

**IN THE COURT OF APPEALS OF IOWA**

No. 6-976 / 06-1006  
Filed January 31, 2007

**IN RE THE MARRIAGE OF SHARON KAY DIVIN  
AND STEVEN J. DIVIN**

**Upon the Petition of  
SHARON KAY DIVIN,**  
Petitioner-Appellee,

**And Concerning  
STEVEN J. DIVIN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, James M.  
Richardson, Judge.

Steven Divin appeals from the decree dissolving his marriage to Sharon  
Divin. **AFFIRMED AS MODIFIED.**

Drew H. Kouris, Council Bluffs, for appellant.

Brian D. Swain and J.C. Salvo of Salvo, Deren, Schenck & Lauterbach,  
P.C., Harlan, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

**BAKER, J.**

Steven Divin appeals from the decree dissolving his marriage to Sharon Divin. We affirm as modified.

**Background Facts and Proceedings.**

Steven, who was born in 1968, and Sharon, who was born in 1960, were married in 1991. Two children, Mitchell and Kylie, were born during the marriage. The parties met while both were working at Millard Refrigerated Services. Other than a \$10,000 retirement account of Sharon's from that employment, neither party brought significant assets into the marriage. Shortly after the marriage Sharon cashed out her retirement account and used it as a down payment on a home the parties were building on land gifted to them by Steven's parents.

Just prior to their wedding, Steven quit his job at Millard and went into the construction business with his father. At the time of trial Steven was the sole shareholder of SDS Construction, Inc., the company he had started with his father. In the years preceding the dissolution, Steven's annual income steadily rose from \$40,253 in 2000 to \$62,775 in 2005. Sharon worked a variety of clerical type jobs during the marriage, and at the time of trial was employed as a bank manager by Farmers & Merchants State Bank in Minden, Iowa. In 2005, she earned \$22,790 at that job.

In July of 2005, Steven moved out of the marital residence, and in August Sharon filed a petition seeking to dissolve their marriage. Steven initially answered admitting that Sharon should serve as the children's physical caretaker, but he later amended to seek physical care of the children for himself.

On August 22, 2005, the court entered a temporary order granting physical care to Sharon and giving visitation to Steven on the condition that he abstain from alcohol use prior to and during the visitations. Following a trial on the petition, the court dissolved the marriage and, among other things, placed physical care of the children with Sharon. Steven appeals from this decree, claiming the court inequitably divided the parties' property, incorrectly set child support, and improperly placed physical care of the children with Sharon.

**Standard of Review.**

We review dissolution decrees de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *Id.*

**Property Division.**

Steven maintains the trial court failed to equitably divide the parties' property. In particular he maintains the court undervalued the marital home, ordered him to pay an excessive equalization payment, improperly gave Sharon a credit for premarital assets, incorrectly valued a pickup twice, and overvalued his construction business.

Upon the dissolution of marriage, the court must divide the property of the parties equitably, taking into consideration, a number of factors, including the length of the marriage, property brought to the marriage by either party, each party's contribution to the marriage, and the parties' ages, physical health, and earning capacities. Iowa Code § 598.21 (2005). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and

equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996).

The first issue we address concerns the 2006 truck. The truck is an asset of the corporation that is part of the \$84,358 in assets of the corporation. The corporation was awarded to Steven as part of his marital settlement at \$84,358, which included the truck. The truck was again awarded to him individually at a value of \$30,000 without any reduction for its indebtedness of \$32,000. Thus, the property division overvalued Steven's share by \$30,000.

Second, the district court valued SDS Construction at \$84,358, which it cited as "the total assets of SDS as set forth on the front page of its 2005 [tax] return." While that is an accurate statement as to the value of the assets, to obtain a truer value of the corporation, one must look at the balance sheet on schedule L on the tax return, which also reflects total assets of \$84,358. But, what the court failed to take into account is the corporation's liabilities of \$53,691, which leaves net equity of \$30,667, per the books. The trial court failed to take into account any of the liabilities of the company to offset against its assets. An adjustment to the balance sheet must be made, however, as the truck was fully expensed under Internal Revenue Code Section 179, so that it is being carried on the books as \$0. The parties appear to agree that the value of the truck is between \$30,000 and \$32,000. If we use \$30,000 as found by the trial court, the true equity of the construction company is closer to \$60,000. As the trial court correctly noted, the truck is actually a wash as its value was not reflected in the value of the assets of the corporation because it had been expensed. The error occurred in not reducing the value of the corporation by its debts.

Steven seeks to have the decree modified to reflect the corporation's true fair market value. There was no evidence from which the trial court could determine this other than the tax return provided. The trial court found that the corporation had no value other than its assets, as the corporation essentially was Steven himself. With the modifications previously noted, this was a reasonable basis on which to value the corporation in lieu of any better evidence. With the above modifications, it appears that Steven's assets have been overstated by \$53,691 by reason of the failure to take into account any of the debts of the corporation.

Steven seeks \$22,609 from Sharon to equalize the assets. This is a reasonable request. Under the trial court's division of the assets, Sharon was to receive assets valued at \$175,640 with a reduction for a premarital asset of \$10,000 and debts of \$6880, for a net share of \$158,780. Steven, on the other hand, was to receive assets with a value of \$156,458. With a reduction of Steven's share by \$53,691, under the trial court's division he would be receiving \$102,767. The decree is modified to require Sharon to pay the sum of \$22,609 from the sale of the house. The portion of the decree requiring Steven to pay Sharon \$2000 is vacated. The decree is also modified to provide that Steven shall pay \$600 per month towards the mortgage on the home pending its sale.<sup>1</sup> On all other matters we affirm the property division.

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<sup>1</sup> We modify to order that Steven pay only \$600 per month because that was the extent of Sharon's proposed relief.

**Child Support.**

As urged by Sharon, the court calculated Steven's child support based upon an annual income figure of \$62,000. The court rejected Steven's request to base it upon an average of his "last few years" of earnings. On appeal, he requests that we recalculate his child support amount after averaging his last six years of earnings.

"[A] determination of the net monthly income of the custodial and noncustodial parent" is necessary in applying the guidelines. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa 2005). In determining the income of a person who has fluctuating monthly income, it may be "best to use an average of income from a period that accurately reflects the fluctuations in income." *In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994). Here, Steven's income was not "fluctuating," rather it was quite steadily increasing over at least the previous six years. Further, there was no evidence indicating that Steven's income was likely to decrease in the future. We therefore affirm the court's refusal to employ income-averaging in determining Steven's child support level.

**Physical Care.**

Steven asserts on appeal that the court should have awarded the parties joint physical care of the children. Both at trial and on appeal, it appears that Steven's main concern is that following the dissolution, if she is granted the children's physical care, Sharon may move out of the State with them. He affirmed his goal is to keep the children near their hometown of Neola.

The objective in a physical care determination is to place the children in the environment most likely to bring them to healthy physical, mental, and social

maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). A district court may award joint physical care when it is in the best interests of the children, but the court is not required to do so. See Iowa Code § 598.41(5) (2005). Several factors are considered in determining the long-term best interests of the children. See Iowa Code § 598.41(3); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Upon our careful de novo review of the record, we are convinced that the children's interests are best served by placing them in the physical care of the mother. First, it is clear that since their births, Sharon has been the primary caregiver to Mitchell and Kylie. She was the parent who attended to the medical, educational, social, and physical needs. In this role she proved to be a caring and nurturing parent that met the needs of her children. Steven, on the other hand, assumed a much more limited parental role. Furthermore, the record supports Sharon's concerns that Steven has a serious alcohol problem that could impact his ability to provide care for the children. For these reasons, we agree with the district court's determination that a shared care arrangement is not viable under the facts of this case.

**Attorney Fees.**

Sharon requests an award of appellate attorney fees. An award of appellate 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 making the request, the ability of the other

party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Sharon's request for appellate attorney fees is denied. Costs of the appeal are taxed one-half to each party.

**AFFIRMED AS MODIFIED.**