IN THE COURT OF APPEALS OF IOWA

No. 2-240 / 11-1549
Filed May 9, 2012

IN RE THE MARRIAGE OF ARCHIE LEROY BELL III AND JENNIFER RENEE BELL

Upon the Petition of
ARCHIE LEROY BELL III,
Petitioner-Appellant,

And Concerning

JENNIFER RENEE BELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, Michael J. Moon, Judge.

Archie Bell appeals from the economic and child custody provisions of the decree dissolving his marriage to Jennifer Bell. **AFFIRMED.**

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Copeland & Williams, P.C., Jefferson, for appellant.

Steven K. Nalean of Nalean & Nalean, Boone, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Archie Leroy Bell III appeals from the economic and child custody provisions of the decree dissolving his marriage to Jennifer Renee Bell. He disputes the district court's grant of their twins' physical care to Jennifer and seeks modification of the decree to provide for joint physical care. In the alternative, he asks this court to grant him physical care. Archie also contends the court erred in dividing the couple's property.

We find credible evidence in the record that Archie has been unable to cooperate with Jennifer; that lack of cooperation justifies the district court's rejection of a joint physical care arrangement. We agree with the district court that the children's best interests are served by granting physical care to Jennifer, who has been the primary caregiver throughout their lives. Moreover, because the district court's division of property is equitable, we affirm on that issue as well.

I. Background Facts and Proceedings.

Archie and Jennifer were married in 2003. They have a son and daughter, who are twins born in May 2006. Jennifer also has joint physical care of her daughter from a previous marriage, who was born in March 2000.

Archie, who was born in 1977, works full-time as a rural letter carrier for the United States Postal Service, earning approximately $62,909 per year. He typically works from 6:30 a.m. until 2:00 p.m. Archie also helps at his father's salvage business. In his leisure time, Archie plays in an adult softball league and coaches youth basketball and softball.

Jennifer, who was born in 1979, earned a nursing degree from Iowa Central Community College. She has been employed as a licensed practical nurse and a registered nurse. By agreement of the parties, Jennifer stayed home with the children for two years after they were born before re-entering the workforce. At the time of dissolution, she had just started working as a case manager for Nurse Force in Grimes, earning $22.50 per hour.

In the spring of 2009, Jennifer began to suffer "excruciating" stomach and back pain, requiring trips to the emergency room, and eventually hospitalization at Mayo Clinic for two weeks. Her doctors prescribed narcotics to treat her pain. In April 2010, her doctors at Mayo diagnosed her condition as autoimmune connective tissue disorder. They changed her prescription, tapering off her pain medications. By the summer of 2010 she experienced a "drastic" improvement in her condition. Although she has occasional flare-ups, Jennifer reported at the dissolution hearing that her health is much better.

Archie filed a petition for the dissolution of marriage on September 1, 2010. Jennifer filed her answer on September 7, 2010. Following a hearing, the district court granted Jennifer temporary physical care of the children with Archie receiving visitation on alternate weekends. At Archie's request, a child custody evaluator was appointed by the court. Her report recommended joint physical care on an alternating weekly basis.

The court held the dissolution trial in July 2011. The main issues before the court were the custody of the children and the division of the marital property. In its decree dissolving the marriage, the district court granted Jennifer physical

care of the children with Archie receiving visitation every other weekend and alternating holidays, as well as four non-consecutive weeks during the summer. The court assigned values to the disputed property and divided it equally between the parties, with each receiving a net worth of $20,505.38.

II. Scope and Standard of Review.

We review dissolutions cases de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We give weight to the trial court's fact findings, especially those regarding witness credibility. *Id.*

III. Child Custody.

Archie first contends the district court erred in granting Jennifer physical care of their twins. He asks us to modify the decree to allow joint physical care. In the alternative, he requests that we place the children in his physical care.

When determining issues of child custody, our overriding consideration is the best interests of the children. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). Our courts strive to place children in the environment most likely to bring them to health, both physically and mentally, and to social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). We are guided by the factors set forth in Iowa Code section 598.41 (2009), as well as those articulated by our supreme court in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).[1]

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[1] These factors are:

> 1. The characteristics of each child, including age, maturity, mental and physical health.
> 2. The emotional, social, moral, material, and educational needs of the child.

If joint physical care is awarded, "both parents have rights to and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing routine care for the child . . . ." Iowa Code § 598.1. We look to the factors in *In re Marriage of Hansen*, 733 N.W.2d 683, 696-99 (Iowa 2007), to determine whether the children would prosper in joint physical care. First, we weigh the stability and continuity of caregiving; "the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution." *Hansen*, 733 N.W.2d at 696-97. Second, we assess the ability of the parents to communicate and show mutual respect. *Id.* at 698. Third, we consider the degree of conflict between parents. *Id.* And finally, we take into account the degree to which the parents concur in their approach to daily matters. *Id.* at 699.

The record here does not paint a positive picture for joint physical care. Specifically, the degree of conflict between Archie and Jennifer and their inability to communicate or show mutual respect weighs against a shared care situation.

> 3. The characteristics of each parent, including age, character, stability, mental and physical health.
> 4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
> 5. The interpersonal relationship between the child and each parent.
> 6. The interpersonal relationship between the child and its siblings.
> 7. The effect on the child of continuing or disrupting an existing custodial status.
> 8. The nature of each proposed environment, including its stability and wholesomeness.
> 9. The preference of the child, if the child is of sufficient age and maturity.
> 10. The report and recommendation of the attorney for the child or other independent investigator.
> 11. Available alternatives.
> 12. Any other relevant matter the evidence in a particular case may disclose.

Winter, 223 N.W.2d at 166-67.

The district court cited Archie's "hostile" attitude toward Jennifer and unwillingness to cooperate with her. The record supports these findings. When interviewed by Susan Gauger, the child custody investigator, the children told her their parents were divorcing because "mommy was naughty." Gauger asked what Jennifer had done that was "naughty" and the children "listed several issues including her affair, taking too much medicine, pretending she was sick, spending all their money and being 'mean' to daddy." The five-year-olds reported they knew this because "Daddy told us." Although Gauger recommended joint physical care, she acknowledged that Archie does not support Jennifer's relationship with the children and has actively sought to showcase her in a negative light in the court and the community.

In *Hansen*, our supreme court noted that "expressions of anger between parents can negatively affect children's emotions and behaviors." *Id.* at 699. "[T]here is evidence that high levels of child contact with a nonresidential father are beneficial to children in low conflict families, but harmful to children in high conflict families." *Id.* This risk of negativity is borne out in Gauger's report where she notes Archie "is emotionally stuck in his anger and hurt. He tends to perseverate in his emotions. These emotions are easily read by the children who at times try and compensate for his feelings." The twins' reaction to their father's cues—as expressed in the evaluator's report—explains the difficulty encountered during custody exchanges, where the children "often do not want to leave their dad's and will throw tantrums or refuse to cooperate with getting ready to leave." While Archie saw the children's behavior as proof of their desire to be with him,

Jennifer reported that once the children were in her home, the emotions would subside. Joint physical care would multiply the chances for conflict and would negatively affect the children.

When joint physical care is not warranted, the court must choose a primary caretaker to be solely responsible for decisions concerning the children's routine care. *Id.* at 691. We believe that both Archie and Jennifer could be suitable custodians for the children. But we agree with the district court that Jennifer offers greater potential for initiating positive communication with Archie regarding the children's needs and would be more likely to support the noncustodial parent's relationship with the children. *See* Iowa Code § 598.41(3)(a), (c), (e). Jennifer has also been the parent who has traditionally provided for the children's care, both before and during the separation. *See id.* § 598.41(3)(d).

Noting its opportunity to observe the witnesses and assess their credibility, the district court found Jennifer "seems to be genuinely interested in doing what is in the long-term best interests of [the children]." The court found that she "has put their needs before hers in the past and there is no reason that she will not do so in the future." While the court found Archie also has the children's best interests at heart, the court determined that Jennifer should be granted physical care.

> Jennifer has been the primary caregiver of the children since their birth, even though at times she struggled to provide care for the children and work a full time job while suffering a debilitating disease. During the time Jennifer was struggling physically and emotionally, it is most telling that Archie refused to alter his routine in any fashion in order to relieve some of the pressure Jennifer was

> feeling. His selfishness in that regard is significant and indicative of his attitude towards Jennifer and how he perceives the division of labor within a family. His approach to family life is chauvinistic as evidenced by the times when he did have responsibility for the children, he deferred to his mother who willingly stepped in and took care of the children.

We defer to the district court's implicit finding that Jennifer was more credible and would be more capable as the children's primary caregiver. The record shows Archie is fixated on discrediting Jennifer and that his anger with her impedes his ability to foster her relationship with the children. Jennifer has provided the children with day-to-day attention since their births, while Archie often spent time away from them to help with his father's business or engage in recreational activities. While the dissolution was pending, Archie relied on his mother to provide much of the children's care. On this record, we agree that the children's best interests are served by entrusting their physical care to Jennifer.

IV. Property Distribution.

Archie also challenges the property division. He argues the district court failed to consider the substantial gifts received from his parents during the marriage. He disputes the district court's valuation of some property and suggests an alternate distribution he believes is more equitable.

Iowa law requires equitable division of assets in a dissolution decree. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa 2009). Equitable division is not always an exactly equal split. *Id.* Courts must decide what is equitable under the circumstances. *Id.* The partners in the marriage are entitled to a just and equitable share of the property they accumulated through their joint efforts. *Id.*

We consider the criteria set forth in Iowa Code section 598.21(5) when distributing marital property.

Section 598.21(6) states that "gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division" unless the court finds that refusal to divide the property is inequitable. Archie claims his parents gave him $164,000 during the marriage. We cannot find adequate evidence to support this claim.

The record shows Archie earned money through the salvage business and would sell merchandise to his father. Archie's father also did salvage work and deposited money into Archie's account, which Archie reported as income on his 2009 and 2010 tax returns. Archie also maintained that his parents helped pay medical bills and other expenses incurred during the marriage. Jennifer testified that she was not aware of Archie's parents giving them assistance of as much as $164,000, and instead believed that Archie sometimes helped his parents with their bills. The district court found that the couple received help and support from their respective families, but did not specifically credit Archie's contention concerning the financial assistance from his parents. We conclude the record does not support Archie's request for a greater distribution of assets based on gifts he allegedly received from his parents during the marriage.

Archie also asserts the district court erred in valuing the marital home at $116,812, the amount Jennifer testified the home was worth at the time of trial. Archie claims the home's value at the time of trial was $96,674. In 2010 the home was valued at $116,812. Its assessed value in 2011 was $96,674. The

home was recently listed for $118,000. Although our review is de novo, we ordinarily defer to the trial court's valuations when accompanied by supporting credibility findings or corroborating evidence. *See Hansen*, 733 N.W.2d at 703. We find the court's valuation of the home was within the range of permissible evidence. *Id.*

Finally, Archie claims the district court should have considered payments he made to Consumer Credit during the separation. He alleges he paid $27,632 toward consolidated credit card debt incurred by Jennifer. Jennifer testified she was unaware of all but one of the credit card accounts and that Archie used the charge cards. She testified that when she learned of the debts, she encouraged him to consolidate the payments with Consumer Credit. We find no error in the district court's treatment of this marital debt.

In considering the factors set forth in section 598.21(5), we conclude the property distribution decreed by the court is equitable. Archie leaves the marriage with significantly more assets and significantly more debt than Jennifer. But their net worth is even at $20,505.39. While Archie made payments on the parties' mortgage, car loan, and the Consumer Credit debt during the separation, he also has a greater earning capacity than Jennifer. Jennifer's autoimmune disease may affect her ability to work in the future and could lead to additional medical costs. Under the record before us, we find the court's property distribution to be equitable.

V. Appellate Attorney Fees.

Jennifer requests an award of her appellate attorney fees. Appellate fees are not a matter of right; instead we have discretion whether to award them based on the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Considering the foregoing, we award Jennifer $2000 in appellate attorney fees. Costs of the appeal are taxed to Archie.

AFFIRMED.