

IN THE COURT OF APPEALS OF IOWA

No. 0-191 / 09-1657
Filed May 26, 2010

**IN RE THE MARRIAGE OF KIMBERLY SOHN
AND BRIAN SOHN**

**Upon the Petition of
KIMBERLY SOHN,**
Petitioner-Appellee,

**And Concerning
BRIAN SOHN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Dickinson County, David A. Lester,
Judge.

Brian Sohn appeals from the district court's decree dissolving his
marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Scot L. Bauermeister of Fitzgibbons Law Firm, Estherville, for appellant.

Shawna L. Ditsworth, Spirit Lake, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Brian Sohn appeals the physical care provisions of the district court's decree dissolving his marriage to Kimberly Sohn, arguing the court erred in awarding Kimberly physical care of the parties' child and in failing to award Brian physical care. He also disputes the amount of child support awarded to Kimberly and the obligations to pay daycare expenses and Kimberly's attorney fees. Brian also asks that the child's dependency exemption be awarded to him. Kimberly requests appellate attorney fees. We affirm as modified and remand.

I. Background Facts and Proceedings.

Brian and Kimberly Sohn were married in October 2005. They have one child, Carter, born in February 2007. At the time of trial, Brian was twenty-seven years old and Kimberly was twenty-six years old. Neither party has any physical or mental limitations. Brian began his employment as a certified public accountant at Erpelding and Voight in Spirit Lake in January 2007. Kimberly stayed at home while pregnant with Carter, and for approximately eight months after his birth. She began her employment as a retail banker and customer service representative at Northwest Bank in Okoboji in October 2007, and Carter began attending daycare at Joyful Journeys in Spirit Lake.

Since Kimberly returned to work, the parties shared equal care of Carter. Due to Brian's employment as a CPA, there are times of the year when he is required to work longer hours, and during those times Kimberly assumes the greater share of Carter's care. However, the parties' employers are flexible and cooperative when either needs to adjust their work schedule to meet Carter's

needs. Both parties plan to continue their employment with their respective employers.

Brian and Kimberly separated in July 2008, and Kimberly filed a petition for dissolution soon thereafter. Brian continued to rent the duplex that had served as the family home, and Kimberly moved in with her mother and step-father. The parties shared equal care of Carter. The district court entered a partial decree of dissolution of marriage and temporary orders in April 2009, ordering the parties to continue to share temporary joint legal custody and physical care of Carter until a final decree was entered. The court ordered Brian to pay temporary child support to Kimberly in the amount of \$519.80 and ordered the parties to share equally the cost for Carter's daycare.

Upon their separation, Kimberly began dating Philip Conover. Conover is a local golf instructor who is similar in age to Kimberly, is from a wealthy family, and has a reputation for frequenting bars and drinking. Kimberly met Conover when she began taking golf lessons prior to the parties' separation. She continued to be involved with Conover at the time of trial. Kimberly introduced Conover to Carter and her parents at the end of 2008. Carter spent time with Conover a few times a week when he was in Kimberly's care and Conover visited them at her parent's house. Kimberly also went on several trips with Conover and accompanied him and other friends to bars after the parties' separation. When Kimberly went out at night, she bathed Carter and put him to bed first. However, after the first month following the separation, Kimberly did not go to bars when Carter was in her care.

Brian did not become romantically involved with anyone after the parties' separation. He has maintained a very structured and regimented life. He has at times been confrontational with Kimberly and her family regarding Kimberly's decisions and Carter. He likes to be in control. Brian has acknowledged that he does not respect or trust Kimberly. In addition, Brian's relationship with his own mother is unstable and caused some problems for the parties during the marriage.

The parties tried their dissolution action on March 27, 2009. The main issue before the court was placement of the parties' child. Kimberly requested physical care, or in the alternative, proposed a joint physical care arrangement. Brian requested physical care and made it clear that he was not amenable to a joint physical care arrangement. On September 15, 2009, the court entered a supplemental decree of dissolution of marriage,¹ dividing the marital assets and liabilities and awarding joint legal custody with physical care of the child to Kimberly. The court ordered Brian to pay Kimberly \$782.22 per month for child support, and provided that the parties should alternate the use of the child's tax dependency exemption. The court also ordered Brian to pay \$2500 in Kimberly's attorney fees.

Kimberly thereafter filed a motion to enlarge and amend, requesting the court to address Carter's daycare costs. Brian resisted the motion. On October 26, 2009, after a hearing, the court entered an order amending the supplemental decree to require Brian to pay for Carter's daycare expenses.

¹ The court previously entered a partial decree of dissolution of marriage and temporary orders on April 6, 2009.

Brian now appeals the district court's physical care provisions, child support and attorney fees awards, and rulings with regard to daycare expenses and the dependency exemption. Kimberly requests appellate attorney fees.

II. Scope and Standard of Review.

We review dissolution decrees de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). We will disturb that determination of a district court only when there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

III. Physical Care.

In determining whether to award joint physical care or physical care with one parent, the best interests of the child remains the principal consideration. Iowa R. App. P. 6.904(3)(o); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2007), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38

(Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

Following the trial, the district court issued a detailed ruling, discussing the reasons for its physical care decision. The court determined that Brian and Kimberly are “equally well-qualified” to care for Carter and provide him with a stable home. The court discussed the factors it weighed in reaching its conclusion, including the four *Hansen* factors. See *id.* at 696-99. The court granted Kimberly physical care of Carter, finding that although Brian has been an active parent, Kimberly has been a “more loving and nurturing parent.” To this regard, the court noted its “serious concerns regarding Brian’s ability to promote Carter’s relationship with Kimberly” due to his “controlling nature, his confrontational, if not overtly verbally abusive, approach to parenting situations when the parties may disagree, and his stated lack of respect for Kimberly’s ability to make decisions.” The court emphasized Kimberly’s flexibility and cooperation with Brian relating to the parenting of Carter, and Kimberly’s close and supportive relationship with her parents.

Brian contends the district court should have placed Carter in his physical care. Brian testified that he is far more stable than Kimberly, is successful in his career, and is planning to purchase a house. He alleges that Kimberly would not provide a stable and wholesome environment for Carter. In support of this contention, Brian points to the fact that Kimberly had an adulterous affair with her golf instructor, Conover, and has subjected the child to contact with Conover on many occasions. Brian further states that Kimberly is financially irresponsible,

spending approximately forty percent of her gross income on her wardrobe. He testified that Kimberly frequents bars and goes on trips with Conover.

Brian states that most of the parties' marital problems stemmed from Kimberly's financial irresponsibility and their inability to communicate about budgeting. He admits he did ask for specifics on what she spent and where, but states that he only asked because he felt that he had a right to know where their money was being spent.

Brian testified that he does not know who Kimberly is anymore and does not trust her or her family. He alleges she is confused emotionally and unable to meet Carter's emotional needs. Brian further states that he is able to provide structure and routine for Carter, whereas Kimberly is more permissive. According to Brian, if he had physical care of Carter, weekend visitation would be an ideal time for Carter to have "fun time" with Kimberly.

Kimberly testified Brian was very controlling toward her during the parties' marriage. Even after the marriage, Kimberly points to two incidents in which Brian lost his temper with her and/or her family, one of which was in front of Carter. She states that she wanted out of the marriage because she realized she had changed and was keeping to herself, and because Brian did not allow her to be the person she wanted to be. She testified she was afraid to tell Brian anything because he was stern with her and "crushe[d] her down." Kimberly testified that she moved in with her parents upon the parties' separation because she had nowhere to go and did not know how to get out.

Kimberly states that she did not begin her romantic relationship with Conover until after the parties' separation, and that she did not introduce Carter

to Conover until late 2008. Kimberly alleges Carter is not harmed or affected by the relationship in any way, and that she has never acted inappropriately with Conover around Carter. She further states that she has never chosen to spend time with Conover over Carter, and that when she is with Conover and Carter, she always directs her primary attention to Carter.

Kimberly agrees with Brian that finances were a big issue during the parties' marriage. In Kimberly's view, Brian questioned her about everything she spent and his behavior was very controlling and undermining. Since the parties' separation, Kimberly pays all her bills on time and always makes sure Carter has what he needs. She admits that she will not be able to continue to spend so much on clothing, and she understands she will need to rearrange her budget for when she moves out from her parents' house and gets her own place. She states that although she does go out with Conover and friends at times, she does not party or drink often. She has also discontinued going out while Carter is in her care.

Kimberly testified that she hoped that the parties could get to a point for Carter's sake where they could discuss and share things that were happening with both their families. However, Kimberly noted that Brian had told her he could not trust her, that he would not stand for someone else to raise his child, and that he wanted and felt he deserved to have the child in his life every day. Kimberly agrees she and Brian have different parenting styles, but believes that being exposed to the differences in their parenting is beneficial to Carter. She states that although she likes to be playful, she still provides structure and routine for Carter. Kimberly respects Brian as a parent, and supports Carter's

relationship with Brian. She feels it is in Carter's best interests to have time with both parents.

Upon our de novo review of the entire record, we agree with the district court that physical care with Kimberly is in the best interests of the child under the unique facts and circumstances in this case. The evidence shows both parents have been concerned about Carter's well-being since his birth, have actively participated in his care, and have continued to do so since their separation. When Carter was born, Kimberly stayed home and provided most of his care. After Kimberly returned to work, however, it appears the parties shared most responsibilities for the child, except during tax season when Brian works longer hours.

The record indicates differences in parenting styles. However, we agree with the district court that both "Kimberly and Brian have several strengths that make them good parents." The record indicates both parties have established a routine for Carter and are able to appropriately care for him. Although Brian's routine may be more regimented, Kimberly appears to maintain good structure for Carter, and Carter likely benefits from the closeness of Kimberly's relationship with her parents. Carter attends daycare, and the record indicates he does well there.

The main difference in parenting styles may actually be the parties' respect for each other. To this regard, notably, Kimberly is respectful of Brian's decisions as a father and is supportive of Brian spending time with Carter. Kimberly is open with Brian, and her behavior indicates she wants to include him on decisions she makes and involve him in what is going on in Carter's life. The

fact that Kimberly was open to the idea of joint physical care is a clear indication she supports Brian's relationship with Carter. In contrast, Brian contends Kimberly fails to offer Carter a wholesome and stable environment and points to her relationship with Philip Conover and Conover's reputation for drinking in excess in support of that contention. Although we do not condone Kimberly's beginning a relationship with Conover so soon after the parties' separation and prior to their divorce, we cannot find that Carter has been adversely affected by the relationship. We make this finding even considering evidence in the record regarding Conover's lifestyle. Kimberly limits Conover's time with Carter and does not act inappropriately with Conover around Carter.

Notwithstanding, we recognize, as did the district court, that Kimberly engaged in some conduct that may weigh against a finding that she can best minister to the interests of the child. Brian has done the same. Yet, the conduct by both parties that occurred during and after the period of separation should not necessarily trump the overall parenting characteristics exhibited throughout the entire marriage. In deciding physical care, it is better to view the total circumstances rather than judging parents based on activities that occur during the time frame of the marriage when the parties are separated or experiencing the break-up of their marriage. *In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1984). Moreover, the deficiencies exhibited by Kimberly largely arose during separation. Brian's behaviors of confrontations, control, and anger reveal a personality trait.

The record indicates that Brian has difficulties in communication with Kimberly. Brian has strong opinions that have extended into the parties'

separation, whereas Kimberly appears to have maintained flexibility and cooperation in her interactions with Brian. Brian states that he does not know who Kimberly is anymore and that he cannot trust her or her family. Although the record indicates that some of Brian's distrust and disrespect for Kimberly was displayed after she began her relationship with Philip Conover, the fact remains that Brian's feelings about Kimberly may impair his willingness to promote the child's relationship with Kimberly if he was granted physical care. As the district court noted:

[T]he court concludes that the evidence establishes that Brian has exhibited a hostile and uncooperative attitude toward Kimberly during the pendency of these proceedings. While Kimberly may have been the instigator of some of the confrontations and arguments that occurred during the parties' separation and shared physical care of Carter, it appears to the court that Brian is primarily at fault. Furthermore, the evidence in the record establishes that these were not isolated incidents, but rather were part of an ongoing pattern of controlling and verbally abusive conduct Brian engaged in throughout the parties' short marriage. This evidence has weighed heavily in the court's decision to not only decline to grant Brian primary physical care of Carter, but also in the court's decision to not grant the parties joint physical care.

We give weight to this assessment of the parties' character and conduct by the district court on appeal. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). Having examined the entire record, we find that Carter's best interests will be advanced by Kimberly having physical care. We therefore affirm the decision of the district court with regard to this issue.

IV. Economic Provisions.

Brian also appeals the issues of child support, tax dependency exemption, and daycare expenses.² He alleges the court erred in awarding Kimberly alternating the child's tax dependency exemption and requiring him to pay daycare expenses for the child. He also argues the court erred in calculating his net monthly income in determining the amount of child support.

Application of child support guidelines first involves determination of the "net monthly income" of the custodial and noncustodial parent. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). "Net income is gross income less certain allowable deductions." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001). Because the guidelines provide for the consideration of a parent's state and federal income tax liability, "the amount of child support ultimately owed . . . is dependent on the allocation of tax exemptions and credits." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 338 (Iowa Ct. App. 2005).

Generally, the parent with physical care of the child is entitled to claim the child as a tax exemption. See Iowa Ct. R. 9.6(5). The district court has the ability, however, to award tax exemptions to a non-custodial parent "to achieve an equitable resolution of the economic issues presented." *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005). Factors the court is to consider include whether allocating the exemption to the noncustodial parent would "free up more money for the dependent's care," or whether it would be inequitable to

² Because Brian contended he should have physical care of Carter and Kimberly should pay him child support, he argued the district court erred in awarding Kimberly child support.

allocate the exemption to the custodial parent when they would benefit the least from receiving it. *Id.*

In this case, the district court considered “the custodial arrangement ordered in [the] decree, along with the parties’ present employment situation, and the amount of Brian’s child support and medical support obligations” and concluded that “Brian shall be entitled to claim the dependency exemption for Carter in even-numbered tax years, as long as he is current in his support obligation as of December 31 each year.”

We agree with the district court that Brian should be allowed to claim Carter as a dependency exemption; however, we find it would be more equitable to allow Brian to claim the dependency exemption every year.³ The evidence establishes that Brian’s income is substantially higher than Kimberly’s and his ability to claim the exemption will save the most disposable income and will be of minimal value to Kimberly.⁴ If her income level significantly changes in the future Kimberly can seek a modification of this award.

The record indicates the parties originally shared equally in the cost for Carter’s childcare upon their separation, but in January 2008, Brian agreed to pay for the full daycare cost beginning in February 2008. Brian agreed to continue to pay for the full cost until the court ordered otherwise, but he believes that the person granted physical care should be obligated to pay the childcare expenses. When the court first addressed childcare expenses and Brian later

³ We affirm the district court’s ruling that Brian be current in his child support obligation in order to claim the child as a dependent for tax purposes.

⁴ Brian also notes that he can deduct Carter’s childcare expenses on his federal income tax return only if he is entitled to claim the Carter as a dependent.

began paying the full amount, Carter's daycare expense was approximately \$650 per month. When the court amended the decree with regard to the daycare issue and ordered Brian to pay for the full expense, the monthly cost was \$592.⁵

Brian argues that in light of his significant support obligation that he should not be required to pay all of the childcare expenses. We further note that in Kimberly's motion to enlarge, Kimberly only requested that the supplemental decree be amended to require that the parties pay the childcare expenses in proportion to the parties' net income. Notwithstanding, the court ordered Brian to pay all such expenses.

Our supreme court has stated that the child support guidelines take into account the normal and reasonable costs of supporting a child including all expenses except for medical support and postsecondary education.⁶ *Okland*, 699 N.W.2d at 268-69. To include an additional support provision such as childcare expenses would be a deviation from the guidelines. *Id.* We have said that a separate support order covering such expenses is improper absent a finding that the guidelines amount is unjust or inappropriate. *Kuperschmidt*, 705 N.W.2d at 334; see Iowa Ct. R. 9.11. Here, the order amending the supplemental decree failed to recite any reasons for the deviation.

Further, in determining Brian's net income for purposes of calculating his child support obligation, Brian should have been permitted a deduction for the childcare expenses in the sum of \$592 per month. However, after amending the

⁵ Currently, the cost is \$511 per month, and it appears the cost will not change substantially before Carter begins kindergarten in a little over two years.

⁶ We note that the guidelines that came into effect on July 1, 2009, now take into consideration medical support.

supplemental decree, the court declined to correct its child support calculations. The court averaged Kimberly's figure of \$4178.81 without allowance for a deduction for childcare expense, and Brian's figure of \$3969.29 with allowance for a \$563 deduction for childcare expense, to determine that Brian's net income was \$4074.05. However, to properly average Brian's net income, Kimberly's net income for Brian should have been \$3586.81 (\$4178.81 less \$592), and Brian's calculation should have been \$3940.29 (\$4532.29 less \$592). The resultant average is \$3763.55. Here, the court used an income figure for Brian in calculating his net income that was greater than the average submitted by the parties and greater than the evidence submitted by either party.⁷

Accordingly, we remand for the district court to recalculate child support under the new child support guidelines (effective July 1, 2009) with Brian claiming Carter as a dependent every year, applying any appropriate deductions, and determining if a deviation from the guidelines is appropriate and, if so, by what amount.

V. Trial Attorney Fees.

Brian argues the district court erred in awarding Kimberly \$2500 in attorney fees. Attorney fees are not a matter of right, but rather rest within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. An award of attorney fees is based upon

⁷ We also note that Kimberly's child support guideline worksheet fails to provide Brian a deduction for medical insurance premiums and the court failed to average the support calculated based upon Brian's income with and without the use of the dependency exemption.

the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). We conclude that the district court did not abuse its discretion when it awarded Kimberly \$2500 in attorney fees.

VI. Appellate Attorney Fees.

Kimberly requests attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *Okland*, 699 N.W.2d at 270. An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Given the relative asset position of the parties and the merits of the appeal, we decline Kimberly's request for appellate attorney fees. Costs on appeal are assessed to Brian.

VII. Conclusion.

We affirm the district court's rulings that Kimberly have physical care of the child. We modify the district court's decision to reflect that Brian be awarded the tax dependency exemption every year. Because the determination of child support can only be accomplished after considering the allocation of tax exemptions, other allowable deductions, and any appropriate deviation from the guidelines, we remand for recalculation of child support pursuant to the new child support guidelines, which became effective July 1, 2009.

AFFIRMED AS MODIFIED AND REMANDED.