the children. And it was just a matter of who was less negative, I guess, who was going to — whose behavior would affect the kids less.

The GAL recommended that Jodi have physical care of the children. She summarized:

I think they have done well in Jodi's care. Brian's continued to improve in school. Brian has never reported to me that Jodi has said negative things about Kevin, whereas Kevin has said negative things about Jodi that were, in my mind, substantial to what was going on. And I don't think that Kevin really understood the ramifications of what he said or how that made Brian feel for that matter.

The district court found that the GAL's final report, conclusions, and recommendations were supported by consistent with the evidence and were entitled to great weight. The court concluded:

The children are in a stable, wholesome and loving environment, and have fully adjusted in their current living arrangement with Jodi. In addition they are bonded with their new half sister and future step-father and step-brother. The children are prospering with Jodi, and have progressed significantly well in school and with their other personal relationships. They are fully adjusted and settled in their schools and extracurricular activities, and are happy back in the primary care of their mother. As reported by the guardian ad litem, Jodi has fostered and would continue to foster a positive relationship with the children and Kevin, although it would be unlikely that his would be reciprocated.

Jodi should be awarded physical care of the children.

Upon our de novo review, it is evident that both parties love and can adequately care for their children. The record also supports the findings that Kevin has difficulty controlling his anger and has inappropriately involved Brian in Kevin's conflict with Jodi. The district court had the opportunity to observe the witnesses and concluded primary care should be awarded to Jodi. We see no reason to disturb the district court's decision.

E. Appellate attorney fees. Kevin also requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the

ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We decline to award Kevin appellate attorney fees.

Costs on appeal are assessed one-half to each party.

IV. Conclusion.

We affirm all aspects of the dissolution decree except we order Jodi to pay \$6750 to Kevin, which is one-half of the amount of marital assets she used for payment of her attorney fees. In addition, we award Kevin rehabilitative alimony in the amount of \$500 per month for a period of twelve months. We affirm as modified.

AFFIRMED AS MODIFIED.