IN THE COURT OF APPEALS OF IOWA

No. 0-738 / 00-0248
Filed February 28, 2001

IN RE THE MARRIAGE OF PAMELIA KAY GREENE AND JOHN ROBERT GREENE

Upon the Petition of
PAMELIA KAY GREENE,
Petitioner-Appellee,

And Concerning
JOHN ROBERT GREENE,
Respondent-Appellant.

FILED
FEB 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Iowa County, Lynne E. Brady, Judge.

Respondent appeals the child custody and property distribution provisions of the parties' dissolution decree. Respondent argues: (1) the district court erred in awarding petitioner physical care of their minor children; and (2) the property division was inequitable. **AFFIRMED AS MODIFIED.**

Margaret T. Lainson of Meardon, Sueppel & Downer, P.L.C., Iowa City, for appellant.

Robert J. Leinen of Elwood, Elwood, Buchanan & Leinen, Marengo, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Respondent John Robert Greene appeals the child custody and property distribution provisions of the parties' dissolution decree. John argues the district court erred in awarding physical care of the parties' two minor children to the Petitioner, Pamelia Kay Greene, and that the property division was inequitable. We affirm as modified.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

John and Pamelia Greene were married November 20, 1982. They have two daughters, Rebecca, born May 29, 1988, and Elizabeth, born November 15, 1989. Pamelia had two daughters from a previous marriage, Darcel who was seven at the time of the parties' marriage, and Danielle, who was three. Shortly after their marriage John adopted both of the older girls. After they were married John and Pam moved into a house in Keswick were they lived for approximately fifteen years, until the time of their separation in August 1997.

In August of 1997 Pamelia moved from the family home to Marengo with Rebecca and Elizabeth. Darcel and Danielle stayed with John. After a failed attempt at counseling John filed an application for temporary custody of Rebecca and Elizabeth. The court awarded the parties joint custody of the two minor children with physical care temporarily placed with Pamelia. Due to various continuances the trial was not held until August of 1999. Pamelia continued to have physical care of Rebecca and Elizabeth up to and including the date of the trial and this appeal, over three years from the time of the parties' separation.

The main issues contested at trial were child custody and property division. The district court awarded Pamelia physical care of the two younger children and ordered John to pay child support of $363.46 per month. The district court also adopted Pamelia's valuation of the parties' property and awarded her net property of $18,756. John was awarded net property of $338,107. In order to nearly equalize the property awards the court ordered John to pay Pamelia $150,000 over three years at $50,000 per year. John appeals the district court's award of the children's physical care to Pamelia and the property division.

John argues that Rebecca and Elizabeth should be returned to him because it would be best for them to live in the house they grew-up in, to live with their older sisters who continue to reside with John in the family home, and because separation of siblings is not favored by Iowa courts. John acknowledges that while the parties were married Pamelia did most of the house work and cooking but points out that since the separation he has learned to perform these tasks fairly well. He also contends Pamelia has done as much as possible to interfere with his visitation and contact with the girls and has been more negative toward him than he has toward her. In contrast, he alleges that if he were awarded physical care of the girls he would ensure they have substantial contact with their mother.

John also disputes the property division made by the district court. The property included real estate, farm machinery, vehicles, livestock, growing crops and stored grain, and Pamelia's retirement account at Amana Refrigeration.

John and his brother, Gerald, own approximately 320 acres of farm ground, as tenants in common. Gerald testified that he was unwilling to sell or mortgage his interest in the farm ground. Pamelia's expert appraised the farm ground as having a value of $576,000. John argues the value was much lower because the appraiser did not properly reduce the value to reflect the joint ownership and the fact that a forty-acre tract was subject to an easement, both of which he argues lower the value of the land. John also asserts the trial court erroneously made no adjustment to the value of assets to reflect tax consequences, either for capital gains or ordinary income. We will address each of the issues on appeal separately.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id.*

III. MERITS

A. Custody

Elizabeth and Rebecca's best interests are paramount in our decision and the objective is to place them "in the environment most likely to bring [them] to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining the best interests of the children is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

There are numerous factors to be taken into account when determining which parent should serve as the long-term primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997); *see* Iowa Code § 598.41 (1999). We give some factors greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See Daniels*, 568 N.W.2d at 54; *Will*, 489 N.W.2d at 397. We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Although not controlling, due consideration is given the fact one parent has been the historical primary caregiver during the marriage, *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996); and careful consideration is given to allowing the children to remain with that parent, *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). "Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive."

In re Marriage of Crotty, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998) (citing *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993)).

There is also a presumption that siblings should not be separated. *Will*, 489 N.W.2d at 398; *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). However, this rule is not ironclad and "circumstances may arise which demonstrate that separation may better promote the long-range interests of children." *Will*, 489 N.W.2d at 398. Considerations in determining whether separation is in the best interests of the children include: each parent's care taking capability; the difference in age between the children separated; whether the children would have been together if split physical care was not ordered; the relationships between the children; and the likelihood one of the parents or children would turn the other children against the other parent. *Id.* We must also consider any denial by one parent of the children's opportunity to have meaningful contact with the other parent. *Id.* at 399.

The record is clear that both John and Pamelia love all of their daughters and wish to participate in their nurturing and upbringing. However, after weighing both parties' respective strengths and weaknesses the trial court determined the balance tipped in Pamelia's favor and found that she was in the best position to administer most effectively to the long-term best interest of the two minor children and place them in an environment that will foster healthy physical and emotional lives. Taking into consideration the factors set forth above, as well as those additional factors found in Iowa Code section 598.41, we agree with the district court.

Both parties agree that Pamelia was the primary caregiver of the girls during the majority of the parties' marriage, performing the normal household duties such as cooking, cleaning, and child care, with the exception of getting the children ready for school in the mornings which John did with the help of the older daughters because Pamelia's job required her to leave home early.

John contends he would be more willing than Pamelia to allow visitation and significant contact with the girls and that she has a more negative attitude toward him than he has toward her. We do not believe the evidence in the record provides John any advantage on this issue. It appears neither party is willing to cooperate as much as possible in order to ensure the best interests of Rebecca and Elizabeth are met. The record indicates each party tends to disparage the other to the children. However, it does seem Pamelia has been more willing to be flexible with the girls' schedules and extracurricular activities to accommodate John than he has been to accommodate her or the girls.

The girls' activities in Marengo are nearly the same as those they participated in while living in Keswick and seem to all be activities which are healthy for them and which they enjoy. John's unwillingness to exchange weekends in order to accommodate the girls' scheduled activities, or to even attend and support such activities, shows his inflexible and somewhat hostile attitude toward Pamelia and her plans for the girls. It would be in the girls' best interests for him to be more accommodating and supportive of their activities rather than insisting on an inflexible visitation schedule at the expense of those activities. We find no evidence in the record to support John's contention that

Pamelia's actions in signing the girls up for extracurricular activities was an intentional attempt to interfere with his relationship with them or his visitation schedule.

Additionally, Pamelia is the one who had taken the time and effort to have Elizabeth tested and treated for her attention deficit disorder (ADD). John continues to deny Elizabeth has ADD despite such a diagnosis by two physicians, a diagnosis which is supported by three of her teachers. The record demonstrates Pamelia has had continual contact with the girls' teachers while they have attended the Marengo schools, has attended the majority of their parent/teacher conferences, and has ensured that they became and remained current in their schoolwork. These facts also indicate Pamelia is in the better position to place the children in an environment that will best foster their healthy physical, mental and emotional development.

We do recognize the presumption that siblings should not be separated. John argues that based on this presumption the two younger girls should be with him and their older sisters in Keswick. However, this presumption is not ironclad and "circumstances may arise which demonstrate that separation may better promote the long-range interests of children." *Will*, 489 N.W.2d at 398. One consideration in making this determination is the difference in age between the children separated. *Id.* There is a significant age difference here between the older girls and Rebecca and Elizabeth. Additionally, the record shows the two older girls have not continually and consistently lived with John, but have variously lived with him, Pamelia, and boyfriends. Further, we share the trial

court's concern regarding the appropriateness of Darcel's boyfriend staying overnight at John's house on occasions when the younger daughters are staying there.

We find the circumstances justify placing physical care of the two younger children with Pamelia even though it results in separation from their older siblings. Pamelia is better able to minister to the children's needs. There is a substantial difference in age between the siblings here, with the older two having both attained the age of majority. The older two daughters' ages, employment circumstances, romantic relationships, and history of changing residences indicates there is no assurance they will continue to live with John. There is also nothing in the record to indicate granting Pamelia physical care will in any way mean the older siblings cannot have as much contact with the younger ones as the two sets of children wish.

Based on our de novo review of the entire record, and for all of the reasons set forth above, we conclude Pamelia is in the best position to provide Elizabeth and Rebecca with the environment most likely to bring them to healthy physical, mental, and social maturity and thus can administer most effectively to their long-term best interests. We affirm the placement of their physical care with Pamelia.

B. Property Valuation and Division

An equitable division of property must be made according to the criteria set forth in Iowa Code section 598.21(1) (1999), as qualified by section 598.21(2). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). The

partners to 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 Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The division should be based on what is equitable and just under all the circumstances. *In re Marriage of McNerney*, 417 N.W.2d 205, 209 (Iowa 1987).

John is currently a full time farmer at Keswick. Based on his testimony at trial it is apparent he wishes to continue to farm on a full-time basis. The district court awarded John all of the parties' interest in the farmland as well as the other property relating to the farming operation, including the farm machinery, livestock, stored grain, and the growing crops. John was ordered to be responsible for all debt on both the real estate and the other farming assets. Based on the values used by the trial court this awarded John a net of $338,107 and Pamelia a net of $18,756. The difference between these amounts is $319,351 and one-half of that is $159,675. The court reduced this amount by $9,675 "[b]ecause of the difficulty and uncertainty of maintaining a viable farming operation." Therefore, the court ordered John to pay a total amount of $150,000 to nearly equalize the property division. John was to pay this amount in three payments of $50,000 without interest unless delinquent, by the end of calendar years 2000, 2001 and 2002.

John argues this amount is inequitable and paying it will require him to liquidate his farming operation, which he contends is contrary to Iowa's affirmative policy of allowing farmers to retain their land and continue farming

following dissolutions. He also asserts the amount was erroneously reached by the district court in that the amount does not reflect an adjustment that is necessary because his interest is held as a tenant in common with his brother rather than by himself individually, and because the court made no adjustment for tax consequences.

Iowa courts have recognized Iowa's position as a farm state and the need to attempt to preserve the farming business in dividing assets in a dissolution. *In re Marriage of Callenius*, 309 N.W.2d 510, 514-15 (Iowa 1981); *In re Marriage of Hardy*, 539 N.W.2d 729, 732 (Iowa Ct. App. 1995). They have also recognized the reasonableness of awarding a farm to the spouse who operated it and fixing the awards and scheduled payments to the other spouse without reaching equality so the farmer-spouse might retain ownership of the farm and continue farming. *Callenius*, 309 N.W.2d at 515.

John owns the farmland as a tenant in common with his brother. His co-tenant brother Gerald testified he would not agree to sell or mortgage his interest in the farmland. Therefore, the only way John's interest would be marketable would be through a partition action which by its nature would take time and money. We conclude some discount should have been applied to what would otherwise be the value of the parties' interest because of the lack of ready marketability of that interest. *See generally In re Marriage of Muelhaupt*, 439 N.W.2d 656, 660 (Iowa 1989) (discounting value of stock in closely held corporation because it was minority stock and because it had no ready market). We do not, however, find at all convincing John's appraiser's testimony that the

value should be discounted some twenty-five to forty percent. Pamelia's appraiser appears to have substantially broader experience and better qualifications as an appraiser and testified that in cases of partition by sale the sale price is in fact at times higher than the appraised value.

The trial court did "discount" by $9,675 the amount John would have had to pay Pamelia to equalize property division, doing so "[b]ecause of the difficulty and uncertainty of maintaining a viable farming operation." However, based on the policy recognized by Iowa courts regarding the importance of preserving farming operations, the fact the appraisal of the land did not take into consideration that the parties' interest was held in common ownership, and the apparent impossibility of John making the required payments without selling the parties' interest in the land, we conclude the discount allowed by the trial court was not sufficient. We conclude that under the circumstances present in this case John's payment to Pamelia should be $100,000 over a period of five years.

The evidence shows the easement which John claims reduces the value of a forty-acre tract of the farmland is for access to another part of the farmland owned by John and Gerald. Therefore, no reduction in value of the forty-acre tract would be appropriate.

The trial court did not act inequitably by not adjusting property values for income tax consequences. We decline to do so now as well for two reasons. First, there does not appear to be any evidence in the record as to what tax consequence the sale of capital assets, such as the farmland, might be and thus there was insufficient evidence for either the trial court or this court on appeal to

consider them. Second, it is not proper to consider income tax consequences absent evidence in the record that a sale of the property in question is pending, contemplated, or has been ordered by the trial court. *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991). The effect of considering income tax obligations of an illusory future sale would improperly "diminish the asset value to the nonowning spouse." *Id.* There is no evidence in the record before us that a sale of the farmland was either pending or contemplated by John and the trial court did not order one.

Based on the evidence in the record regarding the parties' incomes and tax liabilities over the last eight years, it appears they have paid very little income tax over the last four years as a result of their farming operations. There is no evidence John had any plans in the future to substantially expand his operations, thereby increasing his income and tax obligations. We must assume that any income tax consequences to John as a result of the award to him of livestock, stored grain, and growing crops would be nominal. No adjustment to property values for such uncertain consequences would be appropriate.

IV. CONCLUSION

Based on our de novo review of the entire record we conclude the district court properly placed physical care of the parties' two minor children, Rebecca and Elizabeth, with Pamelia. We conclude the amount the trial court required John to pay Pamelia to effect property division was not equitable under the particular circumstances of this case. Therefore, we reduce the amount to $100,000. This $100,000 shall be paid in five equal annual payments of

$20,000, with the payments due no later than December 31 of each of five consecutive years, beginning with a first payment due by December 31, 2000. The trial court's order concerning interest on delinquent payments is affirmed.

AFFIRMED AS MODIFIED.

SACKETT, C.J. concurs specially.

I concur with the result and the majority opinion in all respects except I have not relied on the same factors in valuing the farmland.

$20,000, with the payments due no later than December 31 of each of five consecutive years, beginning with a first payment due by December 31, 2000. The trial court's order concerning interest on delinquent payments is affirmed.

AFFIRMED AS MODIFIED.

Sackett, C.J. concurs specially.