

IN THE COURT OF APPEALS OF IOWA

No. 7-918 / 07-0897
Filed February 27, 2008

IN RE THE MARRIAGE OF TRACY MORAN AND HADI SHAABAN

**Upon the Petition of
TRACY MORAN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
HADI SHAABAN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs,
Judge.

Hadi Shaaban appeals and Tracy Moran cross-appeals from the decree
dissolving their nine-year marriage. **AFFIRMED AS MODIFIED.**

Constance Peschang Stannard of Johnston & Nathanson, Iowa City, for
appellant.

Sharon Mellon of Mellon & Spies, Iowa City, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Hadi Shaaban appeals and Tracy Moran cross-appeals from the March 2007 decree dissolving their nine-year marriage. Hadi challenges (1) the district court's decision to place sole custody of the parties' son, born in March of 2002, with Tracy and its decision to deny both his claims for joint legal custody and joint physical care, (2) certain economic provisions of the decree, (3) the provisions of a permanent restraining order, and (4) the requirement that he provide all transportation for visitation. Tracy contends that the district court abused its discretion in refusing to award her an additional \$25,000 in attorney fees. We affirm as modified.

Background. Hadi, born in 1977, and Tracy, born in 1979, were married in January of 1998¹ when they both were in the early part of their college careers and attending Washington University in St. Louis, Missouri, from which they both graduated in 2000. During the marriage Hadi earned engineering and medical degrees. At the time of the dissolution hearing in March of 2007 he was a surgical resident in Michigan. Tracy, who at the time of the hearing was a Ph.D. candidate at the University of Iowa, earned a B.A. and a M.A. degree during the marriage. They became the parents of a son born in March of 2002.

Unfortunately the couple has not been as successful in their married life as they have been in their educational endeavors. During the course of a five-day trial giving diametrically different testimony, they sought to relate the problems in their nearly nine-year marriage. Tracy sought through her testimony to show that Hadi was controlling and abusive. Hadi in his testimony denied her

¹ At the time of the marriage, they kept the marriage secret. They had a subsequent marriage ceremony in 2000.

allegations of abuse, contending that she has and had a series of problems with her parents, as well as emotional and behavior problems, and that he would be the better parent.

The district court named Tracy the sole custodian, set visitation for Hadi and required him to provide transportation for visitation, and made permanent a restraining order² that had earlier been granted on a stipulation of the parties.

Scope of Review. Our standard of review in dissolution-of-marriage proceedings is de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). In a de novo review we examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1982). 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); *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); see also *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

² The order restrained Hadi from (1) threatening, assaulting, stalking, molesting, or harassing Tracy, (2) communicating with Tracy in person, by telephone or writing or through third persons except to discuss matters directly related to their child, (3) entering, occupying or remaining in or upon Tracy's residence or where she is employed. It provided he may come to her home to pick up or drop off their child for visitation but must remain in his vehicle at all times on the public portion of the street. It further provided if he intended to personally drop off or pick up their child at her home that he should inform her in writing in advance of each occasion or make arrangements for someone to assist the child with his belongings from the car to the house and if Hadi is accompanied by a relative or a friend that person can assist the child to and from the car. A later order nunc pro tunc entered by the district court on March 20, 2007, provided that, "Violation of this order shall result in the arrest of the Respondent."

Custodial Issues. Hadi contends that the trial court erred in awarding Tracy sole legal custody, failing to award him primary physical care, and in denying him joint custody.

Tracy has been the primary caregiver. In assessing who should be a child's physical caretaker, we consider whether one parent has historically been the primary caregiver, although this factor is not controlling. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). This consideration is given due weight; however, the court must consider all relevant factors in determining which parent is better able to provide for the long-term best interests of the child. *See In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa Ct. App. 1996).

Hadi does not challenge the fact Tracy has been the primary custodian. He contends however that Tracy has failed to and been unwilling to keep him involved in their child's life despite the fact they had joint legal custody under the temporary order that was in place preceding trial. He further contends that he found out about the child's medication after the fact and as a doctor, he should have input in his child's care and treatment.

Hadi also contends Tracy has had mental health intervention, has been diagnosed with depression, and has a history of head trauma. He contends he has none of these problems and is better able to offer the child a more stable and consistent environment.

Tracy has been the primary care parent and this weighs heavily in Tracy's favor in addressing the custodial issues. Granting a parent who has been the primary caregiver primary physical care provides continuity and is generally the least disruptive alternative. *See In re Marriage of Hanson*, 733 N.W.2d 683, 700

(Iowa 2007). However, if there is evidence that the primary care parent has failed to properly care for the child, fails to support the other parent's relationship with the child, or has personal problems which may negatively impact his or her ability to parent, any priority the primary care parent has can quickly dissolve. See *Kunkel*, 546 N.W.2d at 636.

Unfortunately the record tells us little about either parent's parenting skills and their plans for the child if he is placed in their primary care. We do know that Tracy, at time of trial, had the child in a child care program which both parents appeared to approve. Yet there was little evidence in the five day trial about how she spends time with her son or what her future plans are for his child care and education, and how she plans to foster his relationship with his father, among other things. There also is little evidence about Hadi's plans should he have custody. He has exercised visitation though he lives in Michigan. His family, with whom he apparently stays when he exercises visitation,³ testified he gives good care to the child when he exercises visitation and the child has great affection for his father.

Tracy testified that Hadi was controlling and abusive during the course of the marriage. Hadi admits he was not faultless in their relationship and could have shown greater concern for Tracy's needs. He denies however that he was ever physically abusive and contends Tracy has manufactured claims of his abuse to give herself a superior position in the custody dispute. Tracy contends, among other things, that Hadi's abusive conduct supports the award of sole custody to her and it should be affirmed.

³ Hadi's family lives in Chicago and it is more convenient for him to exercise visitation there than to take and return the child from his home in Michigan.

We, as did the trial court, have some concern about the manner in which Tracy's claims of abuse surfaced. When she filed the petition for dissolution that led to this appeal in August of 2004 she requested, among other things, that the court grant temporary and permanent joint legal custody of their child to herself and Hadi and that she be granted temporary and permanent physical care. Hadi responded to Tracy's custodial requests with a request for temporary and permanent joint legal custody and joint physical care of his son. A hearing on issues of temporary custody and support was set for January 12, 2005.

On December 10, 2004, the parties and their attorneys met for a pretrial conference and filed stipulations as to assets and liabilities. Hadi, who came from out of town, was unhappy that the law firm⁴ he had engaged had sent a new associate to represent him and did not agree with certain proposals Tracy made. After Hadi and his attorney left the Johnson County courthouse, according to Tracy's testimony, she and her attorney went to the office of the clerk of court in the same courthouse. There, Tracy filed a petition for relief from domestic abuse under Iowa Code chapter 236.⁵ Tracy contended in the petition that Hadi on July 27, 2004, prior to the parties' separation and prior to her filing the petition for dissolution, had physically abused her and that in 1998 he hit her. Tracy further contended Hadi had threatened to harm or kill her if she took his son. She noted on the petition that the abuse occurred "Throughout marriage and since separation on March 22, 2002 to present." Before 12:30 in the afternoon of that day, a district court judge signed a temporary protective order granting Tracy

⁴ He had different representation at trial and on appeal.

⁵ In filing the dissolution petition Tracy identified her husband as Hadi Shaaban while in the petition for relief from domestic abuse she referred to him as Abdel-Hadi Shaaban.

custody of the parties' son and setting a hearing on the domestic abuse petition for December 21, 2004. The domestic abuse petition was subsequently dismissed and no finding of abuse was made. Before the scheduled December 21 hearing Hadi agreed to the entry of a protective order and to Tracy having temporary custody of the parties' son until the January 12, 2005 hearing on temporary custody and temporary support.

A hearing was held on January 12, and on January 25, 2005, the district court, after considering the evidence, entered a temporary order granting joint legal custody to the parties and primary physical care to Tracy. Hadi was given visitation and ordered to pay child support.

On March 5, 2005, Hadi filed a request for an attorney for the child and a child custody evaluator which Tracy challenged and the district court denied.

On June 9, 2005, Tracy sought to amend her petition to ask for sole legal custody. Hadi resisted the motion to amend but it was granted and the trial date that had been set for August 16, 2005 was continued.

Trial finally commenced on November 6, 2006, and continued on the 7th, 8th, 9th, and 13th. The district court provided a limit of time to take testimony and allocated it between the parties. The court had the parties testify and then heard their respective witnesses. It would serve no useful purpose to reiterate the parties' testimony, much of which is not particularly useful to us in deciding custody.

What is clear to us from the testimony of both parties and records of the parties' remarks is that this was a turbulent marriage and the parties both contributed to the problems. Their early marriage put them in a stressful position

as they both were interested in completing their education and earning good grades while doing so. They came to the marriage from different backgrounds and were in different positions with their families. Tracy's parents divorced soon after the marriage and had developed a strong dislike of Hadi. Hadi's parents had been married for decades and they and their three sons and extended families had a strong relationship and they embraced Tracy and welcomed her into their family and were extremely generous in providing financial support for Tracy and Hadi.

We recognize the seriousness of abusive behavior in a marriage and know that it is frequently covered up so the fact that Tracy did not promptly report it to friends, medical providers, and law enforcement does not mean it did not happen. We do not minimize the seriousness of domestic violence and the negative impact it has on children. We also recognize some relationships are mutually aggressive, both verbally and physically. In those situations, a claim of domestic violence must not be used by either party to gain an advantage at trial, but should be reserved for the intended purpose—to protect victims from their aggressors. *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998). A finding that one parent has been abusive to the other puts the abusive parent at a disadvantage in a custody dispute and can provide an incentive for a parent seeking custody to make false allegations of abuse. It also can have other negative consequences to the parent found abusive. Furthermore, though abusive behavior can be detrimental to a child, false allegations of abuse can also jeopardize the welfare of the child by denying him or her of the benefits of joint custody, including the encouragement of both parents to share the rights

and responsibilities, and the frequently joyful and meaningful experiences of raising their children. See *In re Marriage of Weidner*, 338 N.W.2d 351, 359 (1983).

We give close scrutiny to allegations of past abuse during the marriage that surface for the first time after a dissolution is filed and custody has become an issue. This is especially important where, as here, the alleged incidents have never been reported to law enforcement, nor has the alleged abused party sought a protective order earlier, and the corroboration of the alleged abused spouse's testimony is weak. See *Barry*, 588 N.W.2d at 713.

Our review of the record causes us to question Tracy's credibility and to find, contrary to her testimony, that her relationship with her parents has been turbulent at times. There also are medical records that support Hadi's contention that Tracy has suffered from depression and mood swings.

That said, it is apparent after reviewing the testimony of both of the parties that they both want to be good parents but they do not have the ability to communicate with each other regarding the child's needs and appear unable to reach joint decisions with reference to the child's care. We find, therefore, for those reasons joint physical care is not in the child's interest. Tracy having been the primary care parent, we agree with the district court that she should have sole custody. We therefore affirm the custody and visitation provisions of the decree. We modify to provide that Hadi shall have the right to obtain copies of any of their son's medical and school records. In all other respects we affirm the custody award to Tracy.

Restraining order. Hadi argues the restraining order precludes him from having any real input in his child's life. He argues the prohibition against being in Tracy's presence will preclude him from attending any of his son's events at school or otherwise that Tracy may elect to attend. We agree with Hadi that the restraining order is unduly restrictive. Hadi, since the parties' separation, has been counseling on a weekly basis with Dr. Jay Lebor, a family counselor at Northwestern University in Chicago. The counselor who testified at trial found no evidence Hadi had a personality disorder. The doctor testified that in his work as a therapist, when he has concerns his patient might put anyone in physical danger he has an obligation to report to authorities the person who might be at risk of physical danger. He said he never had an occasion to think Hadi might represent a credible threat. He specifically testified, "Everything that I saw from Hadi was that while he would get very upset in the context of some of these conflicts, he did not present a danger to others." The doctor also testified he believed with therapy Hadi now handled conflict in a more tranquil way. We affirm that part of the restraining order that provides Hadi should only contact Tracy to talk about their son. The balance of the restraining order is stricken.

Transportation for visitation. Hadi contends it was unfair to him to have to assume all of the burden of transporting the child for his visits. Tracy seems to have requested the provision because she is afraid she will not be protected from Hadi outside the state of Iowa. She complains about an exchange of their son outside O'Hare airport in Chicago. The exchange was made at her request because she was flying through O'Hare on her way to England. Apparently Tracy's problem with the exchange was that Hadi, in violation of the temporary

restraining order, was in her presence and the child was not properly exchanged through an intermediary. Tracy, Hadi, and a friend of Tracy's present at the time of the transfer testified. Hadi's rendition of the events where he indicated there were no problems is closer to Tracy's friend's version of the events than Tracy's.

We are sensitive to concerns real or imagined that parents may have in exchanging their children for visits. However the transportation provisions are cumbersome to Hadi and may become more cumbersome as the record shows Tracy is considering jobs in other parts of the country and possibly England.

In *In re Marriage of Crotty*, 584 N.W.2d 714, 718 (Iowa Ct. App. 1998), we addressed a district court's requirement that a noncustodial father provide all transportation for visitation. We determined some modification of the visitation schedule was necessary for the children's benefit and in fairness to the father, and to accommodate his work schedule. *Crotty*, 584 N.W.2d at 718. We modified to require the mother provide for some transportation. See *id.* We believe a modification of the transportation provision is justified here.

Tracy's problems with the airport exchange would indicate that she is hyper-sensitive. Hadi, to his credit, has had counseling for two years to improve his life and deal with his problems. We modify the decree to provide that Hadi shall provide transportation for the child for his visitation and Tracy shall provide transportation for the return of the child from visitation to her home. Either party can engage a responsible adult to transport and deliver the child to the other

parent or to be at his or her home when the child is delivered.⁶ As modified, we affirm the transportation provision made by the district court.

Economic provision of the decree. Hadi contends that the district court erred in setting aside what was termed premarital property to Tracy. He contends that the record does not support a finding it was premarital property. He further contends it was inequitable to set the sum aside to Tracy and fail to give him any credit for the substantial contributions his parents have made to the parties when he is required to pay his parents back or his inheritance will be reduced by the contributions.

At the time of the dissolution Hadi was earning \$40,000 a year and Tracy \$23,000. Hadi worked a year after his last year of college as an engineer for a consulting company but quit upon being admitted to Des Moines University. He apparently had a good salary during that period.

Otherwise during the marriage the parties had minimal earnings and substantial expenses as both were students. Tracy appears to have obtained some income for educational expenses from her grandfather's trust but, according to one report she made, her parents stopped giving her money when she started dating Hadi. Both parties recognize that Hadi's family provided substantial support to the young family. The couple paid their bills using Hadi's family credit cards and checks. The couple's lifestyle was luxurious and included overseas trips and an expensive furnished house in Iowa City with maid service. In addition, Hadi's family provided them with motor vehicles and paid for insuring the vehicles. The couple's only repayment for all the money provided by Hadi's

⁶ This provides Tracy a method to totally avoid Hadi during visitation exchanges if she wishes.

parents was a rent payment of less than \$800 a month for the Iowa City house. The cars they drove, as well as the homes they had lived in, had been acquired as a result of Hadi's family's money.

Hadi contended his family provided the couple with nearly \$600,000 and it would come from his inheritance if not repaid as expected, as his older brothers had repaid loans from the family. There was evidence from Hadi and his mother that repayment on the honor system was expected and they both had so advised Tracy. She denied this in her testimony.

Hadi was ordered to pay \$529 a month in child support. Tracy was to provide the health and dental insurance as was currently available through her employer and both parents were ordered to provide health insurance as available in the future. Hadi received the child's tax deduction, and both were ordered to assist with his postsecondary education expenses in accordance with Iowa law and to maintain \$100,000 in life insurance with him as the beneficiary. No alimony was ordered. Certain personal property was given to each party. The parties had an investment account of \$131,321.14 and the court ordered that Tracy have \$81,713 of that amount set aside to her as premarital property and the balance of the account be divided. Hadi's Roth IRA and 401(k) were divided. Debts were allocated including requiring Hadi to pay his student loan of \$75,000 and Tracy to pay her student loan of \$45,971⁷ and Hadi being required to pay any indebtedness to his family, including to his parents and brother and a Discover card in Tracy's name. The court gave Hadi no credit for contributions by his family.

⁷ Apparently Tracy's student loan was taken out to pay her attorney fees.

Tracy contends the \$81,713 is gifted property. Hadi contends that the records do not show this property was exclusively Tracy's and that it is unfair to allow her to leave the marriage with gifted or premarital property when his family contributed so substantially financially to the marriage and he has an obligation to pay them back.

We agree with Hadi that it is difficult to determine what portion of the account is Tracy's gifted or premarital property although it does appear that some of the money in the account was stock that came to Tracy through a transfer under the uniform gifts to minors act.

Section 598.21(2) (2003) provides in relevant part,

Inherited and gifted property.

Property inherited by either party or 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 under this section *except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.*

Iowa Code § 598.21(2) (2003) (emphasis supplied).

In *In re Marriage of Thomas*, 319 N.W.2d 209, 210 (Iowa 1982), the court considered section 598.21, enacted in 1977, which specified in considerable detail the criteria to be considered by a trial court in dividing property in dissolution of marriage cases. The court noted that one provision of this statute addressed property which a party inherited or received as a gift prior to or during the marriage. *Thomas*, 319 N.W.2d at 210. The statute provided, as it does today, that such property

is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Id. at 210 (citing then Iowa Code § 598.21(2) (1981), currently renumbered as § 598.21(6) (2007)). As to this section the *Thomas* court said:

We think this is substantially a codification of principles we had established by case law. *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979); *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of Beeh*, 214 N.W.2d 170, 175 (Iowa 1974). These cases and the newer statute, alike, start with the premise that the property is not subject to division; but the premise yields where its application would be unjust.

Id.

The court then went on to note that the requirement to set aside to a party the property which has thus been inherited or received as a gift is not absolute and division may nevertheless occur to avoid injustice. *Id.* at 211. The court noted a number of factors might bear on a claim that property should be divided under this exception. *Id.* These include:

- (1) contributions of the parties toward the property, its care, preservation or improvement;
- (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
- (3) *separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;*
- (4) any special needs of either party;
- (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

Id. (emphasis supplied). The court explained that

[o]ther matters, such as the length of the marriage or the length of time the property was held after it was devised or given, though not independent factors, may indirectly bear on the question for their effect on the listed factors. Still other matters might tend to negative or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception.

Id.

Clearly the contribution to the parties' economic welfare which was made by Hadi's parents and was not the result of any efforts by either spouse or their combined joint efforts, allowed Tracy to complete her education, enjoy an excellent standard of living, and enhance her life experience by extensive travel, and allowed her to preserve to the extent that she did money that may have been gifted to her by her family. It is unfair and not equitable to Hadi to allow Tracy to leave the marriage with these assets and make Hadi responsible for repaying his family. We modify the property division to provide that the \$131,321.14 be divided equally between the parties.

Attorney fees. The district court ordered Hadi to pay \$1000 towards Tracy's attorney fees. Hadi was ordered to pay his own attorney fees. It appeared that prior to or maybe including trial, Tracy had incurred \$50,000 in attorney fees, some \$25,000 of which she had paid. Hadi had incurred \$75,000 in attorney fees which his parents apparently have paid. Hadi has requested appellate fees of \$25,808.17.

Tracy on cross-appeal contends that she should have been awarded \$25,000 in additional fees. She also has asked for an additional \$15,652.42 for fees incurred in this appeal. Tracy contends that Hadi engaged in frivolous litigation tactics and he had significant money to hire both an attorney in Illinois and Iowa and secure the services of a private investigator. She suggests that we should not only consider the income of Hadi but the resources he had available to him during the litigation.

First, we note that neither party made an effort to compromise or to condense the evidence presented in a 13,000 page transcript. Both parties love

their child and there is no evidence that they present any danger to him. However they have engaged in litigation aimed primarily at criticizing each other and/or their respective families.⁸

Hadi had requested that an attorney be appointed for the child. Tracy resisted the application and the district court denied the application finding it was not necessary because “there is no indication the child’s legal interests are different from those of the parents and both parties are represented by more than competent counsel.” Hadi also asked for a custody evaluation which application was resisted by Tracy and also denied by the district court. Unlike Tracy we do not consider these requests, even though they were denied, frivolous litigation. Secondly, while Hadi’s parents provided the couple a luxurious lifestyle during their marriage, they owe nothing to either their son or to Tracy and they have no responsibility to provide Hadi money to pay Tracy’s attorney fees.

The district court did not abuse its discretion in denying Tracy further attorney fees. We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

We affirm the custody award with modification. We modify the restraining order and the provision for visitation transportation. We modify the property division. We award no attorney fees.

AFFIRMED AS MODIFIED.

Vogel, J. dissents in part.

⁸ That said, we note that Tracy appeared to have fewer problems with Hadi’s family than he did with her family. Also, Hadi was more charitable in his testimony to Tracy than she was to him.

VOGEL, J. (partial dissent)

I dissent in part and would defer to the district court's detailed credibility findings on all issues. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Murphy*, 592 N.W.2d 681, 682 (Iowa 1999) (noting that the district court has a superior vantage point to make credibility determinations due to its ability to observe the demeanor of the witnesses). Additionally, I would affirm the setting aside Tracy's gifted property of \$81,520.00. In all other respects, I concur with the majority opinion.