

**IN THE COURT OF APPEALS OF IOWA**

No. 6-356 / 05-1852

Filed July 12, 2006

**IN RE THE MARRIAGE OF ANGELA MARIE KELLY  
AND CHRISTOPHER RONALD KELLY**

**Upon the Petition of  
ANGELA MARIE KELLY,**  
Petitioner-Appellee,

**And Concerning  
CHRISTOPHER RONALD KELLY,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Cass County, Jeffrey L. Larson,  
Judge.

Christopher Kelly appeals the division of property and denial of joint  
physical care in the parties' dissolution of marriage. **AFFIRMED IN PART AND  
REMANDED IN PART.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Bryan Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for  
appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**HUITINK, J.**

***I. Background Facts & Proceedings.***

Christopher Kelly (Chris) and Angela M. Kelly were married in July 1999. Together Chris and Angela have one child, Katelyn, born in November 1999. Chris adopted Angela's son, Corey, born in September 1992.

Angela filed a dissolution petition on March 24, 2005. At the time of trial Chris was thirty-eight, and Angela was thirty-two.

At the time of the marriage, Angela owned a house at 805 Birch Street in Atlantic. She purchased the home in 1997. The home was valued at \$34,000. Angela obtained a mortgage in the full amount to purchase the home. Chris owned a house at 402 Oregon Street in Lewis. He purchased this property in 1997 for \$44,000 and paid off the mortgage by the time the parties were married. At the time of the marriage, Chris also had approximately \$19,000 in two bank accounts. When the parties married, they resided at 402 Oregon Street in Lewis.

Chris has worked for Glacier Daido in Atlantic for ten years. In the last seven years, Chris worked the second shift from 3 p.m. until 11 p.m. six days a week as a chemical coordinator. Chris earns approximately \$40,000 a year. During the marriage, Angela worked as a licensed practical nurse making \$15.30 per hour. At the time of trial, Angela was working less because she was taking classes to become a registered nurse. In 2004 Angela made \$6542 and incurred \$3500 in student loans.

During the marriage, the parties acquired an apartment building at 601 East Fourth Street and a store at 16 and 18 Fourth Street in Atlantic. The store is used for Chris's model train hobby. The store's related inventory was

approximately \$28,757. The parties also built a Morton building on their property in Lewis at an approximate cost of \$17,000. The parties improved their home in Lewis by putting on a new roof and gutters and installing a new furnace and air conditioning system. They also improved the house which Angela owned at 805 Birch Street by putting on a new roof and replacing the furnace and water heater.

During the marriage Angela assumed responsibility for care of the parties' home. The parties shared primary care responsibilities for the children.

Corey has a history of behavioral problems while attending school in Griswold. He told a school administrator that Angela threw a book at him and Chris damaged his property. The Iowa Department of Human Services investigated the allegations. The allegations were ultimately unfounded. During the investigation, Corey lived with his maternal grandparents in Atlantic and began attending school in Atlantic. Corey's grades and behavior improved at the school in Atlantic. After the parties separated, Angela and Katelyn moved in with her parents in Atlantic where Corey was already living.

In her petition for dissolution, Angela asked for physical care of the children. Chris filed an answer requesting joint physical care. On April 11, 2005, the court entered an "Order Pendente Lite." The order awarded the parties joint legal custody and required physical care be shared as agreed to by the parties until further order from the court.

The parties operated under this order for four months until the date of trial on August 11, 2005. At trial, Chris complained that he did not get enough time with the children. Chris saw the children every other day. Angela claimed Chris called every morning at 8 a.m. requesting care of the children. Angela claimed

she kept Chris informed regarding the children's activities, but Chris maintained that Angela failed to tell him Katelyn registered for dance classes and that Corey was taken to the doctor for a sore throat. Angela claimed Chris spoils the children by buying them things. Chris claimed he had to buy the children things because she took all of the children's things when she moved in with her parents.

In the August 22, 2005, decree dissolving the parties' marriage, the court granted Chris and Angela joint custody of their children. Angela was awarded physical care, subject to Chris's specified visitation rights. The court rejected Chris's request for joint physical care, citing the parties' demonstrated inability to work amicably to advance the children's best interests.

The decree also included the following division of the parties' assets and liabilities:

It is further ordered that Angela shall be awarded and given the following assets and debts:

<u>ASSETS</u>	
805 Birch Street,	\$50,000
<u>DEBTS</u>	
Mortgage	\$31,025
Sears (treadmill)	\$ 800
Student loan	<u>\$ 3,500</u>
	\$35,325
Total Distribution To Angela:	\$14,675

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Christopher shall be awarded and receive the following assets and debts:

<u>ASSETS</u>	
16 & 18 E. 4th Street, Atlantic (store)	\$18,850
402 Oregon, Lewis, IA (valued 40,000, But 20,000 determined to be premarital)	\$20,000
601 E. 4th, Atlantic, IA	\$32,000
store inventory	<u>\$28,757</u>

	\$99,607
(Reduced by \$6,000 premarital property)	(\$ 6,000)
Total Assets:	\$93,607

DEBTS

Real estate mortgages	\$52,444
IRS (interest)	\$ 100
J. C. Penney	\$ 800
Mike Murphy (electrician)	\$ 920
Nebraska Furniture Mart	\$ 725
601 East 4th RE Taxes	\$ 667
Wells Fargo Line of Credit	\$ 2,950
Debt against store inventory	\$ 3,700
Reiman Music	\$ 600
Brian Daket	<u>\$ 146</u>
Total Debts:	(\$63,052)
Total Distribution	
To Christopher:	\$30,555

In addition, Chris was ordered to pay Angela \$7500 in “order to equalize the property division.”

On appeal, Chris argues the following:

- I. Whether or not the court erred in failing to grant the parties joint physical care of their minor children.
- II. Whether or not the trial court erred in ordering Chris to pay a property settlement payment of \$7,500 to equalize the property distribution.

**II. Standard of Review.**

Dissolution of marriage proceedings are equitable actions and are subject to de novo review. Iowa R. App. P. 6.4; *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). “Although our review of the trial court's award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity.” *In re Marriage of Spiegel*, 553 N.W.3d 309, 319 (Iowa 1996) (citing *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996)). “We are not bound by the district

court's findings of fact, but we do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying." *Kurtz*, 561 N.W.2d at 387. Prior cases have little precedential value; we must base our decision primarily on the particular circumstances in this case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of McDaniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997).

### **III. Merits.**

#### A. Physical care.

Joint physical care is an award of physical care to both joint legal custodial parents whereby "both parents have rights and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child" and neither parent has superior rights to those of the other parent. Iowa Code § 598.1(4) (2005). "If joint legal custody is awarded to both parents, the Court may award joint physical care to both joint custodial parents upon the request of either party." Iowa Code § 598.41(5). However, if the court denies the request for joint physical care, the court shall provide "specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child." *Id.*

Joint physical custody can work "if the parents of the children are able to cooperate and respect each other's parenting and lifestyles." *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998). However, if the parents are unable to work amicably towards their children's best interests, joint physical care cannot serve the children's best interests. *Id.* If the court determines joint

physical care is not in the best interests of the child, the court must award one parent primary physical care.

“In determining which parent should be granted physical care, our overriding consideration is the child’s best interests.” *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). A number of factors are considered including the children’s needs and characteristics, the parents’ abilities to meet those needs, the children’s relationship with the parents and any siblings, the nature of each proposed home environment, and the effect of continuing or disrupting the children’s current status. See *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974); see also Iowa Code § 598.41. We look for the “environment most likely to bring [the children] to healthy physical, mental, and social maturity.” *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999) (quoting *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)). Ultimately, “the parent who can administer most effectively to the long-term best interest of the children” is chosen as the primary physical care giver. *Swenka*, 576 N.W.2d at 617.

Chris argues that, contrary to the trial court’s conclusion, the record supports an award of joint physical care. We disagree.

We, like the trial court, find the parties’ joint physical care experience pending trial was unsuccessful. There is evidence that even the most routine primary care details were a source of conflict between the parties. While each claims the other is at fault for these conflicts, we find both contributed to the failure of their joint physical care experience. We also note that the parties’ residence in separate school districts weighs against an award of joint physical care in this case. Although Chris’s work schedule complicates his ability to

exercise joint physical care, we are not inclined to find his work schedule, standing alone, sufficient to disqualify or otherwise deny his request for joint physical care.

We affirm on this issue.

B. Visitation.

Chris correctly notes the trial court's decree failed to address weekend or other regular visitation issues. Angela concedes that Chris should have visitation in addition to that provided for in the decree. We accordingly remand this issue for further consideration by the trial court.

C. Property Division.

"Iowa courts do not require an equal division or percentage distribution." *In re Marriage of Hardy*, 539 N.W.2d 719, 739 (Iowa 1995). "The determining factor is what is fair and equitable in each circumstance." *Id.* The distribution of property should be made according to the considerations codified in Iowa Code section 598.21(1). Property which a party brings into the marriage is a factor to consider in making an equitable division. Iowa Code § 598.21(1)(b). A party may be entitled to full credit for the asset brought into the marriage, but full credit is not required. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996).

A premarital asset is not otherwise set aside like gifted and inherited property. Instead, it is a factor to consider, together with all the other circumstances, in making an overall division. Its impact on the ultimate distribution will vary with the particular circumstance of each case. Furthermore, in considering accumulations to premarital assets, we do not limit our focus to the parties' direct contributions to the increase. Instead we broadly consider the contributions of each party to the overall marriage, as well as other factors. Iowa Code § 598.21(1). Financial matters make up but a portion of a marriage, and must not be emphasized

over the other contributions made to the marriage in determining an equitable distribution.

*Id.* “As an additional factor in dividing appreciated property acquired before the marriage, we consider whether the appreciation which occurred during the marriage was fortuitous or due to the efforts of the parties.” *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). “[A]n equitable property division of the appreciated property should be a function of the tangible contributions of each party and not the mere existence of the marital relationship.” *Id.*

Chris maintains that in order to make the property settlement more equitable, we should vacate the property settlement payment of \$7500 to Angela from Chris and require Angela pay the debts of \$600 to Reiman Music, \$2950 to Wells Fargo, and \$800 to J. C. Penney. These debts total \$4350. Chris maintains the reason the property distribution is unequal is that the trial court failed to separate premarital assets. He argues that the trial court should have excluded the \$40,000 Lewis property and his vehicles from the property division because he acquired them prior to the marriage. He also maintains that he should be given credit for the \$19,000 in cash he had in two accounts at the time the parties were married. We disagree.

Contrary to Chris’s claims, the trial court considered the value of Chris’s premarital assets, and to the extent they were not commingled with other marital assets, equitably credited his share of the property division for the value of that property. Moreover, the record indicates that both parties contributed financially to the improvements made to their respective homes, as well as the acquisition

and maintenance of their apartment building, commercial building, and related inventory. As noted earlier, Chris's net share of the property division was \$23,175, and Angela's was \$22,175. Because we find the property division equitable in all respects, we also affirm on this issue.

***IV. Attorney Fees.***

An award of attorney fees is not a matter of right, but rests within the 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, the ability of the other party to pay, and whether the requesting party was defending the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We determine Angela was required to and successfully defended the trial court's decision on appeal. We accordingly award Angela \$3000 in appellate attorney fees. Costs of this appeal are assessed to Chris.

**AFFIRMED IN PART AND REMANDED IN PART.**