IN THE COURT OF APPEALS OF IOWA

No. 9-563 / 09-0169
Filed September 2, 2009

IN RE THE MARRIAGE OF SHELLIE ANN BANGS AND CORI LEE BANGS

Upon the Petition of
SHELLIE ANN BANGS,
Petitioner-Appellee,

And Concerning
CORI LEE BANGS,
Respondent-Appellant.

Appeal from the Iowa District Court for Boone County, David R. Danilson, Judge.

The respondent appeals from the child custody and economic provisions of the district court's order dissolving his marriage to the petitioner. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Michael Tungesvik of Kruse & Dakin, L.L.P., Boone, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Cori Bangs appeals from the child custody and economic provisions of the decree dissolving his marriage to Shellie Bangs. Cori contends that the district court should have granted the parties joint physical care of their son and the district court should have granted his motion to reopen the record to reflect the decline in the value of his 401(k) account from date of trial to date of ruling. We affirm.

I. Background Facts and Proceedings

Cori and Shellie were married in February 2000. Shellie had previously been married and had two sons from that marriage. Cori and Shellie's marriage resulted in one child: Dylan, born in January 2002. At the time of the dissolution proceedings, Cori was thirty-nine years old and employed as a sales manager and Shellie was thirty-six years old and employed as a teacher.

Cori and Shellie separated July 5, 2007. On September 14, 2007, Shellie filed a petition for dissolution of marriage. During the pending litigation, the parties agreed to and utilized a joint physical care schedule for Dylan. Prior to trial, Cori and Shellie reached an agreement as to the valuation of most property and joint legal custody of Dylan. However, they did not agree as to physical care of Dylan. Cori requested the parties be awarded joint physical care and Shellie requested she be awarded physical care.

On September 3 and 4, 2008, trial was held. On October 15, 2008, prior to the district court's ruling, Cori moved to reopen the record to allow new evidence. He asserted that on August 27, 2008, the balance of his 401(k) account was $166,298, but on October 15, 2008, the balance of his 401(k)

account had dropped to $126,767. Therefore, he requested the district court reopen the record to allow him to submit evidence regarding the current values of his retirement plan. Shellie resisted the motion asserting that the proper date to value assets is the time of trial. On October 30, 2008, the district court denied Cori's motion to reopen the record stating "the Court declines to reopen the evidence after the conclusion of trial for purposes of submitting additional evidence on new values of assets which are subject to daily changes in the stock market."

On December 3, 2008, the district court entered its decree of dissolution of marriage. The district court awarded Cori and Shellie joint legal custody of Dylan, with Shellie having physical care and Cori liberal visitation. Cori was to have visitation with Dylan alternating weekends throughout the school year and every other week during summer vacation. Additionally, the district court set forth a holiday visitation schedule. Cori was ordered to pay child support and thirty months of spousal support. The district court divided the marital assets and in order to make the division equitable, ordered Cori to pay Shellie $65,000 within sixty days or in lieu of a cash payment, Cori "may pay this settlement sum via a QDRO applicable to his 401(k) account."

Both parties filed a motion to enlarge or expand pursuant to Iowa Rule of Civil Procedure 1.904(2). Cori's motion requested the district court to reconsider physical care of Dylan and the valuation of Cori's 401(k) account. On January 8, 2009, the district court declined to award joint physical care or to reconsider the valuation of Cori's 401(k) account. However, the district court ordered that Cori's visitation with Dylan include a weekday visit on Tuesday evenings beginning after

school and ending at 7:30 p.m., to which Cori and Shellie had agreed. Cori appeals, requesting joint physical care of Dylan and challenges the valuation of his 401(k) account.

II. Scope of Review

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *Sullins*, 715 N.W.2d at 247 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)). Finally, we review the district court's decision on whether to reopen the record for an abuse of discretion. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 635 (Iowa 1996) (reviewing a district court's decision to reopen the record and consider additional testimony for an abuse of discretion); *In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984) ("[T]he court has broad discretion to reopen the evidence.").

III. Physical Care

In determining whether to award joint physical care or physical care with one parent, the best interests of the child remains the principal consideration. Iowa R. App. P. 6.904(3)(*o*); *Hansen*, 733 N.W.2d at 695. The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2007), as well

as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). *See Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

Following trial, the district court addressed the parties from the bench, as well as issuing a detailed ruling, discussing the reasons for its physical care decision. The district court found that Cori and Shellie are both "excellent parents" and the record demonstrates that both are caring and loving parents. The district court discussed the factors it weighed, including the four *Hansen* factors. *See id*. at 696-99. The district court granted Shellie physical care of Dylan, finding that although Cori has been an active parent, Shellie has clearly been primarily responsible for Dylan's care throughout the marriage. Additionally, the district court found that the parties have some communication problems.

Cori asserts that the district court should have granted the parties joint physical care because it is in Dylan's best interests as each parent has qualities the other lacks. Cori does not challenge the district court's finding that Shellie

was the primary caregiver, but rather argues that this factor should not be given as much weight and points to the fact that the parties were able to make a joint physical care arrangement work after their separation and prior to trial. Additionally, he asserts that Shellie overstated the communication problems.

Although Cori has been an active parent, Shellie has been Dylan's primary caretaker and responsible for his day-to-day needs. *See id.* at 696 ("In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have traditionally been primary factors."). The parties were able to implement a joint physical care schedule prior to trial, but this schedule involved five changes in care over a two-week period. Shellie testified that she didn't believe this schedule worked because there were too many changes in Dylan's care and Dylan, as well as the after-school babysitter, were often confused as to the schedule. *See id*. at 697 ("[I]mposing a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest."). Further, Shellie testified that an incident during the marriage led to ongoing communication problems between the parties. The district court found that Shellie's perception of the incident has affected the communication between the parties.

We defer to the credibility assessments of the district court and conclude the district court's factual findings were fully supported by the record. Further, the district court's ruling from the bench, as well as its detailed written ruling, reflects that it considered all of the appropriate factors in making a physical care award. Therefore, we affirm the district court's physical care decision.

IV. Property Division

Upon the dissolution of a marriage, the court must divide the property of the parties equitably. Iowa Code § 598.21(5). 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).

Cori argues the district court inequitably divided the property because it failed to reopen the record to consider the decrease in value of Cori's 401(k) account between trial and filing of the decree. Assets are to be valued as of the trial date. *Campbell*, 623 N.W.2d at 588; *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). However, we recognize that in order to achieve an equitable distribution, there may be occasions where the trial date may not be appropriate to determine values. *Driscoll*, 563 N.W.2d at 642.

In this case, we find no reason to depart from using the date of trial as the date of valuing the 401(k) account. As the district court found, the value of this asset is "subject to daily changes in the stock market." Had the opposite occurred and the 401(k) account increased in value, the value would still be established as of the date of trial. *See Campbell*, 623 N.W.2d at 588 (valuing a 401(k) account as of the date of trial where the 401(k) account increased in value from the date of separation to the date of trial); *Driscoll*, 563 N.W.2d at 642 (same). Furthermore, other assets may have decreased in value over this time, such as the real estate. Had the district court reopened the record, it would have either revalued one asset in isolation or allowed the parties to essentially

relitigate the values of all the marital assets as of a new date. One benefit of using the date of trial to fix the value of assets is to avoid asset valuation from becoming a moving target. *See In re Marriage of Locke*, 246 N.W.2d 246, 253 (Iowa 1976) (discussing that the date of trial is the only reasonable date to assess the parties' net worth). Therefore, we find the district court did not abuse its discretion in denying Cori's motion to reopen the record.

V. Attorney Fees

Shellie requests attorney fees on appeal. 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). Having considered the appropriate factors, we decline to grant Shellie appellate attorney fees. Costs on appeal are assessed to Cori.

AFFIRMED.