IN THE COURT OF APPEALS OF IOWA

No. 0-141 / 09-1656
Filed May 12, 2010

IN RE THE MARRIAGE OF JENNIFER A. MEYER AND ROBERT D. MEYER

Upon the Petition of
JENNIFER A. MEYER,
Petitioner-Appellee,

And Concerning
ROBERT D. MEYER,
Respondent-Appellant.

Appeal from the Iowa District Court for Harrison County, James M. Richardson, Judge.

A father appeals from the custodial and economic provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Julie A. Schumacher of Mundt, Franck & Schumacher, Denison, for appellant.

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Robert Meyer appeals from the custodial and economic provisions of the decree dissolving his marriage to Jennifer Meyer. We affirm the judgment of the district court as modified.

I. Background Facts and Proceedings.

Robert and Jennifer were married in November 2001. Robert adopted Jennifer's son, Keenan, in 2002. They have two other children together: Jordan and Samantha. Jennifer filed a petition for dissolution of marriage in April 2009. The petition came before the district court for trial later that year.

At the time of the trial, Robert was thirty-four years old and enrolled at a community college seeking a degree in computer sciences, with an emphasis in computer forensics. He earns approximately $9700 gross per year at an internship through the school. Prior to returning to school in May 2008, Robert was employed at LifeNet Communications where he grossed $35,224 in 2007. He has a retirement account valued at $4849.

Jennifer was thirty-two years old and employed as a registered nurse earning $66,782 gross annually at the time of the trial. She works twelve-hour night shifts for three days one week and four days the next week, with every other weekend off. She has a retirement account valued at $9430.

Jennifer owned a house before the parties' marriage, for which she paid $92,550. She put an $18,550 down payment on that home, resulting in a mortgage of $74,000. Robert lived in the house with Jennifer and Keenan for a short time before Jennifer sold it. Jennifer used the proceeds from the sale to help purchase the home that the family lived in at the time of trial, which was

valued at $125,000 with an encumbrance of $110,000. Robert and Jennifer continued to live together in that home with their children during the dissolution proceedings.

Robert testified that before Jennifer initiated the dissolution proceedings, they shared the parenting duties for their three children. That arrangement changed in the year preceding the trial, according to Robert. He testified that he began providing most of the care for the children because Jennifer was gone from the home a significant amount of time. Jennifer testified that sometimes she would go running, walking, or to Goodwill to look around. Robert attributes Jennifer's absence to an extramarital affair. Jennifer, however, testified she would occasionally leave the home when both she and Robert were there to minimize the tension between them.

Like Robert, Jennifer testified that they shared the parenting of their children during the marriage. However, she viewed herself as the more organized and structured parent, testifying she often needed to remind Robert of the children's schedules and extracurricular activities. Jennifer stated she also took most of the initiative with the children's discipline and housekeeping. But she acknowledged Robert was an excellent father.

The district court entered a decree dissolving the parties' marriage in October 2009. The court placed the children in the parties' joint legal custody and Jennifer's physical care. Robert was granted liberal visitation with the children, including "every other weekend (that [Jennifer] works) from Friday at 5 p.m. until Monday at 9 a.m. and three overnights during weeks without weekend visitation." The court imputed a gross annual income of $33,442 to

Robert based on his previous employment and ordered him to pay $747.77 per month in child support. However, the court determined that "[i]n lieu of any spousal support said child support obligation shall be stayed until May 15, 2011."

With respect to the division of the parties' property, the court awarded Jennifer the marital home, its contents, a vehicle with a net value of $4445, a life insurance policy with a cash value of $500, and her retirement account. Robert was awarded two vehicles valued together at $9500 and his retirement account. The court ordered the parties to split the $12,000 student loan debt incurred by Robert during the marriage. Each party was ordered to pay his or her own attorney fees.

Robert appeals. He claims the district court erred in (1) placing the children in Jennifer's physical care; (2) imputing income to him for child support purposes; (3) failing to award spousal support; (4) inequitably dividing the parties' property; and (5) not requiring Jennifer to pay a portion of his attorney fees. He also requests an award of attorney fees on appeal.

II. Scope and Standards of Review.

Our scope of review is de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Discussion.

A. Physical Care.

When considering the issue of physical care, the children's best interests are the overriding consideration. *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in Iowa Code section 598.41(3) (2009), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in section 598.41(3) apply equally to physical care determinations). Among the factors to be considered are whether each parent would be a suitable custodian for the children, whether both parents have actively cared for the children before and since the separation, the nature of each proposed environment, and the effect on the children of continuing or disrupting an existing custodial status. *See* Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Hansen*, 733 N.W.2d at 695. With these principles in mind, we conclude the district court was correct in placing the children's physical care with Jennifer.

As the district court recognized, we are faced with the fortunate situation of two "good, loving parents." Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In cases such as this, with two suitable parents, "stability and continuity of caregiving are important factors." *Id*. at 696. These factors tend to favor a parent who, prior to the parties' separation, was primarily responsible for the

physical care of the minor children. *Id.* Robert argues that parent was him. We do not agree.

Both Robert and Jennifer testified that prior to their separation they shared the parenting of their children in roughly the same proportion. During the dissolution proceedings, Robert maintained he began providing more of the children's daily care as Jennifer was frequently absent from the home. Jennifer testified she was absent from the home more often after the parties' separation because she found it difficult to be around Robert. We first observe "the quality of the parent-child relationship is not always determined by hours spent together." *Id*. at 697. Furthermore, the factors of stability and continuity of caregiving focus on the caretaking arrangement prior to the parties' separation, which in this case was joint.[1] *Id.* at 696-97.

Upon our de novo review of the record, we agree with the district court that the

> testimony was uncontroverted that the parties equally shared the care of the children to accommodate their busy schedules. The testimony established that Jennifer performed the bulk of the housekeeping chores of the family. Further, Jennifer was the parent that provided the majority of the discipline needed by the children. . . . Both Robert and Jennifer were active in the children's school, sports or scouting functions. Robert is not well organized, therefore, Jennifer kept the family on track by scheduling events on the family calendar.

The court found the scales tipped in favor of Jennifer based primarily on the testimony of Denise Dobberpuhl. According to the court,

[1] We note that although Jennifer requested joint physical care in her dissolution petition, the parties apparently agreed before trial that the children should be placed in one parent's physical care. Neither party argues joint physical care should have been granted.

> [h]er testimony was most informative and revealing. Ms. Dobberpuhl is the paternal biological grandmother of Keenan Meyer but also treats Jordan and Samantha as her grandchildren. She regularly attends and is accepted at the parties' family functions. All three children spend overnights at Ms. Dobberpuhl's home. Ms. Dobberpuhl is employed at Boys Town. In her employment, she directs staff who assess children, families and home life. The Court specifically finds Denise Dobberpuhl to be a disinterested witness who has a positive relationship with both Jennifer and Robert.
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> Ms. Dobberpuhl testified that both parties were good parents. She found that although Jennifer worked to provide the family finances that Jennifer spent more quality time with the children. Further, she opined that Jennifer was the better parent at providing the day-to-day nurturing and care for the children.

Robert complains the court erred in not considering the testimony of other witnesses called by the parties at the trial, including Jennifer's brother who testified Robert was the more stable parent "[a]t this particular point in time." However, we give considerable deference to the following credibility findings made by the court, *see In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997), which had the benefit of hearing and observing the parties firsthand:

> As a result of Jennifer and Robert growing apart, Jennifer had an extra-marital affair with a coworker. This fact is not known by the children. . . . Clearly, Robert's bitterness and anger over this affair ravaged and consumed his testimony as well as tainting the opinions of his own witness. The testimony was uncontroverted that both Jennifer and Robert were good and loving parents who shared the care of the children. Nonetheless, Robert and his witnesses opined that Robert should be awarded primary physical care of the children because of this unfortunate affair. These opinions were based solely on principles of fault and disapproval of an extra-marital affair and nothing about the children's best interest. Therefore, concerning the issue of primary physical care, the opinions of Robert and his witnesses must be disregarded. Similarly, with the exception of Denise Dobberpuhl, the opinions of witnesses called by Jennifer are discounted as only being her friends and/or coworkers.

Robert continues to argue on appeal that Jennifer's relationship with another man during the latter part of their marriage weighs in favor of placing the children in his physical care. *But see Fennelly*, 737 N.W.2d at 103 ("Iowa is a no-fault state."). Like the district court, we do not place much emphasis on that circumstance, especially as there is no evidence the children were harmed by Jennifer's activities. *See In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995) ("Although 'moral misconduct' is a consideration in custody determinations, it is only one factor."); *In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983) (stating moral misconduct has been weighed "most heavily only in those cases where the misconduct occurred in the presence of the children").

We acknowledge this is a close case—very close. In such cases, we give careful consideration to the district court's findings. *Wilson*, 532 N.W.2d at 495-96. And there is good reason for us to pay very close attention to the trial court's assessment of the credibility[2] of witnesses.[3]

> A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (internal citations omitted). A witness's facial expressions, vocal intonation, eye movement,

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[2] "Credibility" in this context, we believe, goes beyond mere truthfulness; it encompasses a witness's motive, candor, bias, and prejudice.

[3] The trial judge's use of the word "disregarded" as it is related to the testimony of several of Robert's witnesses may have been improvident, but as the fact finder, the trial judge was entitled to accept or reject all or part of the testimony of any witness. *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 812 (Iowa Ct. App. 1995).

gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings, and opinions may be detected from this "nonverbal leakage." Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the trial judge is in the best position to assess a witness's interest in the trial, their motive, candor, bias, and prejudice.

After considering the parties' arguments on appeal and reviewing the evidence anew, we find Robert and Jennifer are both capable of providing for their children's long-range best interests. The court thoroughly considered the evidence and made a lengthy ruling, which included detailed findings of fact and reasoning concerning the physical care issue. Its findings are fully supported by the evidence, its reasoning is sound, and its detailed application of the law correct. We accordingly affirm its decision to place physical care of the children with Jennifer.

B. Child Support.

Robert next argues the district court erred in imputing income to him in calculating his child support obligation. We agree.

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). But before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id.; see also* Iowa Ct. R. 9.11(4). In making this determination, the court should examine

the employment history, present earnings, and reasons for failing to work a regular work week. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997).

Robert was employed at a full-time job earning approximately $35,224 gross per year until May 2008 when, with Jennifer's encouragement, he decided to return to school. He testified,

> I came home one day, and [Jennifer] said that she had filled out several applications for college [for me]. . . . [W]e sat down and talked about it and agreed that I should go back to school. Initially I had stated that I thought it might be a better idea for me to take a couple classes a semester and then work full time, and I was told, no, that we were gonna do it all or nothing and I need to go full time.

Robert has been enrolled as a full-time student since then and works at an internship with the school where he earns approximately $9700 gross per year. He anticipates graduating in fall 2010 or spring 2011.

Given these facts, we think the district court should have used Robert's actual earnings rather than his earning capacity to determine his child support obligation. We accordingly remand for a recalculation of child support using Robert's actual earnings of $9700 gross per year. We recognize Robert's income will most likely increase when he completes his schooling and obtains a full-time job. When that occurs, Jennifer can seek a modification of Robert's child support obligation, should she so desire. This brings us to Robert's next claims regarding the court's denial of his request for spousal support and its division of the parties' property.

C. Spousal Support and Property Division.

Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the

property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* Property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

Robert claims the district court erred in awarding Jennifer a larger share of property. The court's division of the parties' property was based, in part, on the assets Jennifer brought with her into the marriage. Under Iowa law, premarital property is not automatically excluded from the marital estate, but its status is one factor to be considered when dividing the parties' property under Iowa Code section 598.21. *Fennelly*, 737 N.W.2d at 102. Other factors include the length of the marriage, contributions of each party to the marriage, the age and health of the parties, each party's earning capacity, and any other factor the court may determine to be relevant to the case. Iowa Code § 598.21(1); *Fennelly*, 737 N.W.2d at 102.

Upon considering all of these factors, we find the district court's unequal division to be equitable in this case. *See In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002) (stating the goal of property division is to assure just and equitable, rather than equal, allocations). Jennifer was awarded the equity in the marital home (approximately $15,000), the contents of the home

valued at $5000, and her life insurance policy with a cash value of $500.[4] She was awarded her car with a net value of $4445 and her retirement account valued at $9430, and she was ordered to pay one-half of Robert's $12,000 student loan debt, resulting in a net award of $28,375. Robert was awarded two cars with a total value of $9500, his retirement account valued at $4849, and a small life insurance policy with nominal value. Subtracting his portion of the student loan debt, Robert's award totaled $8349.

Although Jennifer is leaving the marriage with more assets than Robert, this distribution seems fair to us considering the property she brought into the marriage, the relatively short duration of the marriage, and the contributions of each party during the marriage. *See In re Marriage of Wallace*, 315 N.W.2d 827, 831 (Iowa Ct. App. 1981) (noting the length of the marriage is an important factor in determining how marital property is divided where there were "wide disparities between the assets of the parties at the time of the marriage"). We do, however, agree with Robert that the district court erred in denying his request for rehabilitative spousal support.

Spousal support is a discretionary award dependent upon each party's earning capacity and present standards of living, as well as the ability to pay and the relative need for support. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). In determining whether to award spousal support, the district court must consider the factors set forth in Iowa Code section 598.21A(1), which includes the distribution of property made by the court. *See Trickey*, 589

[4] The district court adopted the values in Jennifer's financial affidavit in its property division. As Robert does not challenge the court's valuations on appeal, we will do the same.

N.W.2d at 756. Prior cases are of little value in determining the appropriate spousal support award, and we must decide each case on its own particular facts. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976).

"Rehabilitative spousal support is 'a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.'" *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008) (citation omitted). "The goal of rehabilitative spousal support is self-sufficiency and for that reason 'such an award may be limited or extended depending on the realistic needs of the economically dependent spouse.'" *Id.* (citation omitted).

Upon our de novo review, we find the district court's denial of Robert's request for rehabilitative alimony was inequitable, considering the unequal property division, the large disparity in the parties' incomes, and their joint decision for Robert to leave his job and return to school, which he expected would take him at least another year to finish. *See Kurtt*, 561 N.W.2d at 388 (stating we will disturb a district court's spousal support determination only when there has been a failure to do equity). We accordingly award Robert spousal support of $350 per month for twelve months from the date procedendo issues in this case.

D. Attorney Fees.

Robert finally claims the district court erred in failing to order Jennifer to pay a portion of his trial attorney fees. We review such a decision for an abuse of discretion. *Sullins*, 715 N.W.2d at 255. "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).

Jennifer was earning substantially more than Robert at the time of the trial, but she also had greater expenses at that time given the district court's decision to stay Robert's child support obligation. In light of the parties' respective financial positions at the time the decree was entered, *see In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009), we cannot say the court abused its considerable discretion in denying Robert's request for trial attorney fees.

However, we believe Robert is entitled to an award of appellate attorney fees of $2500. In arriving at our decision, we have considered the parties' needs, ability to pay, and the relative merits of the appeal. *See Sullins*, 715 N.W.2d at 255.

IV. Conclusion.

We affirm the dissolution decree entered by the district court as modified. We remand the case to the court for recalculation of Robert's child support obligation using his actual earnings of $9700 gross per year. We award Robert spousal support of $350 per month for twelve months from the date procedendo issues in this case, and $2500 in appellate attorney fees. Costs are taxed to Jennifer.

AFFIRMED AS MODIFIED AND REMANDED.

Danilson, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I concur with the well-written majority opinion in all respects except that I would grant Robert primary physical care, strike his child support obligation, and remand for a determination of Jennifer's child support obligation. Reviewing de novo, I find Robert to be the stronger, more dedicated parent. I am not as quick as the majority to discount the effect on the children of Jennifer's extramarital affair, though all the implications of her relationship are not entirely clear from the record. I recognize, as the majority aptly states, that Iowa is a no-fault state; however, we still cannot ignore a parent's conduct when assessing their ability to care for their children.

The district court appeared to make its decision on the opinion of Mrs. Dobberpuhl that Jennifer was the better parent, finding the woman to be a disinterested witness who had a positive relationship with both parents. Dobberpuhl is the biological grandmother of Jennifer's oldest child. The child is not Robert's although Robert has assisted with his care. I do not necessarily see Dobberpuhl as a disinterested witness. She obviously wants to continue her relationship with her grandchild. Jennifer is that child's custodian and were Dobberpuhl's testimony not favorable to Jennifer, Dobberpuhl could well be denied that relationship. Nor am I impressed with Jennifer's excuse for being away from home for a considerable amount of time following the parties' separation. Her excuse being that she found it difficult to be around Robert. I would think that she would place a higher priority on being with her children, even if her relationship with Robert were not particularly comfortable.