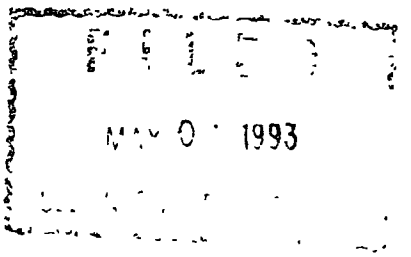
IN THE COURT OF APPEALS OF IOWA

No. 3-091 / 92-1296



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IN RE THE MARRIAGE OF SANDRA KAY HAUGE AND JAMES L. HAUGE

Upon the Petition of
SANDRA KAY HAUGE,

Appellee/Cross-Appellant,

And Concerning
JAMES L. HAUGE,

Appellant/Cross-Appellee

And
GAYLORD HAUGE and LYLA HAUGE,

Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Story County, M.D. Seiser, Judge.

Husband appeals certain economic and custodial provisions of the decree dissolving the parties' marriage. Paternal grandparents appeal visitation provisions of decree. **AFFIRMED IN PART, MODIFIED IN PART AND REVERSED IN PART.**

Carmen L. Janssen, Clive, for appellants intervenors.

Ronald L. Wheeler, Des Moines, for appellant James L. Hauge.

Carol L. Coppola of Coppola, Trout & Taha, Des Moines, for appellee.

Heard by Donielson, P.J. and Hayden and Habhab, JJ.

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HAYDEN, J.

James and Sandra Kay Hauge were married on June 1, 1983. The parties' have one child, Kaylee, born on June 25, 1987. On April 19, 1991, Sandra filed a petition for dissolution. Later, the paternal grandparents of Kaylee filed a petition to intervene, seeking visitation with their granddaughter. A trial was held in May 1992.

Following trial, the district court issued an extensive ruling. The principle issue at trial was whether substantial evidence in the record supported the allegations James had sexually molested Kaylee. The district court found the evidence was overwhelming that James had committed sexual abuse against his daughter. The district court found James guilty of sexual abuse, and denied him visitation with Kaylee until certain circumstances change. Sandra was granted sole custody and physical care of Kaylee. The district court granted James' parents limited visitation on the grounds Kaylee was their only granddaughter and they had developed a substantial relationship with her. Sandra, however, argued the grandparents were not sufficiently close to Kaylee to be entitled to visitation. The district court ruled the only reason the grandparents were not closer to Kaylee was due to Sandra's hostility towards them.

The district court also addressed child support, alimony, and property distribution. The court ordered James to pay $1,050 per month for child support, all health

insurance, and one-half of all medical bills not covered by insurance. James was also ordered to pay alimony to Sandra in the amount of $500 per month for forty-eight months. The district court determined the assets of the parties totaled approximately $156,928. James was awarded $109,965 in marital assets, and Sandra was awarded $56,963 in assets plus a $10,000 cash payment from James. The district court included James' Syntex retirement savings plan and Piper-Jaffrey accounts in the property division and awarded them to him. After paying $10,000 in cash to Sandra, assuming all marital debts, and paying $7,207 of Sandra's attorney fees, James was left with net marital assets of $39,105. The grandparents and James have appealed from the district court ruling. Sandra has cross-appealed.

Our review of this action is de novo. Iowa R. App. P. 4. Although we are not bound by the findings of the district court, we give weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I. Custody. On appeal, James argues the district court erred by awarding legal custody of Kaylee to Sandra. James vigorously maintains there was no evidence of sexual abuse. James also contends the denial of visitation is erroneous.

Our primary concern is Kaylee's welfare and long-term best interests. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984); Iowa R. App. P. 14(f)(15). The

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legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances. See In re Marriage of Winnike, No. 91-1979, slip op. at 6-7 (Iowa App. Dec. 29, 1992). The circumstances of this case are sufficiently compelling to justify setting aside joint custody in favor of a sole custody arrangement.

There was sufficient evidence to support a finding James sexually abused his daughter. Within days of the alleged incident of sexual abuse, Kaylee indicated to third parties acts demonstrating sexual abuse. She repeatedly identified James as the perpetrator throughout the investigation and counseling. Kaylee was consistent in her behavior, verbalization, and drawings relating to the sexual abuse. It is doubtful Sandra could have engineered such conduct. A preponderance of evidence supports a finding James sexually abused Kaylee. Evidence shows the parties are no longer able to cooperate under a joint custody arrangement. The evidence of sexual abuse of Kaylee and extreme bitterness and animosity between the parties dictate a sole custody arrangement. After a careful review of the record and the testimony of the case, we conclude a sole custody arrangement in favor of Sandra is in Kaylee's best interests.

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In addition, we note the presence of a half-sibling in Sandra's home. Sandra has a daughter, Allison, from a previous marriage. Our courts are reluctant to separate half-siblings. In re Marriage of Holcomb, 471 N.W.2d 76, 80 (Iowa App. 1991) (citing In re Marriage of Orte, 389 N.W.2d 373, 374-75 (Iowa 1986)). We affirm the district court on this issue.

II. Visitation. The district court denied James visitation with Kaylee at the present time. The district court provided:

> James shall work with Louise Crum to try to reestablish a relationship with Kaylee. If that is not workable, he should have the right to have a professional evaluation of Sandra, Kaylee and himself to see if he can get a more favorable evaluation. If he does or there are other changes in circumstances, he should be permitted to seek a modification of this Decree if they cannot agree on a modification.

In determining visitation rights, the governing consideration is the best interests of the child. In re Marriage of Drury, 475 N.W.2d 668, 670 (Iowa App. 1991) (citing In re Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988)). We find it is not in Kaylee's best interests to resume visits with James at the present time.

James is not totally denied visitation with Kaylee. He has the ability to have his visitation privileges reinstated. We note his right is not conditioned on a confession he sexually abused Kaylee. James has been given the opportunity to work with Louise Crum in trying to reestablish a relationship with Kaylee and has been given

the right to have Sandra and Kaylee examined by a psychologist to determine if visitation should resume. He may then seek a modification if circumstances have changed.

We affirm the district court on this issue.

III. Distribution of Property. James contends his Piper-Jaffrey account should have been excluded from the property division. He argues the account is a premarital asset and its increase in value during the marriage was due to the accrual of interest and not family contributions.

When dividing property, we must consider the factors listed in Iowa Code section 598.21(1). In re Marriage of Whelchel, 476 N.W.2d 104, 107 (Iowa App. 1991). Iowa courts do not require an equal division or percentage division. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The determining factor is what is fair and equitable in each particular circumstance. Id.

If a party did not significantly contribute to the growth of an asset, it should not be included in the property division. In re Marriage of Oakes, 462 N.W.2d 730, 733 (Iowa App. 1990). The funds in James Piper-Jaffrey account have always been a separate and distinct asset. The appreciation of the account over the duration of the marriage was due solely to the accrual of interest.

We find it would be inequitable not to set off James' Piper-Jaffrey account from the marital assets involved in the property distribution. We determine the Piper-Jaffrey

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account should not be included in the property division. We award the account to James and adjust the property distribution as follows: Sandra shall receive the assets previously divided and agreed upon by the parties, which total $30,690. The proceeds of the home, a total of $16,273, shall also be awarded to Sandra. We modify the district court decree by eliminating the award of $10,000 which James was to pay to Sandra. We also assess Sandra $1,200 of the parties marital debt from Mastercard and JCPenneys. As a result, Sandra receives assets totaling $45,763.

James shall receive previously divided assets totaling $21,585. We also award James his Syntex retirement account, valued at $30,124, a 1966 Chevy, valued at $11,000, and World Wide Auto, valued at $5,500. The remainder of the parties' marital debts, which total $53,653, shall be the sole responsibility of James. We note James testified he has continued to charge on the credit cards and, therefore, the balances have remained unchanged. James is relieved from paying $10,000 cash to Sandra. Consequently, James' property award totals $14,556.

We further modify the district court decision by removing James' liability for part of Sandra's trial attorney fees from the property division. We affirm the district court's decision mandating James to pay Sandra

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$7,207 toward her trial attorney fees; however, this payment shall not be considered part of the property division.

We find this property division is equitable in light of the overall division and Sandra's limited income potential as compared to James'. See In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984).

We modify the district court's property distribution award.

IV. Rehabilitative Alimony. James contends the district court erred in awarding Sandra $500 per mont· in alimony. He argues they were married only nine years and Sandra possesses skills to be self-sufficient.

Alimony is not an absolute right; an award depends on the circumstances of each particular case. In re Marriage of Imhoff, 461 N.W.2d 343, 345 (Iowa App. 1990). An award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1991). We determine Sandra is capable of gainful employment at the present time. Sandra has extensive office management experience. Prior to the marriage, Sandra was employed for seven years as the office manager of a veterinary clinic. Sandra was terminated because of her involvement with a married man on the job. This termination occurred before her marriage to James, and did not involve James. Sandra also has experience as an airline attendant and as a media specialist for the Joint County School System. Sandra's employment history and

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experience show she is currently employable. We find Sandra is not entitled to rehabilitative alimony.

We also must consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Although Sandra received a greater portion of marital assets, we note no spousal support is awarded. James has a greater earning capacity than Sandra and has spent a longer period of time contributing to his pension plan. We reverse the district court decision on the issue of alimony.

V. Grandparent Visitation. The paternal grandparents, Gaylord and Lyla Hauge, argue the district court should have granted them greater summer and holiday visitation with Kaylee. On cross-appeal, Sandra contends the paternal grandparents should not be granted visitation rights. Our review of grandparent visitation is de novo. Iowa R. App. P. 4.

Our first responsibility is to determine whether visitation is in the best interests of the child. In re Marriage of Woodley, 474 N.W.2d 815, 817 (Iowa App. 1991). Iowa Code section 598.35 provides, in pertinent part:

> A petition for grandchild visitation rights shall be granted only upon a finding that the visitation is the best interests of the child and that the grandparent had established a substantial relationship with the child prior to the filing of the petition.

Iowa Code § 598.35 (1991). Evidence shows the paternal

grandparents had established a substantial relationship with their granddaughter prior to the filing of the dissolution petition. The relationship with her paternal grandparents is beneficial to Kaylee and must be continued. We determine, however, the visitation privileges of the paternal grandparents should not be further expanded. We affirm the district court on this issue.

VI. Attorney Fees at Trial. James contends the district court erred in awarding Sandra $7,207 in attorney fees. James argues he should not have to pay towards Sandra's attorney fees because he has assumed all of the marital debt.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 101 (Iowa App. 1991) (citing In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983)). To overturn an award of attorney fees, the complaining party must show the trial court abused its discretion. Id. We recognize the trial involved a custody contest. See Pittman, 346 N.W.2d at 36. We find no abuse of discretion. We affirm the district court on this issue.

VII. Attorney Fees on Appeal. Sandra seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We decline to award attorney fees on appeal. Each party shall be responsible for his or her own attorney fees on appeal. Costs of this appeal are taxed one-half to James and one-half to Sandra.

We affirm the district court decision in all other aspects not specifically addressed in this opinion.

AFFIRMED IN PART, MODIFIED IN PART AND REVERSED IN PART.