IN THE COURT OF APPEALS OF IOWA

No. 0-517 / 10-0145
Filed November 10, 2010

IN RE THE MARRIAGE OF
STEPHANIE ANN PETERSEN
AND JASON RAND PETERSEN

Upon the Petition of
STEPHANIE ANN PETERSEN,
Petitioner-Appellant,

And Concerning
JASON RAND PETERSEN,
Respondent-Appellee.

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

A wife appeals various provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Patrick H. Payton, Des Moines, for appellant.

Nichole Mordini of Davis Brown Law Firm, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

VAITHESWARAN, P.J.

Stephanie Petersen appeals the custody and property provisions of a dissolution decree.

I. Background Facts and Proceedings

Stephanie and Jason Petersen married in 2006 and separated approximately a year and a half later. They have one son, born in 2007.

Stephanie petitioned for a dissolution of the marriage. In a temporary order, the district court granted Stephanie physical care of the child, subject to visitation with Jason

> from Tuesday after daycare to the start of daycare Wednesday morning and Wednesday after daycare until the start of daycare on Thursday morning, every week . . . [and] [o]n alternating weekends . . . after daycare on Friday until the start of daycare Monday morning.

Following trial, the district court entered a decree finding Jason, rather than Stephanie, the primary caretaker of the child but nonetheless granting Stephanie physical care, subject to "parenting time" with Jason every week from Tuesday to Thursday and every other weekend.[1]

Jason filed a motion to reconsider. *See* Iowa R. Civ. P. 1.904(2). In response, the court amended the decree to afford the parents joint physical care of the child. The court retained the same parenting schedule set forth in the original decree. The court also divided the property, (A) awarding Jason the family home, (B) requiring Stephanie to pay Jason $4000 in connection with a vehicle purchase, (C) allocating the tax refund and stimulus checks, (D)

[1] The court extended Thursday visitation time to 3:00 p.m. and specified drop-off at day care would be no later than 7:30 a.m.

allocating personal property, (E) ordering Stephanie to repay a loan made by Jason's mother, and (F) equally allocating the costs of a custody evaluator. Finally, the court denied Stephanie's request for attorney fees. Stephanie appealed.

II. Joint Physical Care

Stephanie contends the district court acted inequitably in granting the parents joint physical care of the child. She preliminarily notes that the district court's amended decree is nearly a "verbatim adoption of Jason's proposed finding of facts" and she asserts the decree does not reflect "independent judgment." Even if the amended decree were identical to Jason's proposed decree,[2] we would be obligated to "review the evidence anew, disconnected, ultimately, from the trial court findings." *See In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996). For that reason, we decline to modify the court's decree simply because it may replicate Jason's proposed decree. *See id.*

The Iowa Supreme Court set forth the framework for our analysis of joint physical care in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007). Among the factors to consider are the "historic patterns of caregiving" and the relationship of the parties. *Hansen*, 733 N.W.2d at 698–99.

The child was with both parents for a little over a year. The district court found that for most of this period, "Jason was the primary caretaker." The record supports this finding. Before the parents separated, Jason assumed most of the childcare duties, including pre- and post-daycare activities. Following the parents' separation and the entry of the temporary order, Jason had the child

[2] The proposed decree is not in the record.

close to fifty percent of the time. There is scant evidence to suggest this arrangement was proving unworkable or even problematic. *See In re Marriage of Gensley*, 777 N.W.2d 705, 715 (Iowa Ct. App. 2009) ("The parties' inability to communicate and cooperate must rise above the 'usual acrimony that accompanies a divorce.'" (citation omitted)).

The problematic evidence for Jason is a custody evaluator's suggestion that Jason exaggerated the scope of his caretaking responsibilities. Of equal concern is the evaluator's comment that Jason showed less maturity and confidence in the parenting process than did Stephanie. While the evaluator acknowledged that both parents "displayed a loving, protective and attentive style" and "a commitment to the child," he cited Jason's troubled past[3] and continued dependence on his parents as reasons to place the child with his mother.

The evaluator elaborated on his written opinions at trial, stating a well-implemented "fifty-fifty" arrangement was "[v]ery rare." He admitted both parents "advocate[d]" this type of arrangement but said, "[I]t isn't in the cards at the moment, and it isn't best for the child."

Based on the custody evaluator's recommendation, the district court could have reasonably granted Stephanie physical care of the child, subject to liberal visitation with Jason. But the district court's findings suggest the court placed more stock in Jason's summary of his parenting time and duties than did the custody evaluator. It was the court's prerogative to evaluate credibility in this

[3] Jason had a substance abuse history that resulted in his incarceration for a period of time and the suspension of his driver's license.

fashion. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996) ("[I]n the end we determine this to be a close case, for both parents love their children very much and each is capable of providing for their long-range best interests. In situations such as this, we note the district court had the parties before it and was able to observe and evaluate the parties as custodians."). Given the court's findings, which, as noted, are supported by the record, we conclude the court acted equitably in rejecting the custody evaluator's recommendation and opting for a joint physical care arrangement. Notably, the court's re-designation of the care arrangement from primary physical care to joint physical care[4] made little practical difference, as the court retained the parenting schedule and child support figure set forth in the original decree.

III. Property

The first task in dividing property is to determine what property is subject to division. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). The second task is to equitably divide the property according to the statutory guidelines set forth in Iowa Code section 598.21 (2007). *Id.*

A. Home. As noted, the district court awarded Jason the family home. The court did not assign a value to the home and did not order Jason to pay Stephanie for her interest. The court explained, "Jason has agreed to pay day-care and educational expenses for the couple's minor child to compensate Petitioner for any interest she may have."

---

[4] The court actually used the phrase "shared physical custody," but we believe the court intended "joint physical care." *See* Iowa Code section 598.41(5) (2007) (allowing the court to award "joint physical care to both joint custodial parents upon the request of either parent").

On appeal, Stephanie contends the home should be valued and sold, with the net proceeds divided equally. Jason counters that the entire down payment was funded with premarital gift money and this sum should be excluded from the property distribution. He maintains Stephanie's interest "does not survive the separation," as she did not make the mortgage payments after the separation and funds obtained through refinancing were used to pay her premarital debts. We agree with Jason.

The home was purchased within three months of the beginning of the short marriage and, at the time of trial, was valued at between $154,000 and $160,000. The down payment of approximately $106,000 came exclusively from Jason, and specifically from a gift made to him by his grandmother, as well as from an account Jason's parents set up for him as a child. This was gifted money that could have been set aside to Jason. *See id.* However, because it was used to purchase a jointly-owned home, the court did not act inequitably in declining to separate it from the property subject to distribution. *See id.* (stating the statutory exclusion for gifted property is not absolute). That said, the court could and did consider the fact that much, if not all, of the home's equity was generated by Jason.

The home's debt, on the other hand, was in large part attributable to Stephanie. The parties refinanced their home shortly before they separated. The funds obtained in the refinancing were partially used to pay off Stephanie's premarital student loans of $6303, $6816, $5604, and $4035, as well as her premarital car loan of $821.

Jason also paid approximately $7000 in delinquent mortgage payments from the post-separation period when Stephanie alone was living in the home. And he paid for flood damage not covered by insurance. In short, Jason expended far more on the home and on home-related expenses than did Stephanie.

We conclude the district court acted equitably in awarding Jason the home without requiring him to pay Stephanie for her interest in the property. Notably, the court held Jason responsible for the outstanding mortgage balance of $83,197.09.

B. Vehicles. Stephanie contends the district court should not have ordered her to pay Jason $4000 in connection with her purchase of a vehicle. The record reflects she purchased a GMC Yukon by trading in a Ford Explorer after she separated from Jason and without his authorization. Under these circumstances, we conclude the district court acted equitably in ordering the payment.

C. Tax Matters. The district court awarded Jason "one-half of the 2007 and 2008 state and federal income tax returns." Stephanie asserts the parties reached an agreement concerning the 2007 tax refund under which she was to receive $5000 and Jason was to receive $2000. The record supports her assertion. Accordingly, Jason owes Stephanie $1500 ($3500, representing Jason's half of the $7000 refund under the decree, minus $2000, representing the amount Jason was to have received under his agreement with Stephanie). We modify the decree to provide for this payment.

The second tax matter involves a 2008 stimulus check of $1800. The district court ordered an equal division of the check. Stephanie argues the equal division was inequitable because $300 of the check was attributable to her child from a previous relationship. She asserts Jason should receive $600 for himself, $150 for their child, and nothing for her child, for a total of $750. This is $150 less than the court ordered.

We decline to redistribute the stimulus check because Stephanie cashed the entire check and deposited it into her account, even though a portion of it was attributable to Jason. Under these facts, the court reasonably could have decided that the entire $300 attributable to his child with Stephanie and the $600 attributable to Jason, should be allocated to him.

D. Personal Property. Stephanie next takes issue with the district court's personal property distribution. The decree stated:

> The Petitioner shall be awarded the property currently in her possession with the exception of: 1 television; 1 leather couch; 1 T.V. stand; 1/2 of the kitchen utensils, including pots and pans; 1/2 of the family photos and framed art; the computer; his iPod; 1/2 of the towels, bedding, and blankets, and rugs; [the child's] bed; the trampoline; the pool; his wedding ring; and his "Lazy Boy" chair, which shall be awarded to the Respondent.

Stephanie asserts this list came from Jason's proposed decree and there is little evidence to support it. At oral argument, Jason conceded that most of the items set forth above were not discussed at trial. The only items he specifically sought at trial were an iPod, a computer, and one of three leather couches.[5] We modify

[5] One of the couches sustained water damage and was not usable. It is not clear whether this couch was among the three leather couches Jason mentioned. At trial, Jason asked that the couches be "split" between the parties. We assume from Jason's use of the word "split" that only two couches remained to be divided.

the decree to delete the references to all the items except "1 leather couch," "his iPod," and "the computer."

E. Parental Debts. The district court ordered Stephanie to repay Jason's mother $4000 for a premarital loan. Stephanie acknowledged the existence of this loan, but contended she repaid her mother-in-law $1000 before trial. Jason's mother countered that she had not been repaid anything despite Stephanie's promise to repay the entire loan after receiving a tax refund. While she conceded a $1000 payment was made to her husband, her husband testified the payment was presumed to be for a separate debt owing to both of them.

Jason's parents gave the couple significant financial assistance in addition to this loan, which was actually in the amount of $4400 rather than $4000. Given their largesse and Stephanie's unfulfilled commitment to repay the entire loan in a lump sum, we conclude the district court acted equitably in ordering Stephanie to pay $4000 toward the obligation.

We find it unnecessary to address the remaining debts and debt allocation.

F. Child Custody Evaluator. The district court held the parties equally responsible for the costs and fees associated with the appointment of the child custody evaluator. Stephanie asserts Jason was the party who requested the evaluator and he should have been held exclusively responsible for these costs and fees. The record reflects that Stephanie agreed to the appointment. Under these circumstances, we conclude the district court did not abuse its discretion in dividing these costs equally.

IV. Attorney Fees

Stephanie argues the district court should have granted her request for trial attorney fees. Review of the district court's decision is for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We discern no abuse, as Stephanie was receiving some income in the form of unemployment compensation, Jason earned less than $20,000, and Stephanie did not prevail. *See id.* (stating that whether attorney fees should be awarded is dependent on the parties' abilities to pay).

Both parties request appellate attorney fees. Although both parties partially prevailed, we decline to order either party to pay any portion of the other's fees. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (noting award is within our discretion).

V. Disposition

We affirm the district court's physical care determination and all aspects of the property division except the following. We modify the portion of the decree relating to tax matters to provide that Jason shall pay Stephanie $1500 in connection with the 2007 tax refund. We modify the personal property division to provide that Jason shall only receive the iPod, computer, and one leather couch.

Costs on appeal are assessed equally to both parties.

AFFIRMED AS MODIFIED.