IN THE COURT OF APPEALS OF IOWA

No. 23-0279
Filed February 21, 2024

IN RE THE MARRIAGE OF ANGELA DENISE WAKELY AND CARLOS ENRIQUE WAKELY

Upon the Petition of
ANGELA DENISE WAKELY,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CARLOS ENRIQUE WAKELY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell, Judge.

Carlos Wakely appeals, and Angela Wakely cross-appeals, provisions of a dissolution decree. **AFFIRMED ON APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL AND REMANDED.**

Andrew B. Howie of Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, for appellant.

Earl B. Kavanaugh and Kaitlin T. Boettcher of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellee.

Considered by Bower, C.J., and Schumacher and Langholz, JJ.

BOWER, Chief Judge.

Carlos Wakely appeals the spousal-support and attorney-fee awards following entry of a dissolution decree. Angela Wakely cross-appeals the district court's: (i) reduction of spousal support; (ii) amendment to the visitation schedule; and (iii) decision to grant the child tax dependency exemption to both parties on an alternating basis. We affirm on appeal and affirm as modified on cross-appeal.

I. Background Facts and Proceedings

Angela and Carlos Wakely were married in 2003. At the time of dissolution, Angela and Carlos had two children, born in 2007 and 2012. It was established at trial Carlos had charges of domestic violence pending against him and as a result Angela had obtained a protective order.

Angela petitioned for dissolution of marriage on October 12, 2021. Carlos was served on October 28. He filed an answer on November 24 through counsel, who later withdrew from the case due to "a material breakdown of the attorney-client relationship." The district court then informed Carlos in writing of his rights and responsibilities as a pro se litigant.

Carlos did not attend the pretrial conference on March 18, 2022. The district court allowed Carlos an additional fourteen days to file his pretrial documentation. He failed to do so. On April 18, the district court sanctioned Carlos, by limiting the presentation of evidence at trial. Angela's attorney discovered attorney R.J. Hudson II planned to represent Carlos in the dissolution proceedings. Hudson informed Angela's attorney he planned to file a notice of appearance for the default hearing. He never did.

Carlos failed to appear for any other hearings, reply to any communications from the district court, mediator, or take any action up to and including the default hearing on September 29. As a result, a default dissolution decree was entered. In its decree, the district court ordered: (i) division of the parties' property and debt; (ii) Carlos to pay $2000 per month in spousal support to Angela for fifteen years, terminating upon death or Angela's remarriage; (iii) Angela to have sole legal custody and physical care of the children; (iv) Carlos to pay child support; (v) Carlos to have supervised visitation with the children; and (vi) Carlos to pay $10,000 of Angela's attorney fees and court costs.

On October 6, Hudson entered an appearance on behalf of Carlos in the dissolution case. On October 13, Carlos filed a combined motion to set aside the dissolution decree, or in the alternative, enlarge, amend, or reconsider the decree. In the motion to set aside, Carlos claimed: (i) he did not receive actual notice of the motion for default judgment; (ii) Angela did not file an affidavit of military status; and (iii) he did not receive actual notice of the default judgment hearing. In the motion to enlarge, amend, or reconsider, Carlos claimed: (i) sole custody was not supported by the evidence; (ii) supervised visits were not supported by the record; (iii) the child dependency tax exemptions should be evenly split; (iv) the property distribution was not equitable; (v) the spousal-support award was not supported by the record; and (vi) the attorney-fee award was not supported by the record.

The district court declined to set aside the decree but did rule on the motion to enlarge, amend, or reconsider. In its ruling, the district court found: (i) granting sole custody to Angela was "supported by the record"; (ii) the original decree was "too restrictive" as to Carlos' visitation with the children; therefore, Carlos was to

have four supervised visits and then unsupervised visits every other weekend and Wednesday overnights or "per the parties' agreement"; (iii) the child dependency tax exemptions "should be split" between the parties each year; (iv) despite a lack of evidence presented from either party, the property distribution was not "inequitable"; (v) Angela was entitled to spousal support in the amount of $1000 per month; and (vi) the award of attorney fees was appropriate.

Carlos appeals. Angela cross-appeals.

II. Standard of Review

Although this case involves issues of default judgment, all arguments relate to the content of the dissolution decree and its modifications. Therefore, review for abuse of discretion is not the appropriate standard. *See In re Marriage of Haidar*, No. 17-1410, 2018 WL 4923016, at *2 (Iowa Ct. App. Oct. 10, 2018) (noting an abuse-of-discretion standard of review applies when issues on appeal were related to whether the district court properly denied a motion to set aside a default judgment); *see also In re Marriage of Huston*, 263 N.W.2d 697, 699 (Iowa 1978) ("Appellate review of default divorce decrees, like contested or dispositive litigated adjudications in such proceedings, is de novo."). Appeals relating to the dissolution of a marriage are equitable proceedings. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 483–84 (Iowa 2012). Our review is de novo. *Id*. at 484. "While not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses." *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa Ct. App. 1991).

To the extent physical care is an issue here, review is also de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We review a challenge to

a district court's award of attorney fees for abuse of discretion, and we will only reverse an award if the court's ruling rests on clearly untenable or unreasonable grounds. *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 73 (Iowa 2011).

III. Issues on Appeal

A. Spousal Support[1]

Carlos argues the district court "abused its discretion" in its default decree by finding Angela was entitled to spousal support as she failed to explicitly request spousal support in her original petition. We first note the standard of review on this issue is not abuse of discretion, but de novo. *Huston*, 263 N.W.2d at 699.

Angela's petition did not include a specific request for spousal support but requested "such other and further relief as the [c]ourt may deem just and equitable in the premises." Carlos was made aware spousal support was an issue in the case. On March 16, 2022, Angela filed her certificate of compliance with pretrial requirements and spousal support was listed as a disputed issue. On March 18, the district court entered its pretrial order, which also listed spousal support as a disputed issue. On June 15, the district court entered its uniform trial scheduling order, which listed spousal support as a disputed issue.

Iowa Code section 598.5(1)(i) (2021) states, "The petition for dissolution of marriage shall" "[s]et forth any application for permanent alimony or support, child custody, or disposition of property, as well as attorney fees and suit money, without enumerating the amounts thereof." In *Hopping v. Hopping*, the supreme court rejected the argument spousal support was waived unless specifically requested.

[1] While the district court and the parties refer to spousal support as "alimony," we will refer to it as spousal support.

10 N.W.2d 87, 90 (Iowa 1943) (holding the parties to a divorce suit should be aware statutes dealing with divorce allow a court to award spousal support). Subsequent cases, even after the advent of no-fault divorce in Iowa in 1970, have upheld the *Hopping* ruling. *See, e.g.*, *In re Marriage of Miller*, 475 N.W.2d 675, 677 (Iowa Ct. App. 1991) (finding no abuse of discretion when the district court allowed a wife to amend her petition at the time of trial to request spousal support when she had earlier made a general prayer for equitable relief); *see also In re Marriage of Clinton*, 579 N.W.2d 835, 838 (Iowa Ct. App. 1998) (finding, although the wife failed to specifically ask for spousal support in her answer to a dissolution petition, the trial court could still award spousal support because the husband was adequately notified spousal support would be a disputed issue).

The issue of spousal support was correctly before the court. Angela's prayer was for equitable relief. Carlos was notified spousal support would be at issue in the certificate of compliance with pretrial requirements, pretrial order, and uniform trial scheduling order. Spousal support was properly awarded.

B. Trial Attorney Fees

Carlos next contests the district court's award of attorney fees. "The court may order either party to pay the clerk a sum of money . . . to enable such party to prosecute or defend the action." Iowa Code § 598.10(1)(a); *see also id.* § 598.5(1)(i) (allowing the petitioner to request attorney fees). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). We review a district court's award of attorney fees in a dissolution proceeding for abuse of discretion. *See In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

Because Carlos was making substantially more money than Angela at the time of the default hearing, we cannot say the district court abused its discretion. The award to Angela of $10,000 in attorney fees is affirmed.[2]

IV. Issues on Cross-Appeal

A. Amount of Spousal Support

Angela argues the district court "abused its discretion" in decreasing her spousal-support award from $2000 to $1000 per month. We first note the standard of review is not an abuse of discretion, but de novo. *Huston*, 263 N.W.2d at 699. The district court ruled on this issue in its order granting the motion to enlarge, amend, or reconsider:

> The criteria for determining spousal support are set forth in Iowa Code section 598.21A. The economic provisions of a dissolution decree are based on a number of factors, including the length of the marriage, the age and health of the parties, the parties' earning capacities, the distribution of property, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed in the marriage. *In re Marriage of Gust*, 858 N.W.2d 402, 407 (Iowa 2015) [(]citing Iowa Code § 598.21A(1)[)]. The case law has recognized three kinds of spousal support: traditional, rehabilitative, and reimbursement. *Gust*, 858 N.W.2d at 408. The Iowa Supreme Court recently recognized transitional alimony as a fourth category. *In re Marriage of Pazhoor*, 971 N.W.2d 530, 542 (Iowa 2022).
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> Angela made [a] valid claim for alimony. The couple were nearly married for 20 years, which essentially qualifies as a long-term marriage. There is income inequity between the two with Carlos earning approximately $90,000 per year and Angela earning approximately $13,000. The information regarding Carlos' earnings could have been better established, but Angela's attorney subpoenaed income information and made a professional statement at hearing of the exact amount earned. Carlos did not present evidence to rebut it as part of his motion. Angela is probably capable

[2] Carlos contends attorney fees are not appropriate because Angela's attorney did not provide an itemized list in his affidavit supporting his charges. There is no authority that affirmatively requires itemization.

> of earning more money, but even then, an alimony award is not unreasonable.
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> With that said, the amount of alimony is excessive. The seminal alimony case in Iowa has very similar facts. *See In re Marriage of Gust*, 858 N.W.2d 402 (Iowa 2015). In *Gust,* the husband had earning capacity of $92,000 per year and the wife had earning capacity of $22,500 per year. The court awarded $1,400 per month in alimony while paying child support, with an increase to $2,000 per month after the termination of child support. *Id.* at 404-06.
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> These parties have essentially the same earning capacity as the parties in *Gust*. The default decree awards the $2,000 in alimony in addition to $951.14 in child support. This makes the alimony inequitable when compared with the result in *Gust*. Accordingly, the alimony amount shall be adjusted from $2,000 per month to $1,000 per month to make the total amount paid close to the same paid in *Gust.*

A district court may award spousal support after considering all of the following: (i) the length of the marriage; (ii) the age and physical and emotional health of the parties; (iii) the distribution of marital property; (iv) the educational level of each party; (v) the earning capacity of each party; (vi) the feasibility of the party seeking support becoming self-sustaining and achieving a standard of living comparable to the one they enjoyed during the marriage; (vii) the tax consequences; (viii) agreements made by the parties; (ix) any antenuptial agreements; and (x) other factors the court determines relevant. Iowa Code § 598.21A(1). We need only consider the factors relevant to the case at hand. *In re Marriage of Mann*, 943 N.W.2d 15, 20 (Iowa 2020). We recognize four types of spousal support: traditional, rehabilitative, reimbursement, and transitional. *See Pazhoor*, 971 N.W.2d at 539, 541–43. "The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

We find the district court inequitably decreased the spousal support payments from $2000 to $1000. Upon our de novo review, we note the marriage was of long duration, nearly twenty years. Angela was the primary caregiver during the marriage, and consequently took a job which afforded her more flexibility, albeit with a decreased income potential. The record also establishes Angela will be unable to support herself or the children according to the lifestyle she was accustomed to during the marriage without additional monthly support. Although the record reflects her intent to return to school, her economic prospects are limited in the near term, and her salary will likely remain near $13,514. We find $1500 per month is an equitable support payment to allow Angela to "live in a fashion approaching her lifestyle during the marriage." *Gust*, 858 N.W.2d at 415. Carlos earns $90,351.56 annually. There is a considerable disparity between the parties' incomes. The danger of inequity is curtailed by the fact the support payments will only continue for fifteen years, as requested by Angela.

We modify the dissolution decree to award Angela spousal support payments in the amount of $1500 per month for fifteen years, or until Angela remarries or the death of one of the parties.

B. Amount of Child Support

Angela claims the court erred in decreasing her spousal support award but failing to adjust the amount of child support Carlos was ordered to pay. Because we have determined Angela is equitably entitled to $1500 per month in spousal support, we remand for recalculation of child support under the child support guidelines.

C. Visitation

Angela further claims the court's change in allowing additional visitation after the initial default decree is not in the best interests of the children. The court initially allowed Carlos only supervised visitation with the children every other Saturday from 1:00 p.m. to 5:00 p.m., but only after he completed the requisite "Children in the Middle" course and furnished his completion certificate to the district court.

The district court augmented its visitation ruling in its order on the motion to enlarge, amend, or reconsider:

> The request for supervised visits is warranted by Angela's testimony, but there was no end date. Rather, it allowed them to move to unsupervised visits on the agreement of the parties, which gives Angela control over the change. That is too restrictive.
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> The court will limit supervised visits to a total of four visits. That will allow the children to connect with Carlos in a safer setting with boundaries. Following the fourth supervised visit, Carlos may have unsupervised visits with the minor children as per the parties' agreement. If they do not agree, Carlos shall have visits every other weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. Carlos shall also have visits every Wednesday from 5:00 p.m. to Thursday morning at 9:00 a.m. (or by taking them to school if school is in session).

The district court, in so ruling, made no determination about whether this schedule was in the best interests of the minor children. The best interests of the children always govern decisions about custody and visitation. *See generally* Iowa Code § 598.41; *see also In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa 1994) ("Although liberal visitation is the benchmark, our governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation.").

From our review of the record, we find the amended visitation schedule is not in the best interests of the children. Carlos has emotionally, physically, and sexually abused Angela. He has emotionally abused the children and uses them as weapons against Angela. He withheld funds from Angela when she tried to buy the children items to contribute to their development, such as soccer cleats. He withheld toys from the children and forbade Angela to retrieve them. He did not bother to engage with the divorce proceedings, knowing custody of the children would be a contested issue. At the time of the default judgment, he had not completed his "Children in the Middle" course.

Consequently, we modify the visitation schedule[3] and return it to its original state:

> Carlos shall have supervised visitation with the minor children. Mosaic Family Counseling Center shall be responsible for supervising Carlos' visits with the minor children. Carlos shall be solely responsible for the cost of supervision. Carlos shall have supervised visits with the children every other Saturday, from 1:00 p.m. to 5:00 p.m. Carlos shall contact Mosaic Family Counseling Center to set up his visitation with the minor children. The parties may add additional time for Carlos, or change the visitation to unsupervised visitation, upon agreement of the parties, in writing. The parties shall be flexible with regard to re-scheduling visitation if the minor children have a pre-existing extracurricular activities during that time. Visitation shall not begin until he completes [the "Children in the Middle"] program and files his certificate of completion with the court.

D. Child Dependency Tax Exemptions

Angela claims the district court incorrectly split the child dependency tax exemption. Generally, the parent awarded primary physical care should be entitled

[3] The district court expressed concern that the original order gave Angela too much control. To the contrary, should Carlos' behavior or circumstances change in any substantial way, he is welcome to request modification of the dissolution decree.

to claim the exemption. *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005). Exceptions to this general rule may be exercised to "achieve an equitable resolution of the economic issues presented." *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). Of significant importance is which parent will derive the maximum tax benefit from the exemption. *Id*. at 679–80. Under these facts and circumstances, the court's allocation of the dependency tax exemptions was equitable. We affirm the tax exemption provision entered by the court, which provides:

> As long as KZW can be claimed, Carlos shall claim KZW and Angela shall claim KMW. When only one child can be claimed, Angela shall claim the child in even years and Carlos in odd years. Carlos shall only take the tax exemption if current on child support as of December 31 of that tax year.

E. Appellate Attorney Fees and Court Costs

Angela requests an award of appellate attorney fees. Whether to award appellate attorney fees is a matter of discretion. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). In determining whether to award appellate attorney fees, some factors to consider are the needs of the party making the request, the ability of the party to pay, and whether the party making the request had to defend the decision of the trial court on appeal. *Id*. In reviewing the case in its entirety, we decline to award appellate attorney fees in this matter. The costs of this case are assessed to Carlos.

V. Conclusion

For these reasons, we affirm on appeal and affirm as modified on cross-appeal and remand for recalculation of child support.

AFFIRMED ON APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL AND REMANDED.