IN THE COURT OF APPEALS OF IOWA

No. 0-822 / 10-0948
Filed January 20, 2011

IN RE THE MARRIAGE OF STACY LYNN LEE AND DANE MICHAEL LEE

Upon the Petition of

STACY LYNN LEE,
Petitioner-Appellee,

And Concerning

DANE MICHAEL LEE,
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, Duane E. Hoffmeyer, Judge.

Dane Lee appeals from portions of the decree dissolving his marriage to Stacy Lee. **AFFIRMED AS MODIFIED.**

Maura Sailer of Reiman, Lohman & Reitz, Denison, for appellant.

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

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Following the dissolution of his twelve-year marriage, Dane Lee appeals from portions of the decree fixing the physical care and visitation for the couple's two sons, the property distribution, spousal support for Stacy Lee, as well as other economic provisions and attorney fees. Because the record supports the district court's finding that Stacy has been the primary caretaker for the children, we affirm the district court's grant of physical care to her. We also affirm the visitation schedule.

As for the economic provisions of the decree, after carefully reviewing the record, we conclude an equitable division of the parties' debts and assets requires modification of the property distribution.

I. Background Facts and Procedures

Dane and Stacy Lee married in June 1997. They have two sons, a nine-year-old and a three-year-old. The couple lived in Schleswig until they separated in January 2009. Both Dane and Stacy were born in 1973.

During the marriage, Stacy earned her associate's degree in early childhood supervision and management and works as a teacher's assistant in a special education classroom for the Denison Community Schools. Her hours are Monday through Friday from 7:45 a.m. to 3:15 p.m. for nine months of the year. She and Dane agreed that her limited work schedule would allow more time to care for the boys after school and in the summers. At the time of the dissolution trial, she earned approximately $18,289.00 annually.

Before the marriage, Dane obtained an associate's degree in agricultural business and farm management. Dane served in the National Guard and was twice deployed oversees. Dane eventually resigned from guard duty so that he would not be separated from his family. Dane has been employed by Farmland Foods in Denison since 2001. At the time of the dissolution, Dane had an annual base salary of $38,530, and earned more when called to work additional hours. He also operated a hog-finishing business in his after-work hours.

The couple invested substantial resources in the hog-finishing business. Their first building was valued at $425,000 in January 2005, and their second building was valued at $507,500 in April 2006. Due to declining hog prices, by August 2009, the combined value of the buildings was just $440,000. The couple took out four separate loans from United Bank of Iowa to finance the buildings; those loans are secured by a mortgage on the hog buildings, as well as a mortgage on the couple's house. Three of the four loans are personally guaranteed by Dane's parents. The district court reached a factual finding that while the hog buildings were currently "upside down"—with the debt exceeding their value—the hog operation was generating "a positive cash flow of $15,000 per month."

The district court issued a decree dissolving the Lees' marriage on April 1, 2010. The court awarded joint legal custody, opining: "Both parties are capable of parenting their children." The court awarded physical care to Stacy because she "has been the primary caretaker of the children." The court noted that "Dane has been the primary wage earner and has not been as actively involved in the

upbringing of his children as Stacy." The court described Dane's demanding work schedule:

> [H]is work hours and expectations vary. Sometimes he works very early in the morning or late at night. After his "regular" job, he then has the responsibility of taking care of the hogs in two confinement buildings. The past is a good judge of the future and he often returned home late in the evenings after Stacy and the boys had already eaten their evening meal.

The court set a visitation schedule of alternating weekends and a weeknight visitation of approximately two hours, as well as alternating holidays and four weeks in the summer. The court ordered Dane to pay $760 per month in child support, an amount which is not being contested on appeal.

As for the economic provisions of the decree, the district court awarded the family home, valued at $100,000, and an adjoining lot, valued at $5000, to Stacy. The court also awarded Stacy the debt owed on the residential property, which totaled $58,690.99—leaving her with a net value in the residence and adjoining lot of $46,309.01. Stacy also received an award of the Jeep, though its value was roughly equal to the amount owed in payments.

The district court awarded the two hog confinement barns, valued at $440,000, to Dane. The court also awarded the debt on the barns to Dane. The amount owed on the barns—$752,832.25—exceeded their current value, which left Dane with a negative net value in this investment property of $312,832.25. The court also awarded Dane a pickup truck valued at $10,875, on which was owed $3546.21.

The district court ordered Dane to pay Stacy alimony in the amount of $500.00 per month for twenty-four months. The court also allowed each parent

to claim one of the children as a tax dependency exemption starting in 2009, and provided that the parents would alternate year to year claiming the youngest child, when the older child no longer qualified as a dependent. The court instructed the parties to pay their own attorney fees.

Dane appeals from both the custody and economic provisions of the decree. Stacy does not cross appeal.

II. Scope of Review

We review de novo challenges to both the child custody and the economic provisions of a dissolution decree. *In re Marriage of Vrban,* 359 N.W.2d 420, 423 (Iowa 1984). Because the district court was able to assess the credibility of the parties and witnesses after seeing them in person, we give weight to its factual findings, but are not bound by them. *Id.* at 424.

The familiar standard for deciding custody is the best interests of the children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Our objective is to place the children in the environment most likely to bring them to healthy physical, mental and social maturity. *Id*. The statutory factors in Iowa Code section 598.41(3) (2009) and those considerations identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974) are appropriately weighed when determining the grant of physical care. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992).

Courts must divide marital property equitably, considering the factors in Iowa Code section 598.21(1). *In re Marriage of Hansen*, 733 N.W.2d 683, 702

(Iowa 2007). Equitable distribution hinges on the particular circumstances of each case. *Id*. "An equitable division is not necessarily an equal division." *Id*.

Likewise, the award of alimony is not a right, but rather depends on the peculiar circumstances of the parties. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Statutory guidance on questions of alimony is found at Iowa Code section 598A.21A. *Hansen*, 733 N.W.2d at 702.

III. Analysis

A. Custodial provisions.

1. Physical care.

Dane contends that the district court should have granted joint physical care, or in the alternative, should have granted him physical care of the children. We consider his contentions with an eye toward which custodial arrangement is in the best interests of the boys. In determining the best interests of the children, we look to the nonexclusive factors in section 598.41(3), including suitability of the parents, whether psychological and emotional needs and development of the children will suffer from lack of contact with and attention from both parents, quality of parental communication, the previous pattern of caregiving, each parent's support of the other, wishes of the children, agreement of the parents, geographic proximity, and safety. *See Hansen,* 733 N.W.2d at 696.

The district court did not believe that a joint physical care arrangement was appropriate or in the best interests of the children. The district court premised that belief largely on the previous pattern of caregiving, finding that Stacy had done the bulk of child rearing before the couple's divorce. The court

also considered that Dane now lives "some distance away" from the family home in Schleswig, that he works long hours, and has not shown an ability to "get along with Stacy's side of the family."

Stability and continuity favor the parent who was primarily responsible for physical care prior to the divorce. *Hansen*, 733 N.W.2d at 696. We agree with the district court's assessment that under these circumstances, joint physical care would not achieve the same stability and continuity for the children as placing physical care with Stacy. Each party highlights faults of the other party in the appellate briefs. We do not believe it would add to our best-interests determination to sift through all of these criticisms. We agree with the district court that both individuals are capable parents. But to approximate the proportion of caregiving before the divorce, it makes sense to grant physical care to Stacy with liberal visitation for Dane.

2. **Visitation**

In establishing visitation rights, our governing consideration remains what is in the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally liberal visitation rights are in the children's best interests. *See* Iowa Code § 598.41(1). The decree allowed Dane visitation with his sons every other weekend and Wednesday nights from after school to 7:30 p.m. Dane asserts he should be allowed a midweek overnight visit. Given the potential disruption an overnight visit could pose for the older child's school schedule, we affirm the visitation provided in the decree.

B. Economic Distribution.

Dane challenges four aspects of the decree's financial determinations. He first claims the court erred in awarding Stacy the marital home and other property with a net equity of $56,231.59, while awarding him property encumbered with debts totaling $291,121.76. Dane next argues that the court erred in not requiring Stacy to reimburse $3020 to Dane's parents for a loan payment they made on the family's Jeep she was driving during the separation. He also objects to the award of spousal support for two years and the tax dependency exemption assignments. We will address each of these claims in turn.

1. Division of Assets and Debts

The district court recognized that the date of the trial is generally the proper time to determine the value of the parties' assets. *See Locke v. Locke,* 246 N.W.2d 246, 252 (Iowa 1976). The court assigned a value of $440,000 to both hog confinement buildings. The court awarded Dane the two buildings—along with the associated debt of $752,832.25. The court reasoned that Dane was receiving a "positive cash flow of $15,000 per month" on the hog finishing business from which he could make the payments to the bank. The court also "assumed" that the value of the hog facilities would fluctuate, "as they have in the past."

Dane takes issue with the court's assumption, claiming that it amounts to using a future date for the actual valuation of the hog buildings. He asserts the district court misinterpreted the testimony of United Bank loan officer Al Weiss regarding Dane's gross monthly income of $15,000 from the hog operation,

which did not take into account the monthly expenses. Dane also claims the trial court erred in not awarding the house to the party who was awarded the barns because the properties are "inextricably tied together." All four bank loans on the hog buildings are secured by a mortgage on the family residence.

We agree with Dane that the district court was bound by the reduced valuation of the hog barns on the date of the dissolution and could not reach an equitable distribution by speculating the value of the barns would rebound in the future. *See In re Marriage of Decker*, 666 N.W.2d 175, 181 (Iowa Ct. App. 2003) (holding date of dissolution is the only reasonable time when court should assess value of parties' property). Further, the trial testimony did not reflect that Dane received a "positive cash flow of $15,000 per month." The bank officer testified that Dane received about $15,000 per month gross income from the barns, which was greater than the monthly payments he owed the bank, but did not necessarily constitute a profit if his overall expenses turned out to be higher than the income. On the other hand, the law requires only an equitable distribution, not an equal one. Given that the hog barns were Dane's business, and given the volatility of these kinds of businesses, we believe an equitable distribution would involve setting aside this business and its associated assets and liabilities for Dane. The remaining nonbusiness property and debts would then be divided approximately equally.

Also, because Dane was ordered to assume all the debts and obligations for the hog barns, he should receive the collateral securing those liabilities. *See generally In re Novak's Marriage*, 220 N.W.2d 592, 597 (Iowa 1974) ("Although

petitioner was ordered to assume all debts and obligations he also received all collateral securing these liabilities."). The evidence at trial showed that the bank would not release its interest in the equity of the house even if it were awarded to Stacy. We believe that reaching a workable solution under these circumstances requires awarding both the barns and the marital residence to the same party. We modify the property division to award Dane both the hog barns and the house and its adjoining lot.

After making this adjustment in the property disbursement, it is necessary to provide additional equity to Stacy. We make two modifications to achieve greater parity between the parties. First, we modify the decree to award the entire $6303 value of Stacy's IPERS account to Stacy rather than awarding half the value to each party. Second, we modify the decree to order Dane to make an equalization payment to Stacy in the amount of $17,500. This sum may be paid in $500 monthly installments or in one lump sum. If Dane elects to pay the equalization payment in installments, he shall pay interest at the rate of five percent per annum. Either the lump sum or the first installment payment shall be paid within thirty days after the filing of this opinion. No prepayment penalty shall apply if installments are initially elected. The modified decree shall also provide Stacy the right to live with the boys in the marital residence for as long as twenty-four months from the date of the original decree, provided that she makes the monthly mortgage payments during that period of time. *See* Iowa Code § 598.21(5)(g); *see In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App.

1999) (noting that allowing a primary physical care parent to remain in the family home for a reasonable period of time provides stability for the children).

The district court noted in its ruling on Dane's motion to enlarge that "Stacy's financial resources will be stretched by awarding her the family residence." From our de novo evaluation of the record, we conclude that our modifications of the property distribution not only achieve a more equitable distribution of the parties' debts, but may provide the parties with greater flexibility and independence from each other as they navigate the challenging financial positions in which they both find themselves. Because the family home served as security for the hog confinement building debt, Stacy's award of the home was at risk, and all subsequent principal payments could be in vain, if Dane defaulted on his loan payments under the terms of the original decree.

2. Jeep loan.

Dane asserts that Stacy should be required to repay $3020 to his parents for the amount they loaned the couple for a Jeep payment before the dissolution was final. In denying Dane's motion to enlarge, the district court stated that it considered the Jeep payment in the overall division of debts and assets. Despite the court's statement, we do not see that the debt to Dane's parents was included in the court's spreadsheet.

During the couple's separation, Stacy drove the Jeep, but did not make the required payments to the bank. Dane suggested several possible solutions to avoid repossession of the vehicle, including refinancing or trading for a less expensive vehicle, but Stacy did not respond. Eventually Dane sought financial

help from his parents, partially to avoid the bad credit consequences from a default on the loan.

We believe it would be equitable for Dane and Stacy to split this debt evenly. *See In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa Ct. App. 1996) (affirming the portion of the decree requiring the parties repay a $2500 loan made by the husband's parents for the down payment on the marital home by using the sale proceeds from the home). Although Stacy did not solicit the loan from Dane's parents, she did benefit from the Jeep not being repossessed. Dane likewise profited from not having his credit score affected by a loan default. The decree should be modified to require each party to repay $1510 to Dane's parents.

3. Spousal support.

The decree ordered Dane to pay Stacy $500 per month for twenty-four months. The district court described the spousal support award as a "combination of reimbursement/rehabilitative alimony." Dane argues the award of spousal support is inappropriate because Stacy has not been out of the job market during the marriage. He also contends that when considered in tandem with the child support he will be paying, the spousal support creates an inequity in the parties' standards of living. Stacy counters that the parties agreed she would be the children's primary caretaker and Dane would be the primary breadwinner for the family. Her scaled-back work hours reflect that agreement. She argues that she needs the transitional support to become economically self sufficient.

No right to spousal support exists and the individual award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The criteria for determining support includes the length of the marriage, the age and health of the parties, the property distribution, the parties educational level, the earning capacity of the party seeking support, and the feasibility of that party becoming self supporting at a standard of living comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal. Iowa Code § 598.21A. In addition to traditional alimony, Iowa case law recognizes spousal support awards as a means of rehabilitation or reimbursement for an economically dependent spouse. Rehabilitative alimony was conceived as 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 Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Reimbursement alimony, on the other hand, is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other, and should not be subject to modification or termination until full compensation is achieved. *Id*. at 64.

The alimony awarded to Stacy doesn't fit precisely within either the rehabilitative or reimbursement categories. She has the same level of education as Dane, having earned her associate's degree during the marriage. She does not assert that she needs additional education or training to become self supporting. Stacy leaves this twelve-year marriage in her mid-thirties and in

good health. But the parties did agree that Stacy would work less hours outside the home during the marriage to allow her more time with their young children. This arrangement enhanced Dane's earning capacity.

We agree with the district court that Stacy is entitled to some amount of spousal support given the disparity between the parties' incomes, the length of the marriage and the parties' mutual decision that Stacy would forego full-time work for time at home with the children. Given the equalization payments Dane is now required to make as part of the modified property distribution, we conclude that the amount of spousal support should be reduced to $350 per month for the second twelve months of its duration, starting on April 1, 2011.

4. Dependant Tax Exemption

Dane contends the district court erred in dividing the tax dependency exemptions between him and Stacy. He claims that he would benefit more from the exemptions than Stacy and equity requires that he be allocated the exemptions for both children.

Under the child support guidelines

> [e]ach parent shall be assigned one personal exemption for the parent. The custodial parent shall be assigned one additional dependent exemption for each mutual child of the parents, unless a parent provides information that the noncustodial parent has been allocated the dependent exemption for such child.

Iowa Ct. R. 9.6.

But the district court has the ability 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). Courts

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

Dane failed to establish that having both exemptions would substantially change his ultimate tax liability. *See In re Marriage of Miller*, 475 N.W.2d 675, 679 (Iowa Ct. App. 1991) (holding the obligation for providing tax information falls to the parties and their attorneys). Without having offered supporting tax information in the district court, Dane is unable to show on appeal that the district court's allocation was inequitable. We affirm on this issue.

5. Attorney fees.

The district court did not award attorney fees to either party. Iowa trial courts enjoy considerable discretion in determining the award of attorney fees in dissolution cases. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa Ct. App. 1994). The complaining party must show an abuse of that discretion to prevail on appeal. *Id*. We perceive no abuse of discretion here. Neither Dane nor Stacy can claim the other has a glut of disposable income to spend for legal representation. Where their relative ability to pay is roughly equivalent, it makes sense to hold the parties' liable for their own attorney fees.

In exercising our broad discretion on the question of appellate attorney fees, 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. *In re Marriage of Okland,* 699 N.W.2d 260, 270 (Iowa 2005). As previously

noted, neither party to this appeal has a far superior ability to pay the attorney fees. Both sides presented cogent, reasonable arguments for their respective positions on appeal. We decline to award Dane appellate attorney fees. Costs of this appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.