IN THE COURT OF APPEALS OF IOWA

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No. 7-383 / 96-2153

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF KENDRA BAUMGARTNER AND KIRK BAUMGARTNER

Upon the Petition of
KENDRA BAUMGARTNER,

Petitioner-Appellee,

And Concerning
KIRK BAUMGARTNER,

Respondent-Appellant.

Appeal from the Iowa District Court for Benton County, Kristin L. Hibbs, Judge.

Kirk Baumgartner appeals the child custody and property distribution provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED, AND REMANDED.**

Steven E. Howes and Barbara A. Connolly of Howes Law Firm, P.C., Cedar Rapids, for appellant.

Constance Peschang-Stannard, Iowa City, for appellee.

Heard by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

Kirk Baumgartner appeals the property distribution and child custody provisions of the district court's dissolution decree. He claims the district court erred by failing to award him an equitable share of marital assets, failing to award shared physical custody, and failing to establish reasonable visitation. We affirm as modified, and remand.

Kirk and Kendra Baumgartner divorced in November 1996, after fourteen years of marriage. They have two children, Heidi, born September 17, 1986, and Katie, born July 11, 1989.

Kirk and Kendra worked outside the home during the marriage, except Kendra stayed home after the children were born for a period of four years. They also acquired college degrees during the marriage. Kendra currently works full time with a software company from 8:00 a.m. till 5:00 p.m. Monday through Friday. She earns approximately $39,000 per year. Kirk currently works part time as a licensed practical nurse. He is also a member of the United States Army Reserves. He works from 3:00 p.m. until 11:00 p.m. Friday through Sunday with every fifth weekend off. He earns approximately $30,000 per year.

Kirk and Kendra brought few assets to the marriage. Kirk owned an antique car, worth $3500, which he subsequently sold for $10,800 after joint assets were used to renovate the car. Kirk also claims he had a bank account valued at $5100. Kirk

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was unable to determine, however, the exact amount in the account at the time of the marriage.

At trial, Kendra expressed concern about Kirk's behavior toward her and the children. She claimed Kirk displayed verbal and physical abuse, did not appropriately supervise the children, and engaged in inappropriate behavior around the children. In 1996, Kendra arrived home early from work to find Kirk and Heidi showering together. She also testified Kirk once picked Heidi up and threatened to slam her head with a door. Furthermore, although Kirk worked part time, the girls spent a considerable amount of time in day care. Kirk acknowledged Kendra's claims, although he denied some of the abuse testimony by Kendra. He also pointed out Kendra never complained to authorities. Kirk confirmed the children are happy, healthy, and doing well in school.

The court awarded Kendra primary physical care of the children. Kirk received visitation every other week from 8:00 a.m. Monday until school begins on Wednesday, with an extension until 5:30 p.m. during the summer. The court also awarded Kirk one night of visitation every other week, and four weeks of summer visitation to be used in two-week blocks. The court ordered Kirk to pay $618 in child support per month and to maintain a life insurance policy valued at $100,000 with the children as beneficiaries.

The trial court valued Kirk and Kendra's net assets at $176,424. The court awarded Kendra the family home and required her to assume the mortgage. She was

also awarded all personal property in her possession, all bank accounts in her name, one-half of the joint bank accounts, her IRA and TSA accounts, her savings bonds, a 1989 Ford Taurus, various lawn equipment, and all insurance policies in her name. The court determined the net property value Kendra received at $104,276. The court awarded Kirk all personal property in his possession, one-half of the joint bank accounts, his antique store inventory, a 1969 Camaro, car parts, guns, tools, his insurance policies, TSA accounts, stereo equipment, the proceeds from the sale of their car, and his military pension. Kirk's net award totaled $72,147, excluding the value of his military pension. Neither party offered any evidence on the value of this pension. The trail court determined the value of the pension equaled the disparity in the value of the property awards.

On appeal Kirk argues the district court erred in dividing the marital assets by miscalculating the value of the military pension, erroneously including the pension in the marital assets, failing to award Kirk one-half of the equity in the marital home, improperly dividing the personal property, and failing to set aside pre-marital assets. Kirk further claims the court erred in failing to award shared custody and in limiting the amount of visitation granted.

I. Standard of Review

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the

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same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Marital Property

A. Military Pension

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russel*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determines what is fair and equitable. *Id.* Further, the property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1) (1995). *Id.* Finally, it is well established that pension benefits, although individually owned, are treated as marital property subject to division. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App. 1997); *see In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989) (military pension is considered marital property).

Kirk asserts the trial court erred in calculating the value of his military pension and in including it as a divisible asset. He claims the trial court placed a value on the pension simply to equalize the difference in the division of the other property. We acknowledge there was no evidence presented at trial on the value of the pension.

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Nevertheless, because a military pension is divisible property, we must make an appropriate division to achieve an equitable distribution. *See In re Marriage of Fuchser*, 477 N.W.2d 864, 866 (Iowa App. 1991).

Property is valued in a dissolution of marriage to enable courts to determine what is an equitable division. *In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa App. 1997). When a divisible asset is not valued, equity can normally be achieved by equally dividing the non-valued asset. *See generally In re Marriage of Alexander*, 478 N.W.2d 420, 423 (Iowa App. 1991) (non valued furniture divided equally). Accordingly, we modify the decree and remand the case to the district court for the entry of a Qualified Domestic Relations Order (QDRO) giving Kendra a share of the pension at the time it becomes payable equal to 50% of a fraction wherein the numerator is the number of years of the marriage during which benefits accumulated (i.e., 11 years) and the denominator is the total number of years during which benefits accumulate prior to vesting. *See Fuchser*, 477 N.W.2d at 866. In this case, Kendra's share equals (½)(11/x), with x being the number of years the benefits accumulate. In order to achieve an equitable distribution in light of our division of the military pension, we award Kirk Kendra's Equitable Policy #10090 valued at $10,324.84 and $5000.00 from her IRA # 385669. On remand to the district court, the necessary orders should be entered to accomplish this division.

B. Marital Home Equity

An equitable division does not require a precise equal division of each asset. *In re Marriage of Robinson*, 542 N.W.2d 4, 5 (Iowa App. 1995). Instead, the issue is what is equitable under the circumstances. *Id.* Kirk asserts the trial court erred in failing to award him one-half equity in the marital home or in not requiring Kendra to remove his name from the mortgage. The district court adopted a valuation of the home at $110,000. The value of the property was well within the possible range of evidence, and we will not disturb it on appeal. *See In re Marriage of Huisman*, 532 N.W.2d 157, 160 (Iowa App. 1995). Additionally, we decline to award Kirk one half of the equity in the marital home as the current division of property reflects an equitable distribution and we need not precisely divide each asset equally. Finally, we note Kendra has no authority to remove a co-debtor's name from a mortgage owed to a bank. We do, however, order Kendra to hold Kirk harmless for the mortgage.

C. Personal Property

To make an equitable distribution of assets, the court must first determine the assets available for allocation between the spouses. *Driscoll*, 563 N.W.2d at 642; *see Alexander*, 478 N.W.2d at 422. Assets are then divided equitably, although not necessarily equally, pursuant to Iowa Code section 598.21(1).

Kirk claims the trial court did not properly divide various personal property and erroneously valued the parties' Ford Taurus. In reviewing the overall property distribution, we find the personal property was divided in an equitable manner.

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Moreover, the value of the Ford Taurus was well within the permissible range of evidence and we will not disturb it on appeal. *See In re Marriage of Higgins*, 507 N.W.2d 725, 726 (Iowa App. 1993).

D. Pre-Marital Assets

Property which a party brings into the marriage is a *factor* to consider in making an equitable division. Iowa Code § 598.21(1)(b). In some instances, this factor may justify a full credit, but it is not required. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). Antenuptial agreements are available to preserve premarital assets. *See* Iowa Code § 598.21(1)(l). A premarital asset is not otherwise set aside like gifted or inherited property. *Miller*, 552 N.W.2d at 465. Instead, it is a factor to consider, together with all other circumstances, in making an overall division. *Id.* Moreover, in considering accumulations to pre-marital assets, we do not limit our focus to the parties' direct contributions to the increase. *Id.* Rather, we broadly consider the contributions of each party to the overall marriage, as well as all other factors. Iowa Code § 598.21(1). Financial matters make up only a portion of a marriage, and must not be emphasized over other contributions in determining an equitable contribution. *Miller*, 552 N.W.2d at 465.

Kirk asserts the trial court erred in refusing to set aside pre-marital assets consisting of a bank account and an antique car. Kirk claims the value of the car he brought into the marriage was $3500 and the bank account was valued at approximately $5100. Considering all relevant factors, we find an equitable

distribution occurred without setting these items aside. Specifically, we note Kendra's sacrifices at the beginning of the marriage in staying with a sick child while Kirk was in the military. Additionally, Kirk failed to establish the value of the bank account at the time of the marriage. Both parties clearly made significant contributions to the marriage and when considering all of the circumstances, an equitable distribution results without setting these items aside.

III. Custody

Generally, a statutory amendment made after trial does not become part of the appeal. *See State v. All-Iowa Agricultural Ass'n*, 48 N.W.2d 281, 284 (Iowa 1951); *In re Marriage of Wallace*, 315 N.W.2d 827, 830 (Iowa App. 1981). However, if the amendment indicates an intent to change the meaning of the existing law or the legislature permits recognition of the amendment, we may consider the amendment on appeal. *All Iowa Agricultural Ass'n*, 48 N.W.2d at 284; *see also Garrison v. Garrison*, 179 N.W.2d 466, 469(Iowa 1970) (consideration of issues on appeal after enactment of new divorce laws made in light of previous statutes).

Following the appeal of this case, Iowa Code section 598.41 governing child custody was amended by House File 612. The amendment became effective July 1, 1997. It makes a joint physical care arrangement an acceptable option in a dissolution of marriage when in the best interests of the child. *See* 1997 Iowa Legis. Serv. No. 182 (West). Prior to the amendment, we repeatedly stated divided physical care is strongly disfavored, except in the most unusual circumstances. *In re Marriage of*

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Roberts, 545 N.W.2d 340, 342 (Iowa App. 1996). The rationale behind this disfavor includes: (1) it is disruptive of discipline; (2) it tends to induce in a child a feeling the child does not belong to either parent; and (3) it deprives a child of a sense of stability. *Id.* at 343.

There is a difference between custody and physical care. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Custody refers to a parent's rights and responsibilities toward the child in matters such as the child's legal status, medical care, education, extracurricular activities, and religious instruction. *Id.*; *see* Iowa Code § 598.41(5). Physical care, on the other hand, refers to the right to provide a home for the minor child and provide for the routine care of the child. *Will*, 489 N.W.2d 394, 397; *see* Iowa Code § 598.1(5). Joint physical care is defined under the amended statute as an award of physical care of a child to both joint legal and custodial parents where both parents have rights and responsibilities toward the child including shared parenting time, maintaining homes, and providing routine care for the child and where neither parent has physical care rights superior to the other parent. *See* 1997 Iowa Legis. Serv. No. 182 (West). Courts may now award joint physical care when it is in the best interests of the children and would preserve the relationship between each parent and the child. *Id.*

In resolving child custody issues, the best interests of the children is the first and governing consideration. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The critical issue in determining the best interests of the children

is which parent will do better in raising the child. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. *Fynaardt*, 545 N.W.2d at 892-93.

Whether we apply the new statutory amendment in this case or the prior statutory language, we reach the same result. Kirk claims the circumstances justify a shared physical arrangement. He asserts his work schedule would enable him to care for the children for a significant amount of time and would be better than day care.

Kirk was available to care for the children prior to the dissolution. Instead, he often placed them in day care. Additionally, the testimony supported the conclusion Kirk engaged in verbally abusive and inappropriate behavior. In light of this behavior, we conclude the best interests of the children would be better served by a joint custody arrangement with primary physical care to Kendra. We also recognize the visitation schedule gives Kirk ample opportunity to involve himself with his children. We find a shared physical custody arrangement would not be in the best interests of the children.

IV. Visitation

In determining visitation rights, the governing consideration is the best interests of the children. Iowa Code § 598.41(1)(a). Liberal visitation rights are to be awarded where appropriate to provide the children with the opportunity for

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maximum continuing physical and emotional contact with both parents. *Id.*; *see In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). However, if direct physical harm or significant emotional harm could result to the children, less contact is acceptable. *Id.*

Kirk requests additional visitation time and a modification of his child support obligations. In addition to the regular alternating visitation, the court awarded Kirk alternating holidays, every Father's Day, and four weeks each summer. We further note the decree provides "Kirk shall have rights of *liberal* visitation as the part[ies] can agree." We find this schedule to be in the best interests of the children. We further encourage Kirk and Kendra to agree to visitation which is in the best interests of the children.

Finally, should Kirk spend more time with his children than the decree provides, we decline to modify his child support obligations. *See In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997) (noncustodial parent not entitled to pro-rated offset from guideline amount for time child spends with the noncustodial parent under shared physical arrangement).

AFFIRMED AS MODIFIED, AND REMANDED.