

IN THE COURT OF APPEALS OF IOWA

No. 6-785 / 06-0115
Filed November 16, 2006

**IN RE THE MARRIAGE OF STEVE R. NEWLANDER
AND CYNTHIA A. NEWLANDER**

**Upon the Petition of
STEVE R. NEWLANDER,**
Petitioner-Appellant,

**And Concerning
CYNTHIA A. NEWLANDER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Steve Newlander appeals from the decree dissolving his marriage to
Cynthia Newlander. **AFFIRMED.**

Thomas J. Jackowski of Jackowski & Graves, Clive, for appellant.

Carmen E. Eichmann, Des Moines, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

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

VOGEL J.

Steve Newlander appeals from the child custody and property distribution portions of the decree dissolving his marriage to Cindy Newlander. Upon our de novo review, we conclude the court properly allocated the physical care of the parties' children to Cindy and equitably distributed the assets and debts of the marriage. We therefore affirm.

Background Facts and Proceedings.

Steve and Cindy were married in 1991 in Las Vegas and two children were born during the marriage, Ethan in 1992 and Lara in 1996. Cindy brought assets into the marriage including a residence, a savings account, and a vehicle, while Steve only brought limited personal property and a vehicle. Steve was employed at the Nevada Power Company until 2000. During that employment, Steve returned to school and received his master's degree in business administration. Cindy held a bachelor's degree in accounting and was employed at Rainbow Tax Service where she worked limited hours during the off-season, but during tax season her hours would substantially increase. Due to Cindy's work schedule, she was able to spend a great deal of time with the children. In August of 2003, the family moved to Iowa in order for Steve to attend law school.

During the marriage, the parties led completely separate economic lives. They never shared a bank account or commingled assets but alternated making payments on the mortgage, and sharing the various household bills. Each paid for their own personal expenses and maintained separate credit card accounts. While in Las Vegas, Steve was involved in a serious automobile accident, for which he received a net settlement of \$167,000 in 1998.

On May 20, 2004, Steve filed a petition seeking to dissolve his marriage to Cindy. Following an extensive trial that included testimony from many individuals and the presentation of multiple exhibits, the court entered a decree dissolving the marriage. The court granted the parties joint legal custody of the children and allocated their physical care to Cindy. In dividing the assets and debts of the parties, the court awarded Cindy assets totaling \$56,970 and Steve assets totaling \$78,056. Steve appeals.¹

Scope and Standards of Review.

Our review in this equity action is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Physical Care.

On appeal, Steve maintains the court improperly allocated their children's physical care to Cindy. The primary consideration in any physical care determination is the best interests of the child. *In re Marriage of Murphy*, 592

¹ We note the massive appendix presented to the court. We prompt appellant to comply with Iowa Rule of Appellate Procedure 6.15(a), by including only *relevant* portions of the record in the appendix, thereby reducing both printing expense and the burden on the appellate courts in referencing points on appeal. See *State v. Oppelt*, 329 N.W.2d 17, 21 (Iowa 1983). We further caution counsel for both parties to comply with Iowa Rule of Appellate Procedure 6.14(5)(b), which requires that a copy of any unpublished opinion be attached to the brief.

N.W.2d 681, 683 (Iowa 1999). In considering which physical care arrangement is in the child's best interest, we consider the factors set forth in Iowa Code section 598.41(3) (2003), see *In re Marriage of Will*, 498 N.W.2d 394, 398 (Iowa 1992) and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). In determining which parent better serves the child's best interests, the objective is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683.

Steve takes great issue with the court's credibility findings in the favor of Cindy. On this topic, the court stated:

The court had serious concerns about Steven's credibility at trial due to the discrepancies regarding the proceeds of the automobile collision settlement, the statements on his loan applications and his inability to account for large sums of money at trial. The Court had equally great concerns regarding Steven's credibility regarding his drinking problem

While Steve takes issue with many of the specific findings made, there is support in the record for each, and we find no reason to depart from the district court's fact and credibility findings.

The record also indicates that throughout much of their married life, Cindy provided the primary care for the children. Early on, Steve worked long hours and was away from the home often for days at a time. Later he pursued his master's degree and most recently was a full time law student at Drake University. While advancing a career and pursuing educational goals is

commendable, the practical impact was that Cindy, having a more flexible work schedule, spent considerably more time with the children. While her role of primary caretaker is not determinative, we believe in this case it supports Cindy's request for physical care of the children. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992) (“[C]onsideration is given in any custody dispute to allowing the children to remain with a parent who has been a primary caretaker so as to enable the children to have continuity in their lives.”).

Accordingly, upon our de novo review, we conclude the court properly allocated the children's physical care to Cindy. Both she and Steve are good parents to their children, however, the evidence tips in favor of affirming the district court's ruling, granting Cindy the children's physical care.

Property Distribution.

As noted above, in dividing the assets and debts of the parties, the court awarded Cindy assets totaling \$56,970 and Steve assets totaling \$78,056. As part of Steve's assets, the Court included \$56,563.33 which was the balance indicated on a March 31, 2004 Vanguard account statement, a full eighteen months prior to trial. The court also allocated to each party various debts, including the balance on the parties' respective credit cards. The largest of those debts, Steve's student loans of \$58,070 were allocated to him. On appeal, Steve argues (1) the Vanguard account was no longer in existence at the time of trial, October 11, 2005, and thus not subject to distribution, (2) the court should have allocated to him a portion of the equity in the marital home, and (3) the court erred in granting Cindy the proceeds of the parties' 2001 tax refund.

Iowa law requires that marital property be divided equitably between the parties, considering the factors in Iowa Code section 598.21(1) (2005). The court should divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the case. *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). An equitable division is not necessarily an equal division. *In re Marriage of Anliker*, 694 N.W.2d 535, 542 (Iowa 2005). A court may consider a party's dissipation of assets when it makes a property distribution. *In re Marriage of Goodwin*, 606 N.W.2d 315, 321 (Iowa 2000) (observing that "a spouse's disposal of assets that would otherwise be subject to division in the dissolution may properly be considered in making an equitable distribution of the parties' property"). We defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

Prior to dividing the assets and debts of the parties, the court found that by as early as 2002 Steve had been maneuvering assets in anticipation of seeking a divorce. It noted that among other actions, Steve had liquidated his retirement accounts without informing Cindy. The court then traced a series of apparently unexplained transfers and liquidations from various accounts which held sums originally gained in Steve's personal injury settlement. These transactions were done without Cindy's knowledge. After analyzing these dealings, the court indicated its belief that Steve "has put in place a plan to dissipate and/or secrete assets away [from] Cindy since 2000." In line with its assumption that Steve had

“hidden” assets, the court found it equitable to attribute the value of the Vanguard account to him as part of the distribution scheme.

Steve argues the Vanguard account and the funds which existed in March 2004 did not exist in October 2005, at the time of trial. He thus believes the court improperly included this in his asset allocation. While we recognize that generally the value of the assets should be determined as of the date of trial, there may be occasions when the trial date is not appropriate to determine values. *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). This is because equitable distributions require flexibility and concrete rules of distribution may frustrate the court's goal of obtaining equitable results. *Id.*

We also agree with Steve that the court cannot allocate a “phantom” asset. However, the district court sifted through multiple financial exhibits before making its property distribution. In addition to the specific findings as to the dissipation of assets, there is a broader reason for the district court’s distribution as it found,

Even if, despite all indications to the contrary, Steven has not hidden assets from Cindy, the result remains fair and equitable. Assuming no hidden assets, what Steven has done is to convert marital property to increased earning capacity for himself. Given the age of the children and the fact that Cindy is not seeking alimony, she will receive minimal, if any, benefit from Steven’s increased earning capacity.

We view the court’s property distribution as a recognition of the inequities of the parties’ economic situations. Accordingly, we must conclude the court’s total asset and debt allocation does equity between the parties and there is no cause to disturb those portions of the decree.

Attorney Fees.

Steve contends the court should have awarded him attorney fees at trial and now seeks an award of appellate 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). Based on the financial picture presented, we conclude the court properly denied Steve's request to assess his attorney fees against Cindy and we deny his request for appellate attorney fees. Costs on appeal are assessed to Steve.

AFFIRMED.

Robinson, S.J., concurs; Huitink, P.J., concurs specially.

HUITINK, P.J. (concurring specially)

I concur in the result only.