

IN THE COURT OF APPEALS OF IOWA

No. 1-973 / 11-1283
Filed February 29, 2012

**IN RE THE MARRIAGE OF ANNA E. PRITCHETT
AND JEREMY L. PRITCHETT**

**Upon the Petition of
ANNA E. PRITCHETT,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
JEREMY L. PRITCHETT,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Page County, J.C. Irvin, Judge.

Anna Pritchett appeals and Jeremy Pritchett cross-appeals the decree issued by the district court dissolving their marriage. **AFFIRMED ON BOTH APPEALS.**

Meredith C. Mahoney Nerem and Ryan J. Mahoney of Jordan & Mahoney Law Firm, P.C., Boone, for appellant.

Suellen Overton, Council Bluffs, and Helen Savage, Council Bluffs, for appellee.

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

DOYLE, J.

Anna Pritchett appeals and Jeremy Pritchett cross-appeals the decree issued by the district court dissolving their marriage. We affirm on both appeals.

I. Background Facts and Proceedings.

Jeremy and Anna married in 1998. Two children were born of the marriage: Madeline, born in 1998, and Rylin, born in 2003. The parties' marital home was in Essex, Iowa, and the family resided there. The parties also owned two rental properties.

Anna has a Bachelor of Science degree in education, and she began working as a special education teacher in 2001. By the agreement of the parties, Anna left the job two years later and was a stay at home mother for a number of years. Jeremy is a high school graduate with some college credits. He worked various jobs until he and Anna opened their business, Tech Support Services (TSS), in 2004. Anna later started another business, Stitches and Baskets.

TSS, a computer services business, is an S Corporation owned wholly by the parties with Jeremy owning fifty-one percent and Anna owning forty-nine percent. TSS is located in one of the properties owned by the parties, and TSS paid the parties between \$30,000 and \$36,000 annually in rent. Jeremy and other TSS employees performed the various technological services offered by TSS, and Anna managed TSS's office and administrative duties, taking calls and maintaining the business's books. TSS owns several vehicles the parties drive, and it pays for gas for the vehicles and other expenses. Additionally it provided and paid for the parties' health insurance. TSS currently pays Jeremy an annual salary of \$38,480.04.

In late 2010, Anna decided to leave Jeremy. On January 4, 2011, Anna removed half of the monies contained in the parties' joint bank accounts. She also removed all the money in the parties' home safe. When Jeremy learned of this later in the day, he confronted Anna. Ultimately, Anna called 911, and an officer responded. Anna stated Jeremy had become violent, shoving her and causing her bruising. Anna admitted Jeremy was holding her purse when she tried to pull it away, resulting in a struggle between the two. Despite Anna's report, the officer saw no bruising on Anna and determined he did not have probable cause to arrest Jeremy. The next day, Anna filed a petition for an Iowa Code chapter 236 (2011) protective order, and a temporary order was entered placing the children in Anna's temporary primary physical care¹ and giving Anna exclusive possession of the marital home.

On January 7, 2011, Anna filed her petition for dissolution of the marriage. She requested joint legal custody of the children with primary physical care. She also requested child and spousal support, equitable division of the parties' property, attorney fees, and for Jeremy to pay the costs. Jeremy responded asserting no spousal support or attorney fees should be awarded to Anna, and he sought joint legal custody of the children with shared physical care, or alternatively, primary physical care, should the court find shared care was not appropriate.

A hearing on the petition for a protection order and other temporary issues was held January 18, 2011, and Jeremy consented to entry of a protective order.

¹ "Primary physical care" is not defined in Iowa Code chapter 598; nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

The district court awarded the parties temporary joint legal custody of the children with primary physical care remaining with Anna. The court ordered that Anna would have temporary exclusive possession of the marital home until February 8, 2011, and she was to remove her personal items from the home by that date. Additionally, she was to make a list of any items of marital property she wished to take and forward the list to Jeremy's attorney for further discussion and negotiation. The court also ordered the children be permitted to have one of Jeremy's cell phones to text and call their father when they desired and for Jeremy to call them once a day, without interference from Anna. Due to ongoing issues, a guardian ad litem (GAL) was appointed for the children in late February.

In early March 2011, Anna was offered employment in Ames, Iowa, and she accepted the position. On the night of March 6, 2011, Anna moved herself and the children to her parents' home in Ogden, a three-hour drive from their home in Essex. Anna also removed numerous household items, including marital property in dispute. Anna did not give Jeremy or the children prior notification of her intentions to move, and the move came as quite a shock to the children, who had attended school in Shenandoah all their lives and participated in sports and other recreational activities there. Anna enrolled the children in the Ogden School District, and she began her new job on March 8, 2011.

The GAL met with the children on March 9, 2011, and they, especially Madeline then age twelve, expressed their displeasure of moving to Ogden. Madeline reported that Anna had taken away the cell phone provided by Jeremy and she and her brother were not permitted to have unlimited contact by phone with Jeremy, their former schoolmates, or anyone else they formerly had regular

contact with except their mother and their maternal grandparents. Thereafter, the GAL filed an application to modify the temporary order in regard to custody. The application stated the children had expressed their desire to live with Jeremy for the remainder of the academic year pending the trial date, so they could continue in their usual school in Essex and participate in their usual activities. The application also stated the children believed Jeremy would not limit their phone contact with Anna as Anna had done. Anna resisted, and the court ultimately denied the GAL's application, finding the dissolution trial was six weeks away. However, the court made some adjustments to Jeremy's visitation and ordered both parents to allow phone access for the children to communicate with the other parent.

Following trial in May and July, the district court on August 5, 2011, entered its ruling dissolving the parties' marriage. The court awarded the parties joint legal custody of the children, and it found it would be in the children's best interests that Jeremy receive primary physical custody of the children, subject to reasonable rights of visitation in Anna. Although the court did not set forth a table delineating its property distribution, it appears the property was divided as follows:

ASSETS:²	JEREMY	ANNA
Marital Home (net equity)	\$63,300.00	
Other rental property (net equity)	\$31,000.00	
Ford Truck		\$21,445.00
Tractor and Forks		\$14,000.00
Mower	\$7,000.00	

² The parties' IRAs, one-half of their 2010 tax return, and money from the safes were a wash and not included in the calculation.

Bush Hog	\$750.00	
John Deere Spreader	\$550.00	
King Kutter Box Scraper		\$500.00
Tractor Chains		\$550.00
H&H Loader Bed Trailer		\$2,500.00
Golf Cart		\$2,000.00
Life Insurance/IPERS	\$737.00	\$1,500.00
Stitches and Baskets		\$12,484.73
Household Items		\$12,000.00
Horses	\$1,750.00	
Ring		\$10,208.00
TSS (not including fixed assets)	\$0.00	
TSS Inventory	\$7,021.00	
TSS Checking Account Funds	\$2,608.00	
TSS Accounts Receivables	\$4,460.00	
TSS owned 2008 Impala	\$12,000.00	
TSS owned 2006 Impala	\$5,000.00	
TSS owned 2008 Lucerne	\$15,000.00	
TOTAL:	\$151,176.00	\$77,187.73

LIABILITIES:	JEREMY	ANNA
TSS Building (net equity)	\$3,000.00	
Loan from Jeremy's mom	\$27,300.00	
TSS Operating Loan	\$41,000.00	
TOTAL:	\$71,300.00	\$0.00

ASSETS LESS LIABILITIES TOTALS:	JEREMY	ANNA
	\$79,876.00	\$77,187.73

The district court did not order Anna to pay any equalization payment based upon its property division.

Additionally, the court found Jeremy's total income from TSS to equal \$70,000 a year and Anna's income from her current employment to be \$40,000 a year. The court ordered Jeremy to pay Anna \$750 per month in spousal support for ten years, primarily based upon the discrepancy of the parties' income. The

court also ordered Anna to pay Jeremy \$610 per month in child support. The court ordered Jeremy to contribute \$5000 toward Anna's attorney fees and to pay any unpaid court costs.

Anna appeals, and Jeremy cross-appeals.

II. Scope and Standards of Review.

An action for dissolution of marriage is an equitable proceeding, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We do so with the realization that the district court possesses the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our determination depends on the facts of the particular case, so precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). In custody matters, our overriding concern is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

Additionally, “[a]lthough our review is de novo, we ordinarily defer to the trial court when valuations are accompanied by supporting credibility findings or corroborating evidence.” *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); see also *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). “Ordinarily, a trial court’s valuation will not be disturbed when it is within the range of permissible evidence.” *In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987).

III. Discussion.

On appeal, Anna asserts the district court erred in failing to award her primary physical care of the children. She also argues the court erred in finding TSS had zero value and in dividing the marital property. Jeremy on his cross-appeal contends the court's spousal support amount and duration was inequitable. Both parties request appellate attorney fees. We address their arguments in turn.

A. Primary Physical Care.

"When considering the issue of physical care, the child[ren]'s best interest is the overriding consideration." *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in section 598.41(3), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). See *Hansen*, 733 N.W.2d at 696 (stating the custodial factors in section 598.41(3) apply equally to physical care determinations). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *Id.* at 700. The following nonexclusive factors are to be considered when determining whether a joint physical care arrangement is appropriate: (1) "approximation," or what has historically been the care giving arrangement for the children between the parents; (2) the ability of the parents to "communicate and show mutual respect"; (3) the "degree of conflict" between the parents; and (4) the ability of the parents to be in "general agreement about their approach to daily matters." *Id.* at 697–99; see also *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

If the court denies a request for joint physical care, “the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child.” Iowa Code § 598.41(5)(a). The court shall then determine placement according to which parent “can minister more effectively to the long range best interest of the child.” *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). “The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.” *Hansen*, 733 N.W.2d at 695; *see also In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) (“The critical issue in determining the best interests of the child is which parent will do better in raising the child[ren]; gender is irrelevant, and neither parent should have a greater burden than the other.”).

With the foregoing principles in mind and our de novo review of the record, we find the district court was correct in placing the children in Jeremy’s physical care. The evidence at trial demonstrated that both parents participated in the children’s care during the marriage. Although both parties have strengths and flaws, in general, either parent is capable of providing adequate care to the children.

In such situations, where the children would do well in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. When faced with close cases like this, we give careful consideration to the findings of the trial court. *See In re Marriage of Wilson*, 532 N.W.2d 493, 495–96 (Iowa Ct. App. 1995). This is because the district court, unlike this court

on appeal, has the opportunity “to view, firsthand, the demeanor of the witnesses when testifying.” *Id.* at 495; *see also In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (stating that because appellate courts “must rely on the printed record in evaluating the evidence” and are “denied the impression created by the demeanor” of the witnesses, there is “good reason for us to pay very close attention to the trial court’s assessment of the credibility of witnesses”). A witness’s facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings, and opinions may be detected from this “nonverbal leakage.” Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the trial judge is in the best position to assess witnesses’ interest in the trial, their motive, candor, bias and prejudice.

After finding both parents were suitable custodians, the district court concluded the children should be placed in Jeremy’s physical care, explaining:

Based on the testimony the court has received, considering the credibility of the witnesses and the court’s opportunity to have firsthand observation of the parties and witnesses, the expressed wishes of the children, and Anna’s abrupt removal of the children from their nearly lifelong surroundings, . . . it would be in the best interests of the children that Jeremy receive primary physical custody of the children, subject to reasonable rights of visitation in Anna.

The court clearly found Jeremy to be more credible than Anna, as the court’s decree expressly found that Anna was not truthful with the court. The ruling detailed Anna’s testimony that the children’s therapist recommended she move without telling anyone was impeached by the therapist, who testified he told Anna

the exact opposite and he was very concerned that this kind of behavior could cause great damage to the children. The court found the therapist's testimony persuasive, and it specifically found Anna's abrupt move was a reason for finding it was in the best interests of the children that Jeremy receive primary physical care of the children.

Anna asserts the court did not place "sufficient weight on Jeremy's violent tendencies," citing the January 4, 2011 incident and an instance years ago when Jeremy hit Madeline on the behind with a PVC pipe. Jeremy admitted the parties had had many heated arguments, but he denied that he was ever violent with Anna. He testified the PVC incident was only a swat on the behind as an attention getter; Madeline had no marks or even cried. He denied pushing or shoving Anna on January 4. The officer who responded saw no bruising on Anna. Anna testified she took pictures of her alleged bruising, but never introduced the pictures into evidence. We believe the court found Jeremy's testimony concerning domestic violence to be more credible, and note it expressly found Jeremy was a suitable custodian for the children. Upon our review of the record, we agree.

Additionally, the testimony at trial evidenced that Jeremy would be more supportive of the children's relationship with Anna than Anna would do if she were awarded primary physical custody. The court's ruling noted that Anna took Jeremy's phone away from the children and replaced it with her own, which she had been previously ordered not to do. The testimony at trial by Jeremy and the children's GAL evidenced that Anna limited the children's contact with Jeremy.

Finally, the court observed that “[i]t is very clear that the children’s home is Essex.” The children had lived the majority of their lives in the marital house, and they attended the same school in Page County their whole lives. They have significant connections in Essex, and the friends they have known their whole lives are in Essex. Moreover, they desperately want to live with their father. Their GAL opined it was in their best interests that Jeremy receive primary physical care. For all these reasons, we agree with the district court that it was in the children’s best interests that Jeremy be awarded primary physical care of the children, and we accordingly find no error on this issue.

B. Property Division.

1. Business Valuation.

Anna contends the district court erred in finding TSS has zero value and testified she believed it is worth \$100,000. Anna did not have any expert testify in support of her valuation.

Jeremy testified the business itself had no value without his computer skills, and he called Douglas Goracke, a certified public accountant, as an expert witness. Goracke testified that he had worked with TSS at its inception and provided them business accounting services until 2006 or 2007. Utilizing an earnings before interest, taxes, depreciation, and amortization (EBITDA) valuation method, he explained:

I took the three-year average [of TSS’s net income reported on its corporate tax returns], and I adjusted some numbers for if . . . someone was going to buy it What [the buyer] would have to do to continue to run the operation, so I took the three-year average, then adjusted certain items up and down to what I thought it would take to run the operation without Jeremy and Anna.

Then what you do is you subtract out the interest, taxes, depreciation and amortization, and then you use a capitalization rate to come up with the value of that business.

Based upon the numbers and his calculations, he opined the fair market value of the business was negative \$84,450. He explained:

[M]y value was an indication of value if someone was to purchase the business. So I'm not saying that this [business] does not have any value. I'm saying that if you were an investor and you were going to buy that business, you would not pay for the earning value of the business.

....
I'm not valuing hard assets. I'm valuing income potential.

He further testified that even if there were improper deductions taken on the corporate returns and those amounts were added back in, the business would still have a zero value, because it would cost \$60,000 to \$70,000 to hire someone to replace Jeremy.

After reviewing the record, it is clear that the district court considered the income potential of TSS when it found the business itself did not have a value other than its fixed assets. The district court did separately value TSS's assets, including its vehicles, inventory, accounts receivable, and checking account balance. In awarding those assets to Jeremy, the court also made Jeremy personally responsible for TSS's operating loan. We find the value placed on the business by the court to be well within the permissible range of evidence and will not disturb it on appeal. See *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984). We accordingly affirm on this issue.

2. Remaining Division of Marital Property.

Anna further argues the district court's property division was inequitable. See *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995) (stating the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts). By her calculations, she believes Jeremy was awarded assets totaling \$141,000 and that she only received assets totaling \$59,000. However, Anna's calculations do not include the valuation of many of the assets awarded to Anna and liabilities assigned to Jeremy, including the household items, the ring, TSS's inventory and operating loan, the loan to Jeremy's mother, and the firearms and hunting equipment. She also has fault with the court's valuation of the household items at \$12,000.

As noted above, the district court's valuation will ordinarily "not be disturbed when it is within the range of permissible evidence." *Hansen*, 733 N.W.2d at 703. "In ascertaining the value of property, its owner is a competent witness to testify to its market value." *Id.* Exhibit C introduced by Jeremy sets forth a list of items Anna took from the residence, valued by Jeremy to be around \$64,000. The court noted Anna had taken many disputed household marital items when she moved, though she had been ordered not to. Jeremy testified that Anna took many everyday items, including all the towels and most of the furniture and appliances, and his exhibit placed values on those items. We find the district court's valuation of items to be within the permissible range of evidence.

By our calculations, as set forth above, the district court awarded Anna a net value of \$77,187.73 worth of marital property, and Jeremy \$79,876 worth of marital property, which included the net equity in the home and rental property. Upon our review of the record, we find this amount to be correct and therefore find no inequity in the order. We accordingly affirm on this issue.

C. Spousal Support.

On cross-appeal, Jeremy argues the spousal support award should have been of a smaller amount and shorter duration. Upon our review, we disagree.

Spousal support “is an allowance to the spouse in lieu of the legal obligation for support.” *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1988). Spousal support is a discretionary award dependent upon each party’s earning capacity and present standards of living, as well as the ability to pay and the relative need for support. See *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Spousal support “is not an absolute right; an award depends on the circumstances of each particular case.” *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in section 598.21A(1). See *id.* We consider the length of the marriage, the age and health of the parties, the parties’ earning capacities, the levels of education, and the likelihood the party seeking support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and spousal support “should be considered together in evaluating their individual sufficiency.” *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). We give the district court

considerable discretion in awarding alimony, and we will only disturb the court's ruling when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

After considering the factors listed in section 598.21A(1), we find no error with the district court's spousal support award of \$750 per month for ten years. We accordingly affirm on this issue.

D. Appellate Attorney Fees.

Both Jeremy and Anna request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the requesting party, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *Id.* Upon consideration of these factors and in light of our resolution of the claims, we decline to award appellate attorney fees. Costs on appeal are assessed to Anna.

IV. Conclusion.

We have carefully considered all of the claims raised by both parties. Those not addressed specifically in this decision are either disposed of by our resolution of other claims or are without merit. For the reasons stated above, we affirm the district court's ruling dissolving the parties' marriage in all respects.

AFFIRMED ON BOTH APPEALS.