

**IN THE COURT OF APPEALS OF IOWA**

No. 9-869 / 09-0727  
Filed January 22, 2010

**IN RE THE MARRIAGE OF AMY MARIE TESTRAKE  
AND KEVIN JOHN TESTRAKE**

**Upon the Petition of  
AMY MARIE TESTRAKE,**  
Petitioner-Appellee,

**And Concerning  
KEVIN JOHN TESTRAKE,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Muscatine County, J. Hobart  
Darbyshire, Judge.

Kevin TeStrake appeals from the custody, property, and alimony  
provisions of the district court's dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas G. Reidel, Muscatine, for appellant.

Barbara K. Wallace, Davenport, for appellee.

Heard by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.****I. Background Facts and Proceedings**

Amy and Kevin TeStrake were married on April 27, 1991. Amy filed a petition for dissolution of the marriage on July 20, 2007. The parties have three sons, Conner, Cameron, and Creed, who at the time of trial were sixteen, nine, and five respectively. Prior to trial, the parties stipulated to a temporary custody arrangement whereby Amy had physical care of Cameron and Creed, and Kevin had physical care of Conner, both subject to reasonable visitation by the other parent. The record reflects that both parties are good parents and are capable of raising their children. Conner has expressed a preference to live with Kevin. At trial, Amy agreed that Conner remain in Kevin's care, but Kevin requested the court to award to him care of Cameron and Creed.

Kevin has been employed at The Hon Company since 1985, after his high school graduation. Kevin's 2007 W-2 shows that he had taxable wages of \$64,179.12 from his employment at Hon. However, Kevin testified that the recent economic downturn decreased available hours for employees, so he believed his income for 2009 would be \$47,570. Kevin's normal work day is from 4:00 a.m. to 2:00 p.m., which has facilitated his spending time with the parties' children after school. After work, Kevin sometimes also helps his parents and a friend with their farming and enjoys volleyball and snowmobiling.

At the time of the marriage, Amy worked for Carver Pump earning roughly seven dollars per hour. Amy later went to work in a chiropractic office, where she worked for seven years. Shortly after the parties' second child was born, Amy left her job at the chiropractic office to work part-time for her brother. She worked

twenty hours per week earning seven dollars per hour. Amy then worked for Little Debbie Snacks around twelve hours per week earning seven dollars per hour. Amy was unable to work during and after the birth of the parties' third son because of complications, but eventually she began working at Ventilation Services. She worked roughly five hours and earned \$100 per week, a substantial increase in her historical hourly wage. In addition, she was able to take the children with her to work. Amy's boss at Ventilation Services testified that he offered to double her hours and pay, but in September of 2008 Amy told him that she was going to quit her job on the advice of her attorney. Amy has not sought employment since leaving Ventilation Services, though she testified that she is physically able to work.

Prior to the marriage, Kevin's parents gave him a parcel of their land on which the parties built their marital home. Though Kevin's parents deeded the land solely to Kevin, Kevin soon added Amy's name to the deed. Kevin invested roughly \$41,000 of premarital funds in the home. In 1994, Kevin's parents gave him a second parcel of land adjoining the marital residence, on which the parties built a pole barn. The property was again deeded solely to Kevin, and Amy's name was not added to the deed for the second parcel.

Janice Gaumer-Bennitt, a licensed appraiser, appraised the parties' marital residence on December 17, 2007. She valued both parcels of the improved property at \$237,000. She testified at trial that it was possible that the value of the property had declined five or ten percent as a result of market conditions. She further testified the value of the two parcels alone, not including improvements, was \$65,000. Lisa Heckman, a local realtor, also prepared a

market analysis before trial. In January of 2008, she recommended listing the property at \$205,500. However, she testified at trial that because of the downturn in the real estate market, she would recommend listing the property between \$190,000 and \$200,000 at the time of trial.

After Amy filed her petition for dissolution, the parties and their three children resided together at the marital home. Sometime after Amy filed for dissolution, she began a relationship with another man. She testified that she limited contact with him when she was around the children. Amy moved out of the marital home with Creed and Cameron in February of 2008, first to an apartment in Muscatine and then, in the summer of 2008, to Blue Grass. Amy's move forced Cameron to change schools, but Amy testified that Cameron has adjusted well to his new school. The record shows that both parties were involved in caring for the children. Amy spent time with the children, especially the younger two children, during the day when she was working part-time or could take the children to work with her. Kevin spent time with the children after work, often playing outdoors with them. The boys share a bond with both parents.

The district court awarded Amy physical care of Cameron and Creed and awarded Kevin physical care of Conner. The district court found that both parents were capable of providing a home for their children and that the children had adjusted to the two-household situation and the separation of the older brother.

The district court awarded the marital residence and adjoining land with machine shed to Kevin and found that the appraisal value of \$237,000 was a fair

value to place on the real estate in light of Kevin's plan to retain the properties and the likelihood that the real estate market would return to prior values. In determining Amy's share of equity in the real estate, the district court deducted \$20,000 from the appraised value, finding this to be the unimproved value of the second tract of land. The court found, however, that Kevin's act of redeeding the first tract of land to himself and Amy constituted a gift from him to her, so the value of that tract of land was included in the equity calculation. The court did not set aside the premarital funds Kevin contributed to the construction of the parties' home and divided the net value of the property equally between Kevin and Amy.

The district court ordered Kevin to pay Amy rehabilitative alimony in the amount of \$600 per month for thirty-six months.

Kevin appeals from the district court's decree, arguing the district court erred in: (1) awarding physical care of Cameron and Creed to Amy; (2) determining the value of the marital residence; (3) failing to credit Kevin for the value of gifted land and his premarital funds when determining the parties' equity in the real estate; and (4) awarding Amy alimony.

## **II. Standard of Review**

Our standard of review in this equitable proceeding is *de novo*. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give weight to the district court's findings of fact, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

### III. Physical Care of the Children

Kevin asserts the district court erred in declining to award him physical care of Cameron and Creed. When we determine physical care, the first and governing consideration is the best interests of the children. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). We consider the relevant factors outlined by Iowa Code section 598.41(3) (2007) and the Iowa Supreme Court in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The court considers stability and continuity of caregiving as important factors, though a parent's prior role as the primary caregiver does not necessarily render that parent the primary caregiver permanently. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We must also consider the willingness of each party to allow the child access to the other party. *Id.*

We agree with the district court's well-reasoned opinion awarding care of Cameron and Creed to Amy, who has been their primary caregiver. Because Amy worked limited hours during the time Cameron and Creed were young, and for a time was able to take them to work with her, Amy has been the parent primarily responsible for their care. Amy was generally responsible for the children's morning and bedtime routines, making dinner, and household chores. Further, Amy has had physical care of Cameron and Creed since February of 2008. The children have adjusted to the situation, and disturbing this

arrangement is not in the children's best interests. Though we recognize that separation of siblings is not favored in arranging physical care, we find that in this case it best promotes the children's long-range best interests. See *In re Marriage of Harris*, 530 N.W.2d 473, 474 (Iowa Ct. App. 1995) (stating separating siblings is justified when it better promotes the children's long-range best interests).

Further, the record establishes that Amy supports the children's relationship with their father and recognizes it is important that the children spend time with Kevin. Amy's flexibility in allowing Kevin to have physical care of Conner demonstrates that she is able to place the children's emotional needs ahead of her own. Though Kevin does not hinder the children's relationship with Amy, there is evidence that he questions the children about their mother's relationships, which bothers the children. This behavior unnecessarily puts the young children in the middle of Kevin and Amy's issues and is not in the children's best interests. We find Amy's retention of physical care of Cameron and Creed is in their best interests.

#### **IV. Property Claims**

##### **A. Value of the Marital Residence**

Kevin claims the district court overvalued the marital residence. We value property for division purposes at its value at the time of the trial. *In re Marriage of Decker*, 666 N.W.2d 175, 181 (Iowa Ct. App. 2003). Both Gaumer-Bennitt and Heckman prepared reports on the value of the real estate roughly one year before trial, which was held December 1, 2008. In the months between the preparation of reports and trial, the real estate market took a downward shift.

Therefore, both Gaumer-Bennitt and Heckman testified at trial that the value of the property likely had declined since they prepared their reports. Gaumer-Bennitt testified it was possible the value of the property had declined between five and ten percent. Heckman testified that she would lower her recommended listing price from \$205,500 to between \$190,000 and \$200,000.

We agree with Kevin that the district court overestimated the value of the real estate at the time of trial by adopting the 2007 appraisal and market analysis. The district court acknowledged this, stating, "It is likely the value of the marital real estate is currently worth less than it was in December 2007 when it was subject to a formal appraisal." The district court found that because Kevin was not planning to sell the real estate, it was possible it would recover the loss of value suffered during the market downturn. Although the district court's prediction of future values may be reasonable, we are required to value assets as of the time of trial. In accordance with the testimony in the record, we determine the value of the real estate at the time of trial was approximately ninety percent of its appraised value, or \$213,300.

### **B. Gifted Land**

Kevin argues that in determining the parties' equity in the real estate, the district court erred in declining to credit him for the value of the first parcel of land that his parents gave him. Iowa Code section 598.21(6) excludes from the court's property division gifts received by either party prior to or during the marriage except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage. The district court credited Kevin for the second parcel of land, but divided the value of the first parcel of



land equally between the parties. The district court recognized there are no hard and fast rules governing when it is equitable to exclude gifted property from the marital “pot.” Rather, the court is to consider, among other factors, the intent of the donor; the circumstances surrounding the gift; and the length of the marriage. *Id.*; *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa Ct. App. 1989).

Although the district court found that Kevin’s decision to re deed the land to himself and Amy shortly after their marriage “irrevocably constituted a gift to her from him,” whether a gift is later placed in joint ownership is not controlling. *In re Marriage of Wertz*, 492 N.W.2d 711, 714 (Iowa Ct. App. 1992). Other factors lead us to agree with the district court that setting aside to Kevin the value of the land on which the home was built would not be equitable. The record establishes the first parcel of land was deeded to Kevin so that Kevin and Amy would have a place to build a home. Kevin’s father testified at trial that his expectation in giving the land to Kevin was that, after the marriage, Kevin and Amy would take possession of the property “share and share alike.” The parties lived in the home for seventeen years, and both parties and their three children used and enjoyed the home. The value of the first parcel should be subject to equal division between the parties. On the second parcel, the parties built a pole barn, which held most of Kevin’s tools. We find that setting aside the value of this property for Kevin is equitable to both parties. Therefore, we affirm the district court’s finding that \$20,000, the value of the second parcel of land, should be excluded when determining Amy’s equity in the real estate.

### **C. Premarital Funds**

Kevin asserts the district court erred in declining to credit him for the roughly \$41,000 of premarital funds he contributed to the marital home. In a dissolution of marriage, property is to be distributed equitably, considering the factors outlined in Iowa Code section 598.21(5). *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). Among the factors we consider are the length of the marriage, the property brought to the marriage by each party, and the contribution of each party to the marriage. Iowa Code § 598.21(5). A party's contribution of pre-marital property to the marriage may justify a full credit to that party, but it is not required. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). "The determining factor is what is fair and equitable in each circumstance." *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995) (citing *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991)).

Kevin used the premarital funds to build the parties' marital home in which the parties both lived. During the nearly seventeen years of the marriage, the house was under the parties' joint control and management. Amy contributed to the maintenance and upkeep of the house during the marriage. We find the district court's decision declining to set aside the \$41,000 in premarital funds Kevin contributed to build the marital home was equitable.

The net value of the marital real estate, recalculated in accordance with our findings, is \$156,758.<sup>1</sup> Thus, each of the parties should receive \$78,379 from the equity in the marital real estate. Kevin must pay Amy an equalization payment of \$78,379, with interest computed by Iowa Code section 668.13.

#### **V. Alimony**

Kevin argues the district court erred in awarding Amy rehabilitative alimony. Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). The district court may grant alimony at its discretion after considering the particular facts of the case and the factors listed in Iowa Code section 598.21A. *Hansen*, 733 N.W.2d at 704. The district court awarded Amy rehabilitative alimony, which is designed to support “an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.” *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004) (internal quotations omitted).

The district court found Kevin should pay Amy \$600 per month in rehabilitative alimony based on Amy’s economic dependence on Kevin and her need to secure job training or further education. We agree with Kevin that Amy did not demonstrate at trial a motivation to improve her employment skills. Amy’s employer at Ventilation Services testified that he offered to double her hours, but she declined, explaining she had been advised by her attorney that she should quit working. Amy’s testimony establishes that, contrary to the findings of the

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<sup>1</sup> The value of the real estate is \$213,300. We deduct \$20,000, which is set aside to Kevin as the unimproved value of the second parcel of land. The value of the parties’ loans at the time of trial was \$36,542. Thus, the net value of the real estate is \$156,758.

district court, she did not apply or look for employment after quitting her job in September of 2008. Further, Amy testified that she was capable of working, and the record suggests that Amy would be immediately employable if she were to seek employment.

However, Amy's equalization payment is reduced under our decision and is payable over time. Whether she is motivated or not, she will need to find employment and to increase her earning potential. We find the district court reasonably determined that a small amount of alimony for a limited period of time was necessary for Amy and within the ability of Kevin to pay. We find an award of alimony is within the court's discretion. Costs on appeal are assessed to Amy.

**AFFIRMED AS MODIFIED.**