IN THE COURT OF APPEALS OF IOWA

No. 9-770 / 09-0607
Filed February 24, 2010

IN RE MARRIAGE OF WENDY IRENE RANARD AND DAVID JAY RANARD

Upon the Petition of
WENDY IRENE RANARD,
Petitioner-Appellee,

And Concerning
DAVID JAY RANARD,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Respondent appeals the custodial and certain financial provisions of the decree dissolving his marriage to petitioner. **AFFIRMED AS MODIFIED AND REMANDED.**

David E. Brown and Alison Werner Smith of Hayek, Brown, Moreland & Smith, L.L.P., Iowa City, for appellant.

Randall B. Willman of Leff Law Firm, L.L.P., Iowa City, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

David J. Ranard appeals, challenging the custodial and economic provisions of the April 9, 2009, decree dissolving his marriage to Wendy Irene Ranard. He contends that he and Wendy should have joint physical care of their two children. He also contends that the district court did not consider all factors in deciding the value of their retirement accounts, and should have granted his request to reopen the record to show the decline in value of his retirement accounts after trial. Wendy asks for appellate attorney fees. We affirm as modified and remand to the district court.

I. SCOPE 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.* Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility, but we are not bound by them. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

II. BACKGROUND AND PROCEEDINGS. The parties were married in May of 1994. They have a daughter born in July of 1995, and a son born in April of 1997. David was born in 1962, and Wendy in 1959. At the time of trial both parties worked for NCS/Pearson. David, a college graduate, earned an annual salary of $114,744, and Wendy, a high school graduate, earned an annual salary of $73,691. Both parties had completed their educations and were gainfully employed at the time of marriage. Since the marriage, David has been employed

outside the home on a full-time basis. Wendy continued her employment outside the home until the parties' second child was born in 1997. At the time, the parties determined it was in the children's interest that she leave her job for a period. She did some temporary work from home then went to half-time employment. In 2005, she returned to full-time employment. During the period she was not working outside the home, she assumed more day-to-day responsibilities for the children than did David. However, the record clearly supports a finding that at all times since their daughter's birth both parties have actively participated in their children's lives.

A dissolution petition was filed by Wendy in February of 2007. In July of 2007, the district court, after hearing the statements and arguments of the parties' attorneys and reviewing affidavits filed by each party, entered a temporary order providing in part:

> Given the parties['] respective merits, I conclude that Wendy and David should be able to parent their children after their separation on a shared physical care basis. . . . Since the parties' residence . . . is the children's familiar, comfortable surroundings, I believe that the children should be permitted to remain in their home while the dissolution is pending.

The court then went on to order a shared care schedule that provided that the parents rotate in and out of the family home every two weeks. Provisions were also made for shared holidays. Subsequent to this order the parties agreed that their rotation would occur every week. By their own agreement, and without further court intervention, they followed this schedule without major problems

until the dissolution decree was filed in April of 2009.[1] In addition to sharing the physical care of the children and the home, they were sharing the expense of their home. They did so without any major problems.

Trial was held on July 7 and 8 in 2008. David sought shared physical care and Wendy sought to be the children's primary custodian. They both had witnesses testify to their parenting ability. The record was left open to provide for the evidentiary deposition of Wilford John Green, a witness for David. Green's deposition was taken and certified by the court reporter on July 17, 2008, but was not filed as an exhibit until one minute before the decree was filed on April 9, 2009.[2] Financial information was also presented to the court including information on the value of retirement accounts and the parties' personal residence.

On March 31, 2009, David had filed a motion to reopen the record noting that his 401(k) and pension accounts had dropped about a third in value since the time of trial. He sought to admit exhibits to support his contention that his retirement accounts had decreased $120,000 in value since the trial nine months earlier. Wendy responded by filing an amended affidavit of financial status on April 2, 2009.

The district court filed its decree on April 9, 2009, some eleven months following trial. The court denied David's motion to reopen and the offer of exhibits, finding that "[t]he court must base the division of assets and liabilities as

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[1] The Supreme Court entered a temporary order which has resulted in the schedule being in place from the time of the dissolution until the appeal is resolved.

[2] We assume that the evidentiary deposition was sent to the court earlier. The court's decree indicates it was accepted as an exhibit.

they existed at the time of trial." The court noted it was aware that the parties are being awarded assets that are subject to market fluctuation.

In addressing the custody issue, the district court found that for most of the marriage Wendy had been the children's primary care parent. The court noted that David wanted shared care and Wendy opposed it. The court further found the parties had difficulty with communication and had different parenting styles. The court found that sharing care was not always without problems and the parties have had financial issues. The court rejected a shared care arrangement as not being in the best interest of the children. The court provided that the parties should "have joint legal custody of their two children . . . [and] Wendy should have physical care of the children."[3] David was ordered to pay child support of $1212 a month.

The court further provided that the family home should go to Wendy finding that David should receive equal value in considering the division of other assets. Ultimately, each party received, based on July 2007 values, about $350,000 in equities. To reach this division, the court ordered Wendy to pay David a $14,000 equalization payment, payable at $1000 a year with interest at two percent per annum. While the district court provided for this payment in equalizing the property settlement in its finding of facts, it did not include it in the decree portion of its ruling.[4] The parties were also each ordered individually to

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[3] This finding came from a nunc pro tunc order entered on April 13, 2009, which amended the paragraph of the decree granting the parties joint legal custody of their children and Wendy physical care. No one challenges the nunc pro tunc order.

[4] It appears Wendy acknowledges that she owes the equalization payment and the $14,000 is currently in her attorney's trust account.

pay a few specified debts. The parties were ordered to pay their own attorney fees.

III. CUSTODIAL ISSUES. David contends the district court should have continued the joint physical care provided for in the temporary order and modified by the parties' own agreement. He contends to do so will assure the combined presence of the parents in their children's lives and will continue the strong relationships the children have with both parents. He expresses concern that Wendy, as primary custodian, would not be supportive of his relationship with the children, as she has engaged in behavior in the past that he believes intended to alienate them from him. He argues that the district court's decision alters the family dynamics and vests in Wendy the sole decisions regarding the children that previously were shared by both of them. He notes that the district court, in denying him shared care found, "[t]here is no question that David is actively involved in the children's lives in very beneficial ways."

Wendy contends that David, in his arguments, has ignored the fact that she was the historic primary physical caretaker prior to the parties' separation. She contends she is the spouse that has, prior to the separation, been primarily responsible for the children's care. She contends that she is in contact with the children's school and is in constant communication with both children even during David's weeks with them. She testified she pays for her daughter's cell phone and sends and receives text messages from her daughter five to ten times during the school day. David pays for their son's cell phone and Wendy is unhappy that David does not pay for text messaging for their son's phone so that

she can have the same contact with him that she has with their daughter, whereas now her only contact with him is by cell phone. She also contends that the parties do not have the ability to communicate well and do not show mutual respect to each other.

The court's objective is to place a child in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Although shared physical care was once strongly disfavored by the courts, the Iowa legislature has proclaimed it a viable disposition of a custody dispute. *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). An award of shared physical care is appropriate where such action would be "in the best interests of the children and would preserve the relationship between each parent and the children." *Id.* If the request is made for shared physical care, then a denial of the request by the court must include specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the children. Iowa Code § 598.41(5)(a) (2007).

Our review of the evidence shows us that both parents have been concerned about their children's well-being since the children's births and have both actively participated in their care and have continued to do so since their separation. Wendy testified that when their daughter was born she stayed home for a short period before returning to work. When she returned to work, David took their daughter to daycare and she picked her up. Wendy was unable to

nurse the child, so the parents shared feedings. Clearly, they both were actively engaged with their daughter from her infancy.

When their son was born, Wendy, as set forth above, took some time out from the work force to be at home and during this time obviously she spent more hours with the children than did David. However, when she returned to work it appears that the parties again began sharing more evenly most responsibilities for the children.

The district court found Wendy was the primary custodian. We recognize that substantial weight in a custody issue is given to the fact a parent has been the primary custodian prior to the parties' separation. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696-97 (Iowa 2007). However, this does not mean in every custody dispute we need determine a primary custodian.[5] Nor is it necessary in a claim for shared care, to make a determination that one of the parents is a better parent; rather a focal question is whether they are each a suitable custodian, a predicate to shared care. *See In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983); *Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). Clearly both parties are suitable custodians. The focus therefore is on whether the interests of the children are better served by substantial and nearly equal contact with both parents through a shared care arrangement or by naming one parent the physical care parent, and providing the other with

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[5] Clearly, there are cases where one parent assumes substantial care of the children, and the other does not and determining a primary custodian is not difficult. However, in cases such as this, where both parents work outside the home, the children are in school, and the evidence is that both parties are active and engaged parents, determining a primary custodian should not be our primary focus.

visitation. There is evidence that the children want to maintain a relationship with both parents and want the shared care to continue. The children are teenagers and they, with their parents have for an extended period, maintained a shared care situation and made it work without grave difficulty. While Wendy contends that the parties do not communicate well enough to share parenting and they have difficulties with the other, our review of the record and exhibits does not prove this out. While they do have some differences of opinion there have been no major problems. Neither party has sought court intervention to enforce or interrupt or change the temporary order. They have agreed to modify the schedules to serve their mutual interests. They agree as to the school the children should attend and they communicate by e-mail about academic concerns related to the children.

Both have been active participants in their children's lives. The children love and want to associate with both parents. We find both to be responsible parents and note that each had credible witnesses who testified to their good parenting. Interestingly, they both contend the other is controlling and we believe they are both correct. They both are take charge people and well-organized, but this is not a case where one party's will is suppressed by the other's. David does not want to deprive Wendy of time with their children. He only wants them to share care which is a clear indication that he supports Wendy's relationship with the children. Wendy does not so clearly support David's relationship with the children.

The parents and children have worked well in a shared care arrangement from the time of the temporary order until the entry of the dissolution decree by the district court. The parents have resolved together problems connected with the children, including their son's ADHD. They have had disagreements. They shout at each other, but there has been no physical violence. They have been able to make shared care work and have both been willing to modify their time with the children so they can be available for activities with the other parent.

Both parties have admitted shortcomings. In a letter from Wendy's parents to David's parents, Wendy's parents opine that both Wendy and David are at fault for the marriage not working. A resolution of the dissolution will remove the parties' need to share expenses for the home and remove this issue from their relationship.

A shared care arrangement is in the children's interest. We find no compelling reason to deny David's request for shared care and modify the district court's order accordingly.

IV. EQUITY OF PROPERTY DIVISION. David contends the district court abused its discretion in not allowing him to offer additional evidence that, during the period between trial and decree, the value of the property awarded to him had declined substantially, rendering the division made in the decree inequitable. He notes that the district court gave Wendy the family home and sought to equalize the division by granting him a greater share of retirement accounts. He contends that the value of the retirement account had dropped substantially during the period in question but that the value of the home remained the same.

He contends the equitable way to resolve the issue would be to award each party one-half of the house and retirement accounts. He further contends that the failure of the district court to put the $14,000 equalizing payment in the decree contributes to the inequity.

The court may reopen the record to allow a party to present further evidence to correct oversights or mistakes. Iowa R. Civ. P. 1.920. "The trial court enjoys wide discretion in reopening a case for the reception of additional evidence." *Neimann v. Butterfield*, 551 N.W.2d 652, 655 (Iowa Ct. App. 1996). The time of trial was a reasonable time to use to establish the valuations of property. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). We do not find an abuse of discretion and affirm the property division in all respects.

V. ATTORNEY FEES. Wendy's attorney requests $8410 in attorney fees contending he spent 40.10 hours on the brief and he charges $200 an hour. He also claims 2.80 hours at $100 an hour for his legal assistant and 2.20 hours at $50 an hour for his law clerk. David does not ask for attorney fees but contends that both parties are able to pay their own. An award of attorney fees is not a right but rests within the sound discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We make no attorney fee award.

VI. SUMMARY. Joint physical or shared care will best assure the children the opportunity for the maximum continuing physical and emotional contact with both parents and will best encourage the parents to share the rights and responsibilities of raising them, and is in the children's best interest. We

therefore conclude the district court should not have rejected David's request for joint physical care and should have awarded the parties joint physical care.

We modify the decree of dissolution to provide that the parties shall have joint physical care of the two children. We therefore vacate the trial court's child support order, which was based on the children's physical care being placed with Wendy. While the current physical care schedule has been working well, we remand to the district court for such further proceedings as are necessary to establish a joint physical care schedule, fix child support, and to resolve any other issues that may arise as a result of our modification of its decree. We do not retain jurisdiction.

We affirm the property division. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.