IN THE COURT OF APPEALS OF IOWA

No. 6-459 / 05-1765
Filed October 11, 2006

IN RE THE MARRIAGE OF MICHELE RENEE FENNELLY AND TED ERNST BRECKENFELDER

Upon the Petition of
MICHELE RENEE FENELLY,
Petitioner-Appellee,

And Concerning
TED ERNST BRECKENFELDER,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Michael R. Mullins, Judge.

Former husband appeals from the physical care and property division provisions of decree dissolving the parties' marriage. **AFFIRMED**.

Arthur Buzzell, Davenport, for appellant.

Lori L. Klockau and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

MILLER, J.

Ted Breckenfelder appeals from the physical care and property division provisions of the decree dissolving his marriage to Michele Fennelly. We affirm the district court.

I. Background Facts and Proceedings.

Ted and Michele were married in 1990. At the time of the marriage Michele had obtained a bachelor's degree in management information systems, and Ted had obtained a bachelor's degree in finance and a law degree. Michele was employed by IBM, and Ted practiced law with a local firm and taught part-time at a nearby college. Each party brought property to the marriage. In relevant part, Ted owned an encumbered home located on Fairview Drive, in Bettendorf, Iowa, and Michelle owned IBM stock and an IBM Tax Deferred Savings Plan (TDSP).

The parties' first child, Kevin, was born in 1991. In 1993, the parties' living and employment situations changed. They bought a new home, located on Barcelona Terrace, and retained the Fairview Drive home to use as rental property. In addition, Michele began working at Lee Enterprises and Ted began his own practice. The parties' second child, Caroline, was born in 1996.

Michele was the primary caretaker for both children. In addition, as Michele advanced at Lee Enterprises she became the family's primary income provider. She also undertook primary responsibility for maintaining the family home and seeing to the family's finances.

Michele filed for dissolution of the parties' marriage in 2001, but later dismissed her petition. At approximately the same time, Ted began spending

more time at home, and became more involved in the children's care. In particular, Ted assumed a greater role in the children's after-school supervision and meal preparation. Ted also began devoting less time to his law practice.

Michele filed a second petition for dissolution of the parties' marriage in 2004. The matter came before the district court for hearing in June 2005. At the time of hearing, Michele was forty-two years old and Ted was forty-four years old. Michele's income was $101,000 per year, with the potential of another $30,000 in bonuses that were dependent on the company's, and Michele's personal, performance. Tax returns indicated that, during the previous year, Ted had earned $18,454 in net income from his law practice. Ted's average net income between 2001 and 2004 was just under $25,000 per year.

Noting that neither party had requested joint physical care, and in fact had "concede[d] that joint physical care is not preferable to the parties," the court determined the children's physical care should be placed with Michele. Ted was awarded liberal visitation. The court also divided the parties' assets and debts. After setting aside to Michele the IBM stock she owned prior to the parties' marriage, currently valued at $37,894, and the $78,200 of the $153,084 in the IBM TDSP traceable to the premarital portion of the account, the court made a nearly equal division of the parties' remaining assets and debts: $342,244.19 to Ted and $342,232.68 to Michele. Although the court had found Ted should receive credit for the premarital equity in the Fairview Drive home, the court included the home's total current equity of $29,900 in its property division.

Ted filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which noted the court's failure to give him credit for any premarital equity in the

Fairview Drive home. Ted asserted the home had a net equity of $12,000 at the time of the marriage, which represented twenty-four percent of the home's total premarital value, and thus, at a minimum, he should be awarded additional assets equal to twenty-four percent of the home's current value, or $26,400. Ted's primary contention, however, was that there was no basis for treating his premarital assets differently than Michele's, that it was inequitable to allow Michele to retain all growth and income from her premarital assets, and thus that the current net value of all premarital assets should be divided equally between the parties. Michele resisted Ted's motion, but requested that, if the court were to award Ted any additional monies, those monies should be from her Lee Enterprises retirement account.

In its ruling, the court recognized Ted should have been given credit for his premarital equity in the Fairview Drive home. However, it concluded the credit should be limited to the actual amount of premarital equity, or $12,000. It also rejected Ted's assertion that the parties' respective premarital assets should be equally divided. As Michele requested, the court directed that Ted be compensated for the $12,000 in premarital equity by utilizing a portion of her Lee Enterprises retirement account. However, it did so by awarding him an additional $12,000 from that account. Accordingly, the final net division of the parties' property, excluding the set asides of the IBM stock, the premarital portion of the IBM TDSP, and the $12,000 in premarital equity in the Fairview Drive home, was $342,244.19 to Ted and $330,232.68 to Michele. When all premarital set asides are considered, the court's ultimate division resulted in Michele receiving approximately $92,000 more in net property than Ted.

Ted appeals. He asserts the court erred in placing the children's physical care with Michele, and in failing to consider an award of joint physical care. He asserts the court further erred by making an unequal division of the parties' premarital assets and debts.

II. Scope and Standard of Review.

We conduct a de novo review of the district court's decision. Iowa R. App. P. 6.4. We give weight to the court's fact findings, especially in determining witness credibility, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Physical Care.

When considering the issue of physical care, our overriding consideration is the children's best interests. Iowa R. App. P. 14(6)(*o*). In assessing which physical care arrangement is in the children's best interests, we are guided by the factors set forth in Iowa Code section 598.41(3) (2005), as well as those identified in *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate goal is to provide the children the environment most likely to bring them to healthy physical, mental, and social maturity. *See In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

The critical issue is which parent will do better in raising the children; gender is irrelevant, and neither parent has a greater burden than the other. *In re Marriage of Courtade,* 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). While not the singular factor in determining which placement would best serve the children's interests, we give significant consideration to placing them with the primary caregiver. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

On appeal, Ted asserts the district court erred not only by placing the children's physical care with Michele, but also by failing to consider an award of joint physical care. The court may award joint physical care upon the request of either party. Iowa Code § 598.41(5)(a). However, neither Ted's answer, which sought "the parties' joint shared physical *custody* of their children," nor his attorney's statement at the commencement of the hearing, that the court needed to decide "whether shared physical *custody* is appropriate in this case," expressly or by necessary implication articulated a request for joint physical care. (Both emphases added).

Moreover, even if we interpret the foregoing as requests for an award of joint physical *care*, *see* Iowa Code § 598.41(5)(a) (differentiating between joint legal custody and joint physical care), both Ted and Michele testified that joint physical care was not appropriate in this particular case. In addition to raising concerns about the home environment that could be provided by Ted, Michele asserted joint physical care would be too disruptive for the children. For his part, Ted asserted that joint physical care was inappropriate in light of Michele's "tremendous amount of unresolved anger towards" him. Having reviewed the record, including clear evidence of a breakdown in communication between Ted and Michele, we conclude that joint physical care is simply not appropriate in this case. We accordingly turn to the question of which party should receive physical care of Kevin and Caroline.

Beginning in 2001, after Michele initially filed for dissolution of the parties' marriage, Ted has become a more active and involved parent. However, even if we assume for the sake of argument that the parties have shared equally in daily

caregiving responsibilities since that time, the fact remains that, for the majority of their lives, Michele has served as the children's primary caregiver. In addition, the record indicates that while the children and Michele are closely bonded, Kevin's relationship with Ted is somewhat strained. The record also credibly demonstrates that Michele can provide the children with greater physical, emotional, and financial stability. While we do not doubt that Ted loves his children, wants to be actively involved in their lives, and would be an adequate and appropriate caretaker, we agree with the district court that Michele can provide the children with the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683.

IV. Property Division.

We accordingly turn to the district court's division of the parties' assets and debts. In reviewing the division, we note the partners to a marriage are entitled to a just 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 or percentage division. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* It is proper to consider premarital assets when making the overall property division, as such assets are not automatically set aside to the one bringing the asset to the marriage. *See In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). However, the impact these assets have on the overall division depends upon the particular circumstance of the case. *Id*.

Here, the court set aside or gave credit to each party for the premarital value of the property each brought to the marriage. Ted does not challenge the

appropriateness of this decision, but asserts the court erred when it included within the property division the $17,900 increase in equity of the Fairview Drive home that occurred during the marriage, while setting aside to Michele the appreciation of her IBM stock and the percentage of the IBM TSDP traceable to Michele's premarital contributions.

When premarital property appreciates during the marriage, we give special consideration to three factors in determining whether and to what extent that appreciation should be considered in the division of assets and debts. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852-53 (Iowa Ct. App. 1998). First, we look to the tangible contributions each party made to the martial relationship. *Id*. at 853. This includes not only the parties' actual financial contributions, but also their participation in homemaking and child care. *See* Iowa Code § 598.21(1). Second, we consider whether the appreciation in the value of the premarital property was due to the efforts of the parties, or mere fortuitous circumstances. *Grady-Woods*, 577 N.W.2d at 853. Third, we look to the length of the marriage. *Id*. Although the three foregoing factors are given special emphasis, we also look to all factors enumerated in section 598.21(1), in an effort to ensure an overall equitable property division. *Id*.

In this marriage of moderate length, it is Michele who has made the greatest tangible contributions, undertaking primary responsibility for the home, the children, and the parties' finances. In addition, it appears that, overall, she has made greater financial contributions to the marriage. Moreover, the record is clear that Michele's IBM stock and IBM TDSP, which have been kept separate from the family finances, appreciated purely due to fortuitous circumstances. In

contrast, during the marriage the Fairview Drive home was used as rental property. Unlike a purely financial asset, an encumbered home must be maintained and its mortgage must be serviced. Ted does not assert that he alone bore these responsibilities, and in fact admits the parties treated the home as a martial asset, using its equity to assist in the purchase of the Barcelona Terrace property and later to restructure martial debt. In light of the foregoing circumstances, we find the court's property division to be equitable.

V. Conclusion.

The district court did not err in placing the children's physical care with Michele, and it equitably divided the parties assets and debts. We accordingly affirm the dissolution decree.

AFFIRMED.