

IN THE COURT OF APPEALS OF IOWA

No. 0-669 / 09-1733
Filed October 6, 2010

IN RE THE MARRIAGE OF KARN J. PALMER AND HEATH L. PALMER

Upon the Petition of

KARN J. PALMER,
Petitioner-Appellant,

And Concerning

HEATH L. PALMER,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Appeal from the support provisions of a decree of dissolution. **AFFIRMED AS MODIFIED.**

DeDra Schroeder, Charles City, for appellant.

Kristy Arzberger of Arzberger Law Office, Mason City, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Karn Palmer appeals from the July 2009 decree dissolving her marriage to Heath Palmer. She contends the district court should have awarded her alimony, additional child support for the two children in her physical care, and attorney fees. We believe that the special needs of the older child in her care justify an increase in child support and modify the decree accordingly. We affirm the district court on the other issues and award Karn appellate attorney fees.

SCOPE OF REVIEW. Because this is an equitable proceeding, our review is de novo. Iowa R. App. P. 6.907 (2009). In equity cases, especially when considering the credibility of witnesses, we give weight to the district court's findings of fact, but we are not bound by them. *Id.* R. 6.904(3)(g); *In re Marriage of Probasco*, 676 N.W.2d 179, 183 (Iowa 2004)

BACKGROUND. Karn and Heath, who were thirty-seven and forty-one at the time of trial, married in July of 1997. Their children were born in September of 1998 and August of 2001. The older child has difficulties and has been diagnosed as a high-functioning autistic child. The child at times is a challenge to parent.

CHILD SUPPORT. Karn contends the district court did not correctly determine child support. The district court found it appropriate to use the parties' actual earnings to calculate child support. It found Karn's net monthly income to be \$3249.14 and Heath's \$4666.43 and set Heath's child support obligation for the two children at \$1142 a month and for one child at \$829 a month.

Karn contends the district court did not correctly determine Heath's earnings and that his earnings for child support purposes should be based on earnings from an earlier year's job—not that of his current employment. Heath was employed in 2008 at Mercy Center as a pharmacist and had an annual salary of \$115,000. He quit that job to take his current job, believing it to be a higher-paying position with AC Pharmacy Concepts. After Heath made the decision to leave Mercy, AC Pharmacy, his current employer, lost a contract for a hospital that Heath was to have covered and Heath's expected salary was reduced to less than he was making at Mercy. The district court rejected Karn's contention that the Mercy wage should be used, finding:

Although Heath is earning less than he did at Mercy he left for legitimate reasons. He had an honest belief that he would be able to earn more working for AC Pharmacy. There is no evidence to support a finding he is responsible for losing the contract that has reduced his pay.

We find no reasons to disagree with the district court's findings and consider, as did the district court, that it is fair to base Heath's child support on his current earnings.

Karn also contends that in determining child support the district court should have considered that she will have \$1000 a month in child care expenses. Her testimony was that the parties' older child receives respite care where he does different things in the community, including going to a restaurant and ordering and paying for his own meal, going to movies, playing miniature golf, and attending various fairs and community activities. The child goes to public school and is mainstreamed about ninety percent of the time. Karn works part time during periods school generally is in session.

Heath contends that Karn has no documentation as to actual expenses for respite care. He points out that neither of their 2008 income tax returns showed child care expenses, their 2006 joint return showed child care expenses of \$4486, and their joint 2005 return showed \$2708 for childcare.

Iowa Court Rule 9.5(10) provides for a deduction in determining net income of “Actual child care expense *while custodial parent is employed, less the appropriate income tax credit.*” (Emphasis supplied.) We cannot determine from this record that the \$1000 a month claimed for respite care is an expense necessary to allow Karn to be employed. Nor has Karn provided an estimate of the income tax credits she would receive for qualifying child care. The district court did not error in refusing the deduction.

Karn further contends the child support should be increased because of the expense for biomedical supplements recommended by doctors for the older child. She argues she spends a significant amount of money for these items. There is an exhibit outlining, among other things, payments for vitamins and supplements, but it gives little guidance of the monthly amount spent.

Karn also contends that an adjustment in child support is necessary to provide for the needs of their children, most particularly the older child, or a substantial injustice will result, and we agree.

Iowa Court Rule 9.11 provides in part:

The court shall not vary from the amount of child support which would result from application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria

9.11(1) Substantial injustice would result to the payor, payee, or child.

9.11(2) Adjustments are necessary to provide for the needs of the child or to do justice between the parties, payor, or payee under the special circumstances of the case.

We find that substantial injustice will result to Karn and the older child if the guidelines support is not increased. In making this determination we recognize the additional care the older child requires, the need to provide the child with some respite care, Karn's claim she is not able to work full time because of the additional care the child requires, the fact Karn has monthly expenses for supplements the child is taking, which the parties agree are effective. We also find that Heath has sufficient income to make additional payments and it is not unjust to require him to do so. We therefore modify the decree to increase his child support obligation by \$400 a month as long as his older child is qualified to receive child support.

ALIMONY. Karn contends that she should have \$1500 a month in alimony. The district court denied her request for alimony. Alimony "is a stipend to a spouse in lieu of the other spouse's legal obligation for support." *In Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005), *Probasco*, 676 N.W.2d at 184. Such an award is not an absolute right. And whether it is awarded depends on the circumstances of the particular case. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). When deciding to award alimony, the district court must consider the factors in Iowa Code section 598.21(3) (2009). *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Although our review of the district court's award of alimony is de novo, we give that court considerable latitude in making this determination based on the criteria in section 598.21(3). *Spiegel*,

553 N.W.2d at 319. We will disturb that determination only when there has been a failure to do equity. *Id.*

The factors in section 598.21A(1) pertinent to this case 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, including educational background, training, employment skills, work experience, and length of absence from the job market; (6) the feasibility of the party seeking alimony 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; and (7) other factors the court may determine to be relevant in an individual case. Iowa Code § 598.21A(1)(a)-(f), (j).

This was a twelve-year marriage. Karn received an equitable property division. The district court found that if the parties worked full time they would both have about the same earnings, and we agree. Heath is a pharmacist. Karn is a physician's assistant. There is no claim that either received their education during the marriage. They are both in good health and are no more than midway through their professional careers. We recognize, as Karn argues, that she spent several years out of the work force while the children were young; however, there is no evidence the short absence jeopardized her employment opportunities. Giving the district court the required deference we affirm its decision to deny Karn alimony.

ATTORNEY FEES. Karn contends the district court erred in failing to award her trial attorney fees. An award rests within the court's sound discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). The district court did not abuse its discretion in refusing to award attorney fees.

Karn requests appellate attorney fees. We award \$2000 in appellate attorney fees. Costs on appeal are taxed to Heath.

AFFIRMED AS MODIFIED.