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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-397 / 94-184

IN RE THE MARRIAGE OF GAIL A. FRUCHTENICHT AND JEROLD M. FRUCHTENICHT

Upon the Petition of
GAIL A. FRUCHTENICHT,

Appellant/Cross-Appellee,

And Concerning
JEROLD M. FRUCHTENICHT,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Petitioner appeals from various economic provisions of the parties' dissolution decree, and respondent cross-appeals on the issue of custody. **AFFIRMED AS MODIFIED.**

Hugh M. Field of Beecher, Ratherts, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellant.

C. Kevin McCrindle of the Law Offices of C. Kevin McCrindle, Waterloo, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

PER CURIAM

Jerold and Gail Fruchtenicht were married on May 29, 1982. They have three children: Katie, born March 3, 1984; Joseph, born April 29, 1986; and Sara, born June 17, 1987. During the marriage the family lived on a farm in rural Black Hawk County.

Jerold was thirty-two years old at the time of the dissolution hearing. In 1985 he entered into a farm partnership with his uncle, Robert Fruchtenicht. The farm partnership owns seventy-six acres and rents another 1000 acres. Jerold receives a draw of $1000 per month, from which he must pay taxes. The partnership pays for his groceries and gasoline. In addition, the partnership owns the farmhouse in which Jerold resides, and he pays no rent for this residence. The district court found Jerold has net monthly income of $1100.

Gail was thirty-one years old at the time of the hearing. She did not work outside the home during most of the marriage. Before the marriage she was employed as a secretary in an accounting firm, and after the parties separated she moved to Cedar Falls and acquired similar employment. She has net monthly income of $849. Gail underwent treatment for depression for a few months after the parties separated, but her emotional state has improved substantially since then.

The district court entered a dissolution decree on April 29, 1993. The court granted the parties joint legal

custody of the children, with Gail having primary physical care. The court found Gail had been the parent more actively involved with providing the day-to-day care of the children. She had also been more involved in the children's school activities. Jerold was granted specific visitation rights. He was ordered to pay child support of $404 per month.

The court divided the parties' property to award Jerold the interest in the partnership, which the court valued at $126,218. Jerold was also awarded Coop stock, a vehicle, and household goods. Jerold was ordered to pay all of the parties' debt. Gail was awarded a vehicle and household goods. To balance out the equities of the asset distribution, the court ordered Jerold to pay Gail a cash property settlement of $12,000.

Each party filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). The court ruled Gail should be required to provide health insurance for the children and expenses not covered by insurance should be allocated three-fourths to Jerold and one-fourth to Gail. In addition, the court ordered the cash property settlement should be paid in full by January 1, 1999. The court denied other portions of the 179(b) motions.

Gail appealed certain economic provisions of the dissolution decree, and Jerold cross-appealed on the issue of custody.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Gail contends the property distribution was not equitable to her. She asks to be awarded a cash property settlement of $30,000. She agrees with the district court's valuation of the partnership, but believes the court improperly considered $12,000 in debt which Jerold claimed he owed Robert and the partnership. She alleges there is insufficient evidence of the debt. She also claims the court improperly listed the parties' Discover Card debt as $4600 when it was actually $460.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

We find there is insufficient evidence Jerold owed Robert $10,000 in interest on past-due payments on a note. The note itself contained no provision for interest. Also, Jerold testified he failed to make a payment in 1987, but Robert did not add any interest at that time. Jerold

stated Robert added $10,000 onto the note when he missed a payment in 1992, while the dissolution proceeding was pending.

Jerold testified he owed the partnership $2000. He took an extra draw of $2000 out of the partnership while the dissolution was pending. Jerold stated he would either repay the $2000 or Robert would take an extra $2000 draw to even the distribution of income. We determine the $2000 was a distribution of income from the partnership and should not be considered a debt. Additionally, we find the parties' Discover Card debt was $460.

Taking these factors into consideration, we find Jerold received assets worth $137,150 and is required to pay debts of $69,510, which gives him net assets worth $67,640. We find Gail received assets worth $11,000. In order to achieve a more equitable property distribution, we increase to $27,000 the cash property settlement which Jerold must pay to Gail. This amount is payable in installments of $3000 per year for a period of nine years. These payments will be due on January 1 of each year and will not bear interest unless Jerold fails to make a payment, in which case the past due amount will bear interest of ten percent per annum.

III. Gail contends Jerold's child support obligation should be increased. She believes his net monthly income should be increased by $500 per month because he lives rent-free in a house owned by the partnership. She states

rent for the house would be about $500 per month and this would increase Jerold's net monthly income to $1600 per month.

In order to apply the child support guidelines, a court must determine the parents' current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parents' income. Id.

We agree with the district court's conclusion Jerold's net monthly income is $1100. We believe the district court considered Jerold's residence in the farmhouse in reaching the conclusion his net income, after taxes, was $1100 per month. We affirm the child support provision of the dissolution decree.

IV. Gail also contends she should have been awarded trial attorney fees. To overturn an award of attorney fees, the complaining party must show the trial court abused its discretion. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We find no abuse of discretion here in requiring each party to pay his or her own trial attorney fees.

V. In his cross-appeal, Jerold seeks to be granted physical care of the parties' three children. He believes the children would be better off living with him and his intended new wife on the farm. Jerold states Gail's bitterness over his extramarital affair with her best

friend has negatively affected her judgment with regard to the children. He claims Gail will not cooperate with visitation and has attempted to undermine his relationship with the children.

In child custody cases our focus is on the long-range best interests of the child. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). Those interests include the opportunity for a continuous relationship with both parents. Id. The critical issue in determining the best interests of the child is which parent will do a better job in raising the child. In re Marriage of Rodgers, 470 N.W.2d 43, 44 (Iowa App. 1991). The factors we consider in determining custody are enumerated in Iowa Code section 598.41(3) (1993). In re Marriage of McElroy, 475 N.W.2d 221, 222 (Iowa App. 1991).

In our de novo review, we determine physical care of the parties' children should be placed with Gail. We agree with the district court's finding Gail was more actively involved in the day-to-day care of the children. We also find Gail was more involved with the children's education. Furthermore, while both parties exhibited some anger shortly after their separation, Diane Schaeffer, a counselor who had met with both parties, testified Gail was able to move on with her life, while Jerold continued to exhibit a decree of anger against Gail. We affirm the district court on the issue of the physical care of the children.

VI. In the alternative, Jerold seeks increased visitation with the children. The dissolution decree granted visitation on each Thursday evening, alternating weekends, alternating holidays, and three weeks during the summer.

We decline to change the visitation specified in the dissolution decree. However, we remind the parties this visitation should be considered a minimum. The best interests of a child include the opportunity for a continuous relationship with both parents. Zabecki, 389 N.W.2d at 398.

VII. Gail seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Hunt, 476 N.W.2d at 103. We determine each party should pay his or her own attorney fees for this appeal.

In summary, we have modified the property distribution to increase the cash property settlement payable to Gail. In all other respects, we affirm the terms of the dissolution decree set forth by the district court. Costs of this appeal are assessed to Jerold.

AFFIRMED AS MODIFIED.