IN THE COURT OF APPEALS OF IOWA

No. 0-597 / 10-0451
Filed November 10, 2010

IN RE THE MARRIAGE OF VERNON PATRICK WOLLENBERG AND TERRI LEE WOLLENBERG

Upon the Petition of
VERNON PATRICK WOLLENBERG,
n/k/a/ VERNON PATRICK FOUST,
Petitioner-Appellee,

And Concerning
TERRI LEE WOLLENBERG,
Respondent-Appellant.

Appeal from the Iowa District Court for Jackson County, Gary D. McKenrick, Judge.

Terri Wollenberg appeals from the child custody and support provisions of the parties' dissolution decree. **AFFIRMED.**

Richard A. Davidson, Davenport, for appellant.

Jennifer A. Clemens-Conlon of Clemens, Walters, Conlon & Meyer, L.L.P., Dubuque, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Terri Wollenberg appeals from the child custody and support provisions of the parties' dissolution decree. Upon our de novo review, we affirm the district court's award of physical care to Vernon Foust, determination of child support, equitable division of the parties' assets and debts, and denial of Terri's request for alimony.

I. Background Facts and Proceedings.

Vernon Foust and Terri Wollenberg were married on May 4, 1991. Terri had already earned two bachelor's degrees (Spanish and mass communications) and is certified to teach seventh through twelfth grades. When she and Vernon married, Terri was involved with the ROTC and was working toward a master's degree[1] in Mankato, Minnesota. Vernon had left college and was not employed.

The couple moved to Texas, where Terri was on active duty at Fort Hood and Vernon worked in apartment maintenance. They then moved to Kansas, where Terri was a manager at Frito-Lay, and Vernon worked full-time for the State of Kansas and attended classes at Washburn University.

Terri and Vernon had a daughter in May 1999. Terri returned to work for a short time, but then decided to leave full-time employment and stay home with the child. She continued in the Army Reserve, however, reporting for duty one weekend per month and two weeks per year.

Vernon received a bachelor's degree in computer sciences in 2001. He found work in Omaha, Nebraska, and the family moved to Council Bluffs.

[1] Terri was working towards a master's in teaching English as a second language, but did not complete the degree in Minnesota.

In November 2001, Terri and Vernon had a son. Terri remained in the Reserve and again pursued classes toward a master's degree. The family moved to eastern Iowa when Vernon found work in Iowa City as a computer programmer.

In 2005, Terri was called to active duty, serving the majority of time at Fort McCoy, Wisconsin. After the initial tour of duty, Terri continued full-time military employment on a voluntary basis until July 2008. While on active duty, Terri earned in excess of $70,000 per year. Her principal activity while mobilized was teaching languages and culture to those who were to be deployed to Afghanistan, Iraq, and Djibouti.

Vernon filed a petition for dissolution in January 2009. Terri was gone for much of September, October, and November 2009. She was in Kansas City for extended periods visiting and assisting her mother and father: her father first had pneumonia, and then was diagnosed with cancer--he died in October. She also reported for military duties and made several extended trips to California. Both parties continued to reside in the marital home until the time of trial in February 2010, sharing the responsibilities of caring for their two children, ages ten and eight at the time of trial. Conflict arose when Terri's friend from California, Susan Brinksma, came to stay at the family residence for extended periods.[2]

[2] Vernon contends Terri had an extramarital relationship with Brinksma. Terri testified Brinksma was a friend. In any event, Brinksma's presence in the family home caused dissension and, in December 2009, a verbal dispute between the three adults escalated to a physical confrontation, Vernon's calling the police, and criminal charges being filed against Terri and Brinksma. The children were in the house at the time but asleep.

At the time of trial, Vernon was forty-one years old and Terri was forty-six. Vernon requested physical care of the children. Terri sought shared care, or in the alternative, physical care. The marital residence located near Bernard, Iowa, is encumbered with a mortgage in excess of its assessed value. The children attend school in Bernard and are doing well. Both Terri and Vernon are involved in the children's care and both are described as capable and loving parents. Vernon has extended family in the area, who have been involved with the children. Vernon's mother and sister are available to assist Vernon with the children's care and transportation.

Vernon is employed as a computer programmer in Iowa City, requiring about a one-hour commute to work each way. He works 37.5 hours per week, with a "very flexible schedule." He earns $72,273 annually and provides health care coverage for the family.

Terri is a Major in the Army Reserve and reports for duty two days per month on a weekend and two weeks during the year. She has been employed with the military since 1992. Her annual income as a Reservist is $13,895. Although she has pursued a master's degree in teaching English as a second language off and on for several years, she has yet to complete that degree. She testified that she has not worked full-time since July 2008, but plans to get full-time employment. She did not seek full-time work outside the home when she returned from her active duty tours in 2008. Terri testified she could earn $92,000 "in uniform." However, to do so would require relocating.

Following trial, the district court found: "[n]either party was particularly credible in his and her testimony." The court found that Vernon "exaggerated his

childcare activities" and minimized Terri's role in the household. The court also found that Terri's request for "shared physical care is not based in the reality of the breakdown in the relationship or the residential changes likely to occur post-dissolution of the marriage."

The trial court found that both Vernon and Terri "have demonstrated an ability to provide for the daily needs of the children." The court noted that Terri had been the children's primary caregiver when not on military assignment. During those times when Terri was attending military duties, Vernon "handled all household duties and childcare responsibilities with limited assistance from extended family." The court noted, however, that it was "not convinced that the parties are capable of the cooperation and coordination necessary to the success of" a shared physical care arrangement.[3] The district court rejected Terri's request for shared care and awarded Vernon physical care.

The court awarded Vernon the marital home, which had a net negative value. The court noted that the residence was located in relatively close proximity to Vernon's extended family with whom the children have a "healthy and beneficial relationship." The court also noted Vernon was in a "better position to maintain the children in that residence."[4]

---

[3] The district court found the December 2009 incident resulting in criminal charges "indicative of the communication problems between the parties" as well as "indicative of both parties subordinating the needs of the children to their own emotional needs." The district court also expressed concern about Vernon's ability to support Terri's relationship with the children post-dissolution. With respect to Terri, the court noted that though testifying in an apparently supportive manner, she demonstrated a tendency to place her own needs before the children's, and consequently, the court stated it "has no confidence" that Terri "will consider the children's needs to be paramount to her own in the future."

[4] Vernon testified he had received pre-approval to refinance the house solely in his name.

Pursuant to Iowa Court rule 9.11(4), the court found that using Terri's actual earnings of $13,895 to determine child support would "fail to do justice between the parties" because "[n]o reason exists for the respondent not to obtain full-time employment." The district court did not impute earnings at a level commensurate to what Terri could earn on active duty, but found that "given the respondent's education, training and experience," she had an annual earning capacity of $40,000. Based upon the $40,000 figure, the court ordered Terri to pay $655 per month so long as two children remain eligible for support. Vernon was ordered to provide medical support for the children.

The court made the following property distribution. In addition to the marital residence,[5] Vernon was awarded two vehicles with a combined value of $16,500, a life insurance policy with a cash value of $10,529, tractors and machinery with a combined value of $13,800, bank accounts with a combined value of $1195, and debts in the amount of $17,734.[6] Terri was awarded a vehicle with a value of $10,500, a life insurance policy with a cash value of $13,458, an individual retirement account with a value of $3079, the "Conex" with an agreed value of $2500,[7] and debts in the amount of $10,739. The court ordered a qualified domestic relations order (QDRO) be prepared dividing Vernon's TIAA-Cref account and the marital portion of Terri's unvested military

[5] The residence had an appraised value of $124,000. The mortgage balance on the property was approximately $125,600. The court found the net value of the residence was a negative $1600.

[6] Most of the debt assigned to Vernon is from a VISA credit card debt ($14,177) incurred by Terri during the course of the dissolution proceedings. But the court ordered Vernon responsible for the payment of the credit card "in order to more equalize the property distribution between the parties."

[7] This item is not described, but the parties agreed upon the value and that it should be awarded to Terri.

pension. Other personal items and gifts without assigned value were also divided.

The court declined to award Terri alimony. The court wrote,

> Should the respondent choose to seek an active duty military assignment and be accepted, the respondent will have a greater income than the petitioner. If the respondent chooses to obtain employment commensurate with her education, training, and experience, she has the ability to fully support herself. Spousal support is not appropriate.

Terri now appeals.

II. Standard of Review.

Because this is an action in equity, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Especially when considering the credibility of witnesses, we give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. Discussion.

Terri contends the child custody determination was based on an impermissible consideration and not on the appropriate factors. She argues the district court erred in calculating child support based upon her earning capacity rather than actual earnings. Terri also contends she is entitled to rehabilitative alimony and seeks an award of appellate attorney fees.

A. Child custody and support. Terri requested that the parties continue their joint physical care of the children (which was accomplished by their decisions to continue to live in the same home during the pending divorce proceedings) or, alternatively, that she be awarded physical care. Vernon objected to shared care. The district court awarded physical care to Vernon. On appeal Terri contends the district court based its decision on the impermissible consideration of alleged sexual orientation and did not properly apply the factors set forth in *In re Marriage of Hansen*, 733 N.W.2d 683, 696–99 (Iowa 2007).

We have reviewed the record and find no support for Terri's contention that the district court placed emphasis on her alleged sexual orientation in reaching its decision to award the children's physical care to Vernon. The district court does refer to Brinksma and the confrontation that occurred in December 2009. We do not find it improper to consider the incident and Terri's choice to have Brinksma in the family home for extended periods of time knowing it did not sit well with Vernon. Brinksma's presence in the family home during the pendency of the dissolution proceedings introduced unnecessary additional conflict.

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.904(3)(*o*). In assessing which physical care arrangement is in the children's best interests, we utilize the factors in Iowa Code section 598.41(3) (2009), as well as the factors identified in *In re Marriage of Weidner*, 338 N.W.2d 351, 355–56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The objective is to place the child in the environment most likely to bring the child to healthy physical, mental, and social

maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37–38 (Iowa Ct. App. 1996).

Shared physical care can be a viable disposition of a custody dispute. Iowa Code § 598.41(5); *see Hansen*, 733 N.W.2d at 695 (noting "joint physical care issue must be examined in each case on the unique facts and not subject to cursory rejection based on a nearly irrebuttable presumption found in our prior cases"); *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998).

If the request is made for shared physical care, then a denial of the request by the court must include specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the children. Iowa Code § 598.41(5)(a). Here, the district court's ruling does not include such specific findings of fact and conclusions of law.[8] However, because our review is de novo, we may make our own findings and conclusions on issues properly raised. *See Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968) (noting our review of an equity case is de novo where we may issue fact findings and legal conclusions on our own review as we deem proper).

Clearly both parties are suitable custodians. The focus, therefore, is on whether the interests of the children are better served by substantial and nearly equal contact with both parents through a shared care arrangement or by naming one parent the physical care parent, and providing the other with visitation.

[8] The court states, "This Court is not convinced that the parties are capable of the cooperation and coordination necessary to the success of such an arrangement."

The following are relevant, but not the exclusive, factors in determining whether shared care is to be awarded: (1) approximation—"that the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution," *Hansen*, 733 N.W.2d at 697; (2) the ability of the former spouses to communicate and show mutual respect, *id.* at 698; (3) the degree of conflict between parents, *id.*; and (4) "the degree to which the parents are in general agreement about their approach to daily matters." *Id*. at 699.

(1) Approximation. Our review of the evidence shows us that both parents have been concerned about their children's well-being since the children's births and both have actively participated in their care. When Terri was on active duty and when she reports for Reserve duty, Vernon has been the sole caregiver. Until three or four years before trial, and before the children began attending school and when Terri was not performing her military duties, she was the parent primarily providing day-to-day care. However, once Terri was deployed, and then volunteered for another eighteen months, she was out of the family home and often did not return there for visits, choosing to spend her time off with friends. The children are now in school and involved in various activities. In the fourteen months following the end of her second—voluntary—tour of duty, Terri did reside in the marital home when she was not traveling. We find that continuing the children's placement in the family home and in Vernon's primary care, but encouraging substantial continued contact with both parents, approximates pre-divorce care giving and promotes stability.

(2) The ability of the former spouses to communicate and show mutual respect. We acknowledge that Vernon and Terri have had difficulties sharing a

residence during the pendency of the dissolution and that both have failed to show respect for the other. We believe those difficulties will ease when they have separate residences. There has been some disagreement about Terri's desire to change the children's school and some conflicting information about where Terri planned to reside if she were not awarded the marital home. Both parents testified that they are able to communicate effectively in matters related to the children, but have not been in agreement about those critical decisions.

(3) The degree of conflict between parents. Terri states that other than conflict concerning Brinksma, the parties have had very little conflict. She argues that the conflict will not continue with her establishing another residence. The parties lived separately for three years before Terri returned home and they experienced a contentious relationship once Vernon filed for dissolution. We, along with the district court, hope the level of discord will indeed lessen once the litigation is finalized.

(4) The degree to which the parents are in general agreement about their approach to daily matters. The parents here have acted independently with regard to the children, and their previous general agreement about their approach to daily matters has suffered in recent years.

The children have a significant relationship with both parents. However, Terri has focused on her military career during recent years and now is uncertain about her future residence and employment. We view Terri's conduct since first completing her involuntary active duty period as evincing ambivalence to parenting. Terri was absent from the family home voluntarily for eighteen months and, upon returning from active duty, spent considerable time with her friend—

both in Iowa, which caused upset in the family home, and in California—rather than with her children. We thus conclude that the children's need for continuity and stability can best be met with physical care awarded to Vernon, and that an award of joint physical care is not in the best interest of the children.

While not always having both parents with them, the children have resided in the same home for more than five years with their father and with the support of extended family and friends. An award of shared physical care is appropriate where that arrangement would be in the best interests of the children, and not "based upon perceived fairness to the *spouses*." *Hansen*, 733 N.W.2d at 695. Here, establishing physical care of the children with Vernon will best assure the children the stability and continuity they need and is in the children's best interest. We find no compelling reason to change the award of physical care to Vernon.

B. Imputed income. Terri argues the district court improperly imputed income to her. We disagree.

Iowa Court Rule 9.11(4) effective July 1, 2009, provides:

> The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

The district court made a finding that using Terri's actual earnings would not do justice between the parties and we agree.

"The court must determine the parents' income from the most reliable evidence presented." *In re Marriage of Wade*, 780 N.W.2d 563, 566 (Iowa Ct. App. 2010). Using a parent's earning capacity rather than his or her actual

income is appropriate where the parent's inability to earn a greater income is self-inflicted or voluntary. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). When both parties are in reasonable health, and capable of working to support themselves, each needs to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for permanent support. Iowa Code § 598.21B(2)(b)(1); *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988) ("Consideration shall be given to the responsibility of both parents to support and provide for the welfare of the minor child and of a child's need.").

We examine the employment history, present earnings, and reasons for failing to work a regular work week when assessing whether to use the earning capacity of a parent. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). Terri clearly has the education and the capacity to earn a good income far in excess of the court's imputed income. Both she and Vernon testified she was capable of earning $80,000 to $90,000. Her decision to remain partially employed has been a conscious decision. Using her earning capacity rather than her actual income is appropriate. *See In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) (noting that using a parent's earning capacity rather than actual income is appropriate where the parent's inability to earn a greater income is self-inflicted or voluntary).

While Terri testified she intended to seek employment, her testimony as to her intentions was less than clear. When asked if she was "going to look or are you looking for teaching positions," she answered, "Yes, I can." She testified she had transferred her teaching certificate from Minnesota to Iowa, but did not state

she had applied for any teaching positions. She stated she did not want to do "shift work." She testified that she looked into the ROTC program at the University of Dubuque, but it paid $22,000 a year for twelve-hour days, "[a]nd it was never a job offered to me by any means." She offered no evidence on the income she expected to earn. Nonetheless, in light of Terri's education, experience, and earning abilities, we believe the district court was well within its discretion to impute an annual income of $40,000 to Terri.

C. Alimony. Alimony "'is a stipend to a spouse in lieu of the other spouse's legal obligation for support.'" *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004) (citation omitted). Alimony is not an absolute right. *Anliker*, 694 N.W.2d at 540. The district court may grant alimony at its discretion after considering the particular facts of the case and the factors listed in Iowa Code section 598.21A (2009). *Hansen*, 733 N.W.2d at 704. These factors include: (1) the length of the marriage; (2) the age and physical and emotional health of the parties; (3) the property distribution; (4) the educational level of each party at the time of the marriage and at the time the action is commenced; (5) the earning capacity of the party seeking alimony; and (6) the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal. Iowa Code § 598.21A. While our review is de novo, we give the district court considerable latitude in making its determination and will "disturb that determination only when there has been a failure to do equity." *Anliker*, 694 N.W.2d at 540.

Terri's characterization of herself as a stay-at-home wife and mother in need of training is contrary to her many years of military training, her rank as a Major in the Army reserve, her two bachelor's degrees, teaching certification, and many hours toward a master's degree. She testified, "In the three years I was mobilized, I taught 25,000 soldiers, sailors and airmen destined for Afghanistan, Iraq, and . . . [Djibouti]" culture and languages. She further testified she could earn up to $92,000 per year should she choose active duty again. While she is not required to pursue a military career, her complaint that she is without work experience is not supported by the record.

We do not find a failure to do equity in the district court's denial of spousal support. Terri is not incapable of self-support. *See In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (noting traditional or permanent alimony "is usually payable for life or for so long as the dependent is incapable of self-support"). Indeed, she has substantial education, skill, and training and is quite able to support herself. *See Anliker*, 694 N.W.2d at 540 (noting rehabilitative alimony supports an economically dependent spouse through a limited period of education or retraining following divorce "thereby creating incentive and opportunity for that spouse to become self-supporting"). Moreover, reimbursement alimony is not appropriate as it does not appear she has made economic sacrifices that directly enhanced Vernon's earning capacity. *See In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989) (stating reimbursement alimony "is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other"). We affirm on this issue.

D. Appellate attorney fees. Terri asks us to require Vernon to pay her appellate attorney fees. We enjoy broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id*. Neither party to this appeal has a far superior ability to pay the attorney fees. We decline to award Terri appellate attorney fees.

IV. Summary.

Joint physical care is not in the children's best interests. We agree with the district court that establishing physical care of the children with Vernon will best assure the children the stability and continuity they need and is in the children's best interest. We find no reason to disturb the district court's findings with respect to Terri's earning capacity or the denial of alimony. We award no appellate attorney fees.

Costs of this appeal are taxed to Terri.

AFFIRMED.