IN THE COURT OF APPEALS OF IOWA

No. 0-410 / 09-1907
Filed July 14, 2010

IN RE THE MARRIAGE OF MICHAEL A. FREDRICKSON AND HEATHER L. FREDRICKSON

Upon the Petition of

MICHAEL A. FREDRICKSON,
Petitioner-Appellant/Cross-Appellee,

And Concerning

HEATHER L. FREDRICKSON,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney, Judge.

Petitioner appeals from the child custody, visitation, and support provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Lynn Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellant.

Melissa Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Michael A. Fredrickson appeals, and Heather L. Fredrickson cross-appeals, from the decree dissolving their July 2002 marriage. Michael challenges Heather receiving primary care of their daughter, born in September of 2003. Both parties challenge certain provisions concerning visitation with the child and other financial aspects of the decree. We affirm as modified and remand.

SCOPE OF REVIEW. We review dissolution decrees de novo. Iowa R. App. P. 6.907 (2007); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). We examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1982). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); *see also In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

BACKGROUND. The parties met in 2000. Heather was married at the time and she and her husband had a son and a daughter who were then seven and six years of age. Heather subsequently left her first marriage and moved in with Michael, who had never been married. Michael and Heather married on July 13, 2002. At the time of the marriage Heather was suffering from post-traumatic stress disorder and depression. Her first husband had been abusive. Michael

and Heather were living Titonka, Iowa, when Heather became unhappy in her marriage to Michael, and she became romantically involved with Randy Rosenboom. In April of 2008 Heather moved to Estherville, moving in with Rosenboom. She took her two older children with her but left the child at issue in Michael's care. It had been agreed the child would stay with Michael until Heather's move was completed, at which time the child would move from home to home on a weekly basis.

On April 18, 2008, Michael filed a petition for separate maintenance. Heather subsequently filed an answer to the petition in which she included a counterclaim asking for dissolution of the marriage. On June 11, 2008, Michael filed an application for a custodial evaluation. Heather responded to the application asking that Michael be required to pay for same. On July 7, 2008, the district court ordered that the Des Moines Child and Adolescent Guidance Center be appointed, pursuant to Iowa Code section 598.12 (2007), to conduct a custody evaluation and file a report of conclusions.

On July 25, 2008, Heather, who had become unhappy with the fact the child attended a preschool in Titonka where Michael's sister taught, filed an application for temporary custody, visitation, child support, spousal support, and attorney fees. An order setting the matter for hearing on September 2, 2008 was entered and the parties were ordered to present affidavits and financial statements. The district court found as to temporary custody that the parties should have joint legal custody, Heather should have primary physical care, and Michael should have secondary physical care and visitation. In arriving at the

primary care decision the court noted it gave consideration to the principal that children of broken homes should be kept together and that also includes half siblings. Michael was ordered to pay child support and provide the medical and dental insurance for the child.

The ordered custody evaluation commenced on September 3, 2008, and continued through October 16, 2008. Keri Kinnaird, Ph.D. Psychology Supervisor with Orchard Place Child Guidance Center, conducted an extensive evaluation. She interviewed at length the parties, the child, and Rosenboom. She also had a telephone interview with the child's Head Start teacher. Her written report recommended:

> that [the child] be placed in the primary physical care of her father to have time with her mother and older siblings three weekends each month . . . .
>
> I am making this recommendation because I believe Mr. Fredrickson and his extended family are in a better position to provide a predictable, secure home base for the child.

Kinnaird testified at trial and affirmed her written recommendation.

On December 22, 2008, Michael filed an application asking the court to reconsider the temporary custody order, noting that in response to the order for custody evaluation the ordered report had been filed recommending that Michael be primary custodian of the child. Michael also noted that hearing on the dissolution was not set until May 13, 2009, some 359 days after Heather was served with notice of his petition, and that leaving the temporary order in place for an additional five months was contrary to the recommendation of the court-ordered custody evaluation. The district court declined the application to modify temporary custody.

The matter came on for trial on May 13, 2009. At the time of the hearing Michael, who has a bachelor's degree, was gainfully employed. He testified he was focused on his child and was not interested at the time in establishing another romantic relationship. He has had stability in employment. He has the assistance of his extended family[1] in Titonka to assist with the care of his child. He was born in September of 1960 and appears to be in excellent health.

At the time of the hearing Heather, who has an associate degree, was gainfully employed. She continued in her relationship with Rosenboom. Rosenboom was divorced, had children of his own, and appeared to have a good relationship with Heather's children. Kinnaird testified she had no concerns about Rosenboom. He holds several degrees and has stable employment. Heather had a difficult marriage prior to her marriage to Michael. She was thirty-six years old at the time of trial and had suffered from and had been treated for post-traumatic stress syndrome following an assault by her first husband. She suffered from depression and apparent blackouts. Kinnaird testified she questioned Heather's ability to cope with stressful situations over the long haul and how it would impact the child.

On December 8, 2009, over six months following the hearing, the district court filed its lengthy decision deciding a number of issues including primary physical care, child support, allocation of the income tax exemption for the child, health insurance, attorney fees, and a division of the parties' property. The portions of the decree (1) awarding Heather primary physical care, (2) granting

[1] Michael's sister and her husband, two nephews, a niece, and his mother with whom he enjoys a close relationship live in Titonka.

Heather the tax exemption for the child, and (3) giving Michael's visitation are challenged on appeal. Heather has cross-appealed contending that (1) the district court erred in calculation of child support, (2) the property award was not equitable, and (3) she should be awarded appellate attorney fees.

PHYSICAL CARE. Michael contends he should have been awarded primary care of the parties' daughter. We consider numerous factors in determining which parent should have primary physical care of a child. *See* Iowa Code § 598.41(3). We look to which parent can administer most effectively to the children's long-term interests. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). We also consider the emotional and environmental stability each parent offers. *Id*. at 762. There is no inference favoring one parent over the other. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003). The "critical issue is determining which parent will do a better job raising the children; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain primary care in an original dissolution proceeding." *Id*.

The district court considered a number of these factors, found both parents able to serve as primary custodian, and indicated because of this the decision was difficult. The court then said:

> Ultimately, this court's decision comes down to separating siblings, and that [the child] has been doing well in the temporary custody of Heather. Siblings in dissolution actions should be separated only for compelling reasons. The court finds no compelling reason to separate [the child] from her half siblings. Therefore, the court finds that Heather should be the primary caretaker for [the child].

Michael advances that Dr. Kinnaird, while considering the issue of separation of half siblings, concluded that the child's long-term best interest would be in Michael's primary care. Michael argues, citing *In re Marriage of Pundt*, 547 N.W.2d 852, 854 (Iowa Ct. App. 1996), and *In re Marriage of Harris*, 530 N.W.2d 473, 475 (Iowa Ct. App. 1995), that separation of children is justified where it better promotes their long-range best interests. He notes that one factor, aside from the caretaking capability of the parties, in determining whether separation is in the best interest of the child is the difference in the age of the children being separated. He notes that by 2012, Heather's son and her older daughter will have left Heather's home.[2] He also argues that while the child's statements about her relationship with her older half sister were predominantly positive, her description of her relationship with her older half brother was negative, and she described him as the person who makes her feel "afraid," "too angry," "impatient," and "sad." She described him as a person who yells at her mother and makes her afraid, and noted that he hurts their feelings. She also noted that Rosenboom also yells at her half brother. Michael argues the district court ignored this evidence and Dr. Kinnaird's findings in reaching its conclusion there are no compelling reasons to separate the half siblings.

Michael also contends the district court's finding that the child was doing well in Heather's temporary custody is not supported by the facts. He notes his testimony that the child cries most of the time at the conclusion of his visits. He points to Kinnaird's testimony that the child presented negative aspects of her

[2] At the time of the hearing the child at issue was in kindergarten, her half brother was a sophomore and her half sister was a freshman.

relationship with her half brother as well as her worries and concerns about his behavior, that Heather might not be fully aware of or ready to address what the child might be feeling, and her conclusion it probably is not in the child's best interest to have her half brother as a primary babysitter when Heather is not home. Kinnaird testified:

> [W]henever I hear a small child telling me about a negative relationship with a much older sibling and the parent isn't aware of or is not talking about it with me, then I am wondering, is the little girl telling her mom, is this something people are not aware of, or is it something people are aware of and not paying sufficient attention.

Heather contends she was the primary care parent and has more parenting experience than does Michael. She points to raising her two children, the fact that she was the nanny for her first husband's children, who apparently were three, four, seven, and eight when she married, and that she helped him raise them for thirteen years. She points out her older daughter is doing well in school but recognizes her son needs assistance. She contends she left the marriage because Michael was not a good step-father to her children.

Heather has a different opinion of Rosenboom's parenting skills. She testified that he is an older, educated gentleman who is easy going and gets along well with her children. While she has placed Rosenboom in her children's life, she testified she has no immediate plan to marry him. Heather also contends she is involved with her child's education, serves as an aide to the teachers, and attends parent-teacher conferences. She also contends she is more likely to support the child's relationship with her father than he is to support the child's relationship with her. She further contends is it not in her children's

interest to be separated from her half siblings, and the report of the child investigator is not controlling.

During the parties' time together, Michael worked outside the home, and Heather either worked outside the home or was attending school, and both were engaged in assisting with their daughter's care. At the time of separation it was agreed that the child should remain with her father until Heather's move was completed and then the parties would share her care. The parties were sharing parenting responsibilities. Consequently, we disagree with Heather that during this time she was the primary care parent.

A temporary order placed the child in the primary care of her mother. The delay in obtaining a trial date resulted in the child being in her mother's primary physical care for some period before the dissolution hearing. This temporary order created no presumption that she should be the preferred parent in the final custody decision. *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1988). Nor does it put a higher burden on Michael to have it changed. *See In re Marriage of Short*, 373 N.W.2d 158, 160 (Iowa Ct. App. 1985).

We agree with the district court that either parent would be an adequate primary care parent and that they have shown the ability to work together when considering the child's care.

Siblings in dissolution actions should be separated only for compelling reasons. *See In re Marriage of Gonzales*, 373 N.W.2d 152, 155 (Iowa Ct. App. 1985); *In re Marriage of Mayer*, 347 N.W.2d 681, 684 (Iowa Ct. App. 1984). The principle also has been recognized as having application to half siblings. *In re*

Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993); *see also In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986); *In re Marriage of Hunt*, 476 N.W.2d 99, 102 (Iowa Ct. App. 1991). Separation of children is justified when it is found to promote their long-range best interests better. *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981), *In re Marriage of Harris*, 530 N.W.2d 473, 474 (Iowa Ct. App. 1995). There is a strong interest in keeping children of broken homes together. *See Jones*, 309 N.W.2d at 461; *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 517 (Iowa 1976). We are directed that half brothers and sisters should be separated only where it may better promote the long-range interest of the children. *Orte*, 389 N.W.2d at 374; *In re Marriage of Holcomb*, 471 N.W.2d 76, 80 (Iowa Ct. App. 1991).

The three children have a relationship. The child at issue has spent a considerable part of her life with her two half siblings. She appears to have a good relationship with her older half sister. These factors support keeping her in her mother's home. That said we also consider the fact the half siblings are considerably older than the child here, the concern of Kinnaird about the child's relationship to her half brother, and Heather's apparent inability to recognize and deal with it.

We give Heather credit for recognizing the importance of Michael to their daughter and her cooperation prior to trial with Michael to assure he had substantial contact with his daughter. Giving the required deference to the district court we affirm the award of primary care. We affirm on this issue.

VISITATION. Michael was given visitation every other weekend, every other holiday, and the months of June, July, and August, subject to Heather having the child every other weekend during these three months. Michael contends he should have additional visitation. Heather contends he should have less. We find no reason to disturb the visitation schedule set by the district court. The evidence indicates that it is important the child have substantial contact with her father, and further, the visitation set decreases the time she will spend with her half brother. We affirm on this issue.

PROPERTY DIVISION. The district court determined that the parties' equity in their home was $47,000 and awarded Heather one-half thereof or $23,500. The court divided certain personal property, noting that "the court has little information to indicate the value of any of these items." The court gave each party their IRAs. The court denied Heather's claim that Michael should reimburse her for a workers' compensation check that came to their home in 2007 and that Michael put in their joint checking account that was used to pay bills and credit card debt of the parties.

Iowa is an equitable division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id*. Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *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. *Id*. The determining factor is what is fair and equitable in each circumstance. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(5). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not demanded. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007).

Heather contends the disposition of certain items of personal property was not equal and it should be equalized by requiring Michael to make a payment to her. The district court, after dividing these items said:

> The court has little information to indicate the value of any of these items. The court considers these items to have minimal value and has taken these items into consideration in reaching the overall equitable distribution of property.

The parties did not agree on values. Michael allegedly had some of the items the court distributed prior to his marriage to Heather and some were inherited. We agree with the district court that the value of the items is not clear. We defer to the trial court's valuations on property when they are accompanied by supporting credibility findings or corroborating evidence, *see In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999), and are within the permissible range of the evidence presented at trial. *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997). We find no reasons to disagree with the district court's division of assets.

Heather argues she should have one-half of Michael's IRAs in the amount of $8964.80. Heather at the time of trial had an IRA valued at $2763, and

testified that in 2008, after the parties' separation, she liquidated three pension accounts of $4541 for a total of $7304. Michael argues the result is that he received a retirement account of $8964.80 and Heather one of $7304 so the division is equitable.

We disagree. Generally, valuations and divisions of property are to be made at the date of trial. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989). We find no reason to depart from that rule here. The two IRAs total $11,727.80. It is equitable that they be divided equally, which should leave each party with an IRA of $5863.90. We modify the decree to provide that Michael shall allocate $3000 of his IRA to Heather.

CHILD SUPPORT. The court ordered Michael to pay child support of $452.50 a month and gave the child's tax exemption to Heather. Michael challenges the allocation of the tax exemption. Heather challenges the amount of the child support. She does not provide us with her calculations as to how she contends the child support should be computed but asks that we remand the matter to the district court to consider factors she claims the court did not consider. She had the right to raise these challenges in a post-trial motion but failed to do so. We affirm the allocation of the tax exemption. We remand to the district court to reconsider the child support award.

ATTORNEY FEES. Heather had requested the district court to order Michael to pay her attorney fees of $8153.99. The court noted that Michael's attorney fees were $11,504.58. The court ordered Michael to pay $2500 towards Heather's attorney fees. Heather challenges this allocation. The trial court has

considerable discretion in fixing fees and costs. *See Muelhaupt*, 439 N.W.2d at 662-63. We find no abuse of discretion and affirm the trial court on this issue.

APPELLATE ATTORNEY FEES. Heather requests that the district court order Michael to pay her appellate attorney fees in the amount of $5000. We award her attorney fees of $1500. Costs on appeal are taxed to Michael.

AFFIRMED AS MODIFIED AND REMANDED.