IN THE COURT OF APPEALS OF IOWA

No. 0-659 / 00-339
Filed January 24, 2001

IN RE THE MARRIAGE OF JAMES EDWARD BLACK AND LOIS ADELE BLACK

Upon the Petition of
JAMES EDWARD BLACK,
Petitioner-Appellant,

And Concerning.
LOIS ADELE BLACK,
Respondent-Appellee.

FILED
JAN 2 4 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Kossuth County, John P. Duffy, Judge.

The petitioner appeals the child custody and property distribution provisions of the parties' dissolution decree. **AFFIRMED.**

Lorraine J. May of Hopkins & Huebner, P.C., Des Moines, for appellant.

Thomas D. Hanson of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

When Jim and Adele Black divorced, the district court awarded them joint physical care of their three children. The court also ordered Jim to pay Adele $200,000 as part of the property distribution. Jim appeals these portions of the decree. We affirm.

I. Background Facts and Proceedings

Jim and Adele married in 1985. Jim, a college graduate, worked on the family farm and later entered politics. Adele, also a college graduate, taught school until the birth of the parties' first child, Byron, in 1988. She subsequently did not earn wages outside the home. Twin daughters Rachael and Elizabeth were born in 1991.

In 1997, the marital relationship deteriorated. The parties were unable to resolve their differences through marriage counseling at a Texas facility. Ultimately, Jim filed an action for separate maintenance. He simultaneously obtained an ex parte injunction removing Adele from the home and awarding him temporary custody of the children.

Meanwhile, Jim gathered a group of family and friends in his home with a professional "interventionist" and scheduled an "intervention" designed to persuade Adele to obtain mental health treatment. When Adele refused, he had her served with the injunction.

Adele counterclaimed for dissolution of the marriage. By stipulation, the parties modified the injunction to afford Adele unsupervised visitation with the children. Following a hearing, the district court awarded Jim temporary custody,

subject to liberal visitation with Adele. The court also awarded Adele temporary support. On appeal, this court affirmed the order.

Before trial, the district appointed an independent custody evaluator to examine the situation and present a recommendation to the court. The evaluator recommended Jim retain physical care of the children, subject to liberal visitation rights for Adele. Following protracted discovery and a lengthy trial, the district court granted the dissolution. The court declined to adopt the evaluator's recommendation concerning physical care, electing instead to award the parties joint physical care of the children. The court additionally awarded stock in the family farm to Jim, divided the remaining property, and, as part of that division, ordered Jim to pay Adele $200,000 over time. Jim appealed. Our review is de novo. Iowa R. App. P. 4.

II. Joint Physical Care

Jim contends the joint physical care arrangement ordered by the district court is not in the children's best interests. He seeks physical care of the children. "Physical care" is defined as "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." Iowa Code § 598.1(7) (1997). "Joint physical care" is defined as:

> [A]n award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to those of the other parent.

Iowa Code § 598.1(4). An award of joint physical care is appropriate "[w]hen the court determines such action would be in the best interest of the child and would

preserve the relationship between each parent and the child." Iowa Code § 598.41(5).

Jim cites the following factors in support of a physical care award to him: (1) the children had been living with him since October 1997; (2) the custody evaluator stated it would be unwise to disrupt the primary care arrangement; (3) Adele is emotionally unstable; (4) Adele lacks family support, as she is estranged from her parents; (5) Jim is the more flexible of the two parties; (6) The court-appointed evaluator recommended physical care rest with Jim; (7) Jim is the party better able to support the parenting relationship of the other; (8) and Adele does not foster communication between the parties. We will address each contention in turn.

1. Children Living with Jim. Pursuant to the district court's temporary custody order, the children had been living with Jim from October 1997 through January 2000. Jim points out that during this time, the children thrived and did well in school and the custody evaluator found no psychological problems of clinical significance. We agree the record reflects the children were well-adjusted and stable at the time of trial. However, the fact that the children had been living with their father without incident pursuant to a temporary order is not dispositive of the final custody arrangement. *See In re Marriage of Denly*, 590 N.W.2d 48, 52 (Iowa 1999). Instead, we are required to examine the entire trial record to determine the appropriate placement. Here, the record reflects both parties are equally capable of parenting the children. Adele served as the children's primary caretaker until the temporary order was entered and, by all accounts, she was an excellent, highly creative mother who placed her children's interests above all

else. Similarly, Jim sacrificed his political career to raise his children and commendably did not obstruct the liberal visitation granted Adele during these proceedings. After examining the parties' parenting skills in light of the remaining factors cited by Jim and addressed below, we are not convinced his role as temporary caretaker for two years mandates he also be awarded permanent physical care of the children.

2. Stability of Children. Pointing to the recommendation of the court-appointed custody evaluator, Jim contends a change in the children's routine would prove disruptive to them. We have disfavored shared physical care arrangements for this reason. *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa App. 1998); *In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa App. 1993). However, factors militating against such an arrangement in other cases are not present here. For example, unlike the situations in *Swenka* and *Levsen*, where the children changed homes every three or four days or every week, the decree here provides the children will be transferred from one home to another on a monthly basis. This time period will afford the children a chance to adjust to their new environment before having to move back to their old one. Additionally, the parents live in the same school district and both are able to adjust their work schedules to attend to the children's needs.

3. Adele's Emotional Stability. Jim also suggests Adele lacks the emotional stability to serve as a joint caretaker. We disagree. Adele acknowledged she suffered from depression beginning in 1997, mainly as a result of her deteriorating marital relationship. She testified she sought help in April of that year, then again in July through a facility in Texas. However, she

continued to perform parental obligations, and by her estimate, "was no less than 90 to 100 percent functional during that period of time." For example, she did not miss a single one of her son's ball games and, before leaving for Texas, made arrangements for someone to take her children to swimming classes and prepared food and clothing for the children during her absence.

Evidence from mental health professionals also does not support Jim's contention that, at the time of trial, Adele lacked the emotional stability to serve as a joint caretaker. Adele's treating psychologist diagnosed her with anxiety disorder with posttraumatic features and adjustment disorder with mixed anxiety and depressed mood. However, he did not feel these conditions rendered her emotionally unstable. He testified:

> Well, I think she will do fine. I think once this is over, and if she will get the distance she wants from her husband and the time with her children that she wants and there's no more courts and bills adding up from the attorneys fees and all that stuff, I would think she will do fine, which is part of what an adjustment disorder is about. You take away the stressor, and things get better.

Although the psychologist acknowledged Adele would not come out of the situation unscathed, he stated she had complied with his treatment recommendations and her anxieties would not prevent her from being a good parent.

This psychologist's testimony is consistent with a psychiatric report prepared approximately a year before trial finding "not one shred of evidence to indicate that Ms. Black does now or has ever in the past suffered from any type of diagnosable psychiatric illness." The report further noted Adele was "fully able

to parent her children in a thorough, responsible, loving, and compassionate manner."

We are inclined to accord more weight to this more recent testimony than to the testimony of a Texas counselor who visited with Adele and Jim in 1997. That counselor opined Adele was depressed, angry, not as willing to work on the marriage as Jim, and possibly suffered from a borderline personality disorder. This testimony is not surprising given the marital stress Adele was experiencing at the time. Recognizing her stress, Adele voluntarily sought treatment in Texas. Although she did not continue with counseling there, she began taking the medication prescribed by the counselor and continued with counseling in Iowa. Notably, even during this highly stressful period, the counselor conceded Adele was not a danger to herself or others.

Ultimately, we accord weight to the findings of the district court on this crucial issue, in light of the court's first-hand observations of Adele. *See In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998). The court stated:

> Adele was very alert and attentive throughout the trial. For the most part, Adele's testimony was as credible as Jim's testimony and on many issues her testimony was more credible than Jim's. There was nothing about Adele's appearance or conduct in court which would lead this Court to believe that she is somehow "out of balance." She may have had some emotional problems in 1997 and maybe rightfully so. . . . Adele's intelligence, memory and knowledge of the facts lead the Court to believe that, at the present time, her emotional health is excellent. Her appearance, conduct and intelligence throughout the trial of this case amply demonstrate that she is capable of being a primary caretaker of the minor children.

These findings support our conclusion that, as of the time of trial, Adele possessed the emotional stability to provide physical care to the children either jointly or alone.

4. Lack of Family Support. Jim maintains Adele has been estranged from her parents. He points to the custody evaluator's concern that this estrangement deprives the children of family support. We agree with the district court this is not a factor militating in favor of awarding physical care to Jim. Jim conceded at trial he had a fine relationship with Adele's family and he fostered the relationship by taking the children to visit family members and allowing them to exchange cards and gifts. There is nothing to prevent him from continuing this relationship as a joint physical caretaker. Accordingly, we reject this basis for altering the caretaking arrangement.

5. Flexibility. Jim contends he is more flexible than Adele when it comes to the children. This evidence, however, is disputed, as Adele contends Jim is controlling. We have carefully reviewed the record and conclude both parties displayed instances of inflexibility. However, as our analysis of other factors reflects, we are not convinced either party jeopardized the children's welfare as a result of this conduct.

6. Recommendation of Custody Evaluator. Jim contends the district court should have adopted the recommendation of independent custody evaluator Stephen Mayhew that primary care be placed with him. In reaching this conclusion, Dr. Mayhew relied in part on Adele's apparent suspiciousness and distrust of Jim. The district court commended Dr. Mayhew on his comprehensive report and noted it gave serious consideration to his

recommendation. The court ultimately rejected the recommendation on the ground Adele's suspicious nature was in large part an outgrowth of the intervention. On our de novo review of the record, we agree with this conclusion. We are persuaded by the testimony of Adele's treating psychologist that, by the time of trial, Adele had learned not to allow her own distrust of Jim to cloud her judgment as to the children's best interests.

7. Supporting Relationship of Other. Jim next contends Adele does not support his relationship with the children. He points to the custody evaluator's statement that Adele would be the parent at greater risk of diminishing the role of the other parent. However, the independent custody evaluator reported he had a difficult time finding evidence of this lack of support, other than Jim's statements. He further testified that although Adele seemed less flexible about scheduling times for visitation, both parents "acknowledged the importance of the children having a relationship with the other parent."

Jim also points to the fact Adele insisted on exchanging the children at neutral sites such as the library or McDonald's rather than at the parties' homes. However, Adele testified a custody mediator actually suggested the parties minimize contact until the anger surrounding the litigation had been resolved. Given Adele's acknowledged situational depression resulting from the parties' deteriorating marital relationship and the trauma she experienced as a result of the intervention, we are not convinced her insistence on a neutral transfer site reflects an unwillingness to support the children's relationship with their father.

8. Lack of Communication. Jim finally contends a joint physical care arrangement is not feasible because Adele does not communicate with him. Our

courts have repeatedly pointed to the importance of communication between parents about their children's welfare. *See In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983) (stating parents "owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other."). We are not persuaded the parties were unable to communicate about key issues concerning the children. Both parties proffered substantial evidence of their contacts with the other parent during the pendency of the proceedings. Although Adele avoided face to face contact with Jim, there is scant evidence she purposefully refused to keep him informed of the children's needs or wants. Jim pointed to only isolated instances when this occurred, most due to misunderstanding or inadvertence rather than malice.

There is no question the proceedings leading up to trial were lengthy and contentious. Given this protracted litigation, it comes as no surprise the parties were less than amicable toward each other. However, based on the record evidence, we are not convinced this unfriendliness translated into the inability of either party to effectively minister to the children's needs. *Cf. In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa App. 1992) (tension between parents factor to be considered in modifying custody). The evidence reflects both parties loved and nurtured their children and actively participated in their lives during the pendency of this very stressful litigation. Based on this record, therefore, we conclude a joint physical care arrangement is appropriate, as ordered by the district court.

III. Property Distribution

The property dispute turns on Jim's interest in the family farm. Prior to and during the marriage, Jim inherited or was gifted all the stock in the farm corporation, valued by the court at $925,389. Jim argues the court should not have included the farm in the property to be divided but, assuming the court was correct in doing so, it should have considered tax and sale consequences. He also contends the court made errors in its calculations of property values. He urges this court to reduce the lump sum monetary payment to Adele from $200,000 to $100,000 to prevent an ultimate liquidation of the family farm.

The principles guiding division of property are well established. The parties to a marriage are entitled to a just and equitable share of property accumulated through joint efforts. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa App. 1996). We do not mandate equal division of assets. Rather, we must determine what is fair and equitable under the circumstances, considering the factors set forth in Iowa Code section 598.21(1).[1] *Id.* Inherited property is not subject to distribution unless failure to do so would result in inequity. *See* Iowa Code § 598.21(2); *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993).

We are convinced the district court's property distribution was equitable. First, we conclude the court acted equitably in including the farm in the assets subject to division. The marriage between the parties lasted for twelve years. Adele was the primary caretaker of the home and children for most of those

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[1] These factors include the marriage length; property brought into the marriage; contributions to the marriage; age and health of the parties; contribution of one party to the education, training or increased earning power of the other; award of the home; alimony award; the economic circumstances of each party; tax consequences; written agreements; terms of a prenuptial agreement and any other factors deemed relevant by the court.

years. She assisted with the renovation and maintenance of the bunkhouse and main house at the farm as well as a house in town. She also attempted to suggest and implement innovative conservation practices on the farm and cared for some of the animals. Because Adele made significant contributions to the farm and family, she is entitled to a just and equitable share of the farm assets. *See Miller*, 552 N.W.2d at 464.

We are also convinced the court acted equitably in excluding the consequences of selling the farm property, as there was no evidence the farm was listed for sale or a sale was contemplated in the imminent future. *See In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991).

We concede the court mistakenly undervalued Adele's home by $11,500 and mistakenly determined certain stocks held by Jim in Black Acres, Inc. were not gifted or inherited. However, these errors do not fundamentally change the value of the assets subject to division. Therefore, we will not tinker with the property distribution based on these errors.

Finally, in concluding the property award was equitable, we note Adele waived her right to future alimony. Our courts have considered both in relation to each other. *In re Marriage of Callenius*, 309 N.W.2d 510, 513 (Iowa 1981). The absence of a short-term award when Adele re-entered the job market weighs in favor of a more substantial property award.

For these reasons, we conclude the district court's property distribution was equitable.

IV. Attorney Fees

Adele seeks appellate attorney fees. An attorney fee award is not a matter of right but rests within the sound discretion of the court. *Williams*, 589 N.W.2d at 762. We 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 district court's decision. *Id.* After consideration of these factors, we award Adele $500.

We affirm the decision of the district court.

AFFIRMED.