IN THE COURT OF APPEALS OF IOWA

No. 1-351 / 10-1175
Filed June 29, 2011

IN RE THE MARRIAGE OF
SCOTT M. THOMAS AND
NATALIE A. THOMAS

Upon the Petition of
SCOTT M. THOMAS,
Petitioner-Appellant,

And Concerning
NATALIE A. THOMAS,
Respondent-Appellee.

Appeal from the Iowa District Court for Madison County, Artis Reis, Judge.

Scott Thomas appeals from the provisions of the district court's decree of dissolution. **AFFIRMED AS MODIFIED.**

David E. Brick of Brick Gentry, P.C., West Des Moines, for appellant.

Kimberly A. Graham of Graham Law Collaborative, Indianola, and Robert H. Laden of Laden & Pearson, P.C., Des Moines, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Scott and Natalie Thomas were married on January 9, 1993, and have two children born in 1993 and 1995. On June 12, 2009, Scott filed a petition to dissolve the parties' marriage. A trial on the matter was held February 25, 2010.

At the time of trial, Scott was forty-two years old, in good health, and living with his mother and stepfather. He had a vocational degree from DMACC, which he earned during the marriage. He was employed at The Baker Group where he earned a gross income of approximately $65,000 per year. As part of Scott's employment, he was obligated to belong to a union, which he asserts had mandatory annual dues in 2009 of $7447.30.

Natalie was thirty-nine at the time of trial, in good health, and living in the parties' marital home. She had a bachelor's degree in mass communication and radio and television. She was employed by KCCI where she earned a gross income of approximately $36,000 per year.

The parties stipulated at trial that they share joint legal custody of the children with physical care to be with Natalie subject to Scott's right to reasonable visitation. At trial, Scott testified Natalie was not supportive of his visitation rights. Natalie testified she had encouraged the children to participate in visitation with Scott, but the children often told Scott they were busy on the weekends. She further testified Scott had only exercised his mid-week visitation twice in the past nine months.

The district court entered a dissolution decree on April 9, 2010. The court determined that for purposes of calculating child support, Scott's union dues in

the amount of $7447.30 were a mandatory deduction from his gross income pursuant to Iowa Court Rule 9.5. The court also ordered that Scott pay Natalie alimony in the amount of $500 per month until July 1, 2014.[1] The district court ordered that Scott's and Natalie's retirement accounts be divided by a qualified domestic relations order (QDRO) prepared by Scott's attorney. The district court ordered the parties to share equally their debts with Bank of America, American Express, and a Wells Fargo line of credit. The court found that Scott should pay Natalie's attorney fees for a previous filing of a contempt action against Scott. The court also ordered, "[Scott] shall pay [Natalie's] attorney fees in the sum of $1,800 and the court costs of this action."

Both parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904. As a result, the district court filed a modification to dissolution decree ordering that the portion of Scott's union funds applied to vacation and holiday pay should not be deducted from his gross income for purposes of calculating child support. The court therefore concluded Scott's union dues for purposes of calculating child support were $4637.09.

Scott appeals, arguing the district court erred in: (1) failing to include in its decree precautions for visitation; (2) awarding alimony; (3) calculating child support; (4) awarding attorney fees for the contempt action; (5) the disposition of debts; and (6) its ruling on the QDRO.

[1] Originally the court ordered alimony to continue through July 1, 2015, but changed the year in its subsequent modification to the dissolution decree.

II. Standard of Review

We review the district court's ruling de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50–51 (Iowa 1999). In doing so, we give weight to the fact findings of the trial court, but we are not bound by them. *Id*. at 51.

III. Visitation Provisions

Scott states that because he was not successful in exercising visitation with his daughters under the temporary order, he requested at trial that the court order extra precautions to ensure he would be able to exercise his visitation under the decree. He asserts the district court "indicated that such precautions would be included in the decree," pointing to the district court's statements at trial that, "[T]here is going to be visitation ordered in this case. I don't think we have an issue as to visitation. There is going to be visitation. . . . Both parties are going to be ordered to cooperate with visitation." Scott argues on appeal that the district court failed to provide promised precautions to ensure him visitation "unfettered from any negative influence or manipulation by Natalie."

We conclude the district court adequately provided for visitation for Scott in its decree. The district court awarded Natalie physical care of the children "subject to reasonable and liberal visitation rights of [Scott]. [Natalie] may not schedule activities for the children which conflict with [Scott's] visitation without prior permission from [Scott]." The district court also established a visitation schedule. Under the express language of the decree, Scott is entitled to visitation with the children at specified times. The court has the power to enforce

the decree and does not need to include further precautions to protect Scott's visitation rights.

Scott also requests this court to order Natalie to drop the children off at Scott's residence before his visitation so that the parties share in the transportation of the children. The district court ordered that Scott "pick up and return the children for his visitation time." [2] We decline to grant Scott's requested modification of the decree. We find the district court's provisions regarding visitation to be fair and equitable. Further, under the terms of the decree, Scott's arrival at Natalie's home at the court-ordered times clearly signals the beginning of Scott's visitation, which may alleviate Scott's problems exercising visitation.

IV. Alimony

Scott asserts the district court erred in awarding alimony to Natalie. Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). 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). *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007). The court also considers each party's earning capacity, as well as the parties' present standards of living and ability to pay, balanced against the relative needs of the other. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Although our review of the district court's alimony award is de novo, we afford that court considerable latitude in making the determination.

[2] Scott agreed to return the children to Natalie's residence after visitation, as ordered in the decree.

Anliker, 694 N.W.2d at 540. We will disturb that determination only when there has been a failure to do equity. *Id*.

Upon considering the relevant factors, including the length of the parties' marriage, the parties' disparate earning capacities, and the feasibility of Natalie's becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, we conclude the district court's alimony award is equitable. "In a marriage of long duration, alimony can be used to compensate a spouse who leaves the marriage at a financial disadvantage, especially where the disparity in earning capacity is great." *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). We find the alimony award in this case serves such a purpose.

V. Child Support

Scott argues the district court erred in concluding that certain amounts he paid to his union for holiday and vacation pay were not union dues and were not to be deducted from his gross monthly income in calculating child support. Iowa Court Rule 9.5 provides that union dues should be deducted from gross income in determining a party's net monthly income. We must determine what fees are encompassed by the term "union dues."

Scott's annual statement from the United Association Local No. 33 lists dues and hourly dues separately from vacation and holiday pay. Further, a letter admitted at trial from a business representative of local union 33 states monthly dues for the union are thirty-two dollars per person. Based on the record presented, we agree with the district court's interpretation of the exhibits to

exclude from mandatory dues the amounts listed for holiday and vacation pay. We affirm the district court's calculation of Scott's child support obligation.

VI. Attorney Fees

Scott argues the district court erred in awarding Natalie attorney fees for filing an application for order to show cause involving his failure to comply with a temporary order and an order to preserve assets, a matter he rectified prior to a hearing.

Iowa Code section 598.24 provides

> When an action for a modification, order to show cause, or contempt of a dissolution, annulment, or separate maintenance decree is brought on the grounds that a party to the decree is in default or contempt of the decree, and the court determines that the party is in default or contempt of the decree, the costs of the proceeding, including reasonable attorney's fees, may be taxed against that party.

Because no court determined Scott was in default or contempt of the temporary order, the district court erred in ordering Scott to pay Natalie's attorney fees for the application for rule to show cause against Scott.[3]

VII. Distribution of Debts

Scott argues the district court erred in distributing the parties' debts. The district court ordered each party to pay half of the parties' total debts to Bank of America and American Express as well as a line of credit with Wells Fargo. Scott asserts he did not contribute to any increase in the debt on these accounts after the parties' separation on June 1, 2009, so he should not be responsible for any debt accrued after that date.

[3] The record does not reveal the amount of Natalie's attorney fees attributable to the application for rule to show cause, but the court ordered Scott to pay $1800 in attorney fees, which we conclude was the amount for the contempt action.

Scott testified at trial that the Bank of America debt of $4703 was joint debt that should be split between the parties. Although he added that he wanted to review it again, he did not present additional evidence regarding that debt. Accordingly, we find the district court did not err in ordering the parties to split this debt.

Scott testified that the American Express credit card was Natalie's and there were no joint expenses on the card. The balance on this card was $457.30 on June 18, 2009. By the time of trial, the balance on the card was roughly $5900. Natalie testified she charged roughly $8000 in attorney fees on her credit cards. The district court also ordered the parties to split approximately $6500 due on a Wells Fargo line of credit. Natalie testified she paid attorney fees using this line of credit.

"Attorneys' fees incurred in dissolution proceedings are not marital debt." *Hansen*, 733 N.W.2d at 703. The district court therefore erred in characterizing Natalie's attorney fees charged on her credit cards and to the parties' line of credit as marital debt rather than as Natalie's personal liability. *See id*. The court, however, did have the discretion to make an award of attorney fees if it had found such an award to be equitable. *See id.* As discussed above, it appears the district court declined to make such an award for trial attorney fees.

We conclude Scott is not responsible for any of the payment on the American Express card and is responsible for only $2000 on the Wells Fargo line of credit.

VIII. QDRO

Scott asserts the district court erred in ordering his attorney to draft any QDROs necessary in this case. He asserts counsel for both parties should be required to draft the necessary QDROs. We conclude the district court's order regarding QDROs was equitable.

IX. Appellate Attorney Fees

Natalie requests an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). The court considers the needs of the party making the request, the ability of the other party to pay, and whether the party making the request is obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We award Natalie appellate attorney fees of $1000. Costs on appeal are assessed to Scott.

AFFIRMED AS MODIFIED.