IN THE COURT OF APPEALS OF IOWA

No. 2-067 / 11-1181
Filed February 29, 2012

IN RE THE MARRIAGE OF LISA A. MURRAY AND DANIEL V. MURRAY

Upon the Petition of
LISA A. MURRAY,
Petitioner-Appellant,

And Concerning
DANIEL V. MURRAY,
Respondent-Appellee.

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

Lisa Murray appeals the decree issued by the district court dissolving her marriage to Daniel Murray. **AFFIRMED.**

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellant.

J. David Zimmerman of J. David Zimmerman, P.C., Clinton, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Lisa Murray appeals the decree issued by the district court dissolving her marriage to Daniel Murray. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

Lisa and Daniel married in 1982. In 1997, the parties adopted a son, Taylor, who was then five months old. On November 29, 2010, Lisa filed her petition for dissolution of marriage, and trial was held on May 12, 2011. At the time of trial, Lisa was forty-eight, Daniel was fifty-one, and Taylor was thirteen years of age.

Daniel is employed as a maintenance mechanic at Nestle and has worked there for ten years. He works third shift and is gone when Taylor goes to bed and wakes up in the morning. In 2010, Daniel earned $70,695. He has been working overtime to supplement his income during the dissolution proceedings.

Lisa worked at a title company for nine years, earning $23,836 in 2009. She performed most of the household duties, participated in Taylor's extracurricular activities, and took Taylor to his doctor's appointments. In 2010, Lisa decided to run for the public office of county recorder. After Lisa announced her candidacy, she was required to resign her position at the title company due to a potential conflict of interest. Lisa ultimately lost the race. She applied for and was awarded weekly unemployment benefits in the amount of $300. At the time of trial, she was unemployed.

Both parties agree Lisa's behavior changed when she was running for office. She was extremely stressed. Daniel testified Lisa began having problems with alcohol, evidenced by her passing out at their son's birthday party. Daniel

further testified Lisa did not come home one night, and he contacted the police to inform them she was missing. Lisa was found gambling in the company of another man. Daniel learned Lisa had made numerous withdrawals from the parties' joint bank account, as well charges on a credit card, for gambling and hotels. Lisa had maxed out her personal credit card at approximately $16,000 for gambling purposes. Daniel testified he confronted Lisa about her behavior, and she admitted she had loaned money to her male friend for gambling, specifically to try to "get her money back" through gambling. Lisa denied she had a problem with alcohol or gambling, but admitted she had lent money to her friend for gambling purposes. She also admitted she had visited a place with gambling activities as recently as two weeks prior to the trial.

Lisa's behavior also put a strain on her relationship with her son. She acknowledged Taylor had been "quite upset with [her] and [her] conduct and [her] behavior and things that [she was] doing. Not coming home, et cetera." Lisa also sent Taylor a text message stating she was going to jump off a bridge "and the water is cold this time of year." Taylor took the message as a suicide threat; he was very upset and took the message to Daniel. Lisa testified it was just a figure of speech. Lisa began taking Taylor to see a therapist. Lisa also testified Daniel was turning Taylor and her family against her.

Daniel testified Taylor does not want to live with Lisa. He testified that a week before the trial, Lisa had insisted Taylor attend a wedding with her that Taylor did not want to attend. When Taylor did not come outside when she came to pick him up because he was looking for his other shoe, she got angry and came inside, screaming and yelling at Taylor. Taylor left crying.

Both Daniel and Lisa requested joint custody of Taylor. However, Daniel requested primary physical care[1] of Taylor, and Lisa requested shared physical care. Lisa testified she has had "a hard time dealing with [Taylor] staying at the house by himself. He's thirteen years old," and she stated a shared care arrangement would allow her to care for Taylor when Daniel worked.

On May 18, 2011, the district court entered its decree dissolving the parties' marriage. The court determined Daniel should have primary physical care of Taylor with Lisa receiving liberal visitation. The court found Daniel's income to be $71,000 a year, and it imputed Lisa's income to be $24,000 a year. The court ordered Lisa to pay Daniel $311.50 per month in child support. Additionally, the court ordered Daniel to pay Lisa $600 per month in spousal support for two years as rehabilitative support to assist Lisa in becoming self-sufficient.

In equalizing the division of the parties' property, the court awarded Daniel the house and the two debts secured by the home. The net equity in the home, $41,000, was included in Daniel's share of the division; Daniel was not required to sell the property or refinance to remove Lisa from the debt obligations. The court awarded Lisa 60.5% of the parties' retirement benefits, exclusive of the defined benefit pension plans, "a result which helps alleviate the potential disparity in social security income available to the parties on their retirement." The court specifically awarded Lisa $64,728 of Daniel's Nestle 401(k) valued at $122,277 as part of the equalization of the parties' property.

[1] "Primary physical care" is not defined in Iowa Code chapter 598; nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

Thereafter, Lisa filed a motion to amend or enlarge the court's decree. She noted the 401(k) amount awarded to her would be subject to taxes, whereas, the equity in the home would not be. She requested she receive half of the home's equity and that amount be deducted from the 401(k) amount awarded to her. The court denied her motion.

Lisa now appeals.

II. Scope and Standards of Review.

An action for dissolution of marriage is an equitable proceeding, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We do so with the realization that the district court possesses the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability 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). Our determination depends on the facts of the particular case, so precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). In custody matters, our overriding concern is the best interests of the child. Iowa R. App. P. 6.904(3)(*o*).

III. Discussion.

On appeal, Lisa contends the district court's decree was inequitable in three respects: (1) in not awarding her more than $600 a month for two years in spousal support; (2) in failing to award her part of the equity in the home and to remove her from the debt liability; and (3) in failing to award her primary physical

care of Taylor. She requests appellate attorney fees. We address her arguments in turn.

A. Spousal Support.

Spousal support "is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Spousal support is a discretionary award dependent upon each party's earning capacity and present standards of living, as well as the ability to pay and the relative need for support. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Spousal support "is not an absolute right; an 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 discretionary award of spousal support is made after considering the factors listed in section 598.21A(1) (2009). S*ee id*. We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and spousal support "should be considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). We give the district court considerable discretion in awarding alimony, and we will only disturb the court's ruling when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

After considering the factors listed in section 598.21A(1), we find no error with the district court's spousal support award of $600 per month for two years. We accordingly affirm on this issue.

***B. Property Division*.**

Lisa contends the court's property division was inequitable because she would be required to pay taxes on the 401(k) amount awarded to her if she cashed it out, whereas she would have no tax obligation on half of the equity of the home. Additionally, she asserts the court erred in failing to remove her from the debt liability. We disagree.

Generally, the partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1); *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

Here, we agree with the district court's explanation for awarding the portion of the 401(k) to Lisa, as set out in its ruling on Lisa's motion to amend or enlarge:

> [Lisa] correctly notes the potentially negative tax consequences from early liquidation of the retirement assets. However, the court also notes that [Lisa] would be at a retirement disadvantage based upon the income history of the parties during the marriage. The disproportionate award to [Lisa] of retirement assets ameliorates that disadvantage.
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> Additionally, [Lisa's] position ignores the evidence presented at trial concerning [Lisa's] waste of marital assets through her gambling. The adverse income tax consequences of early

> liquidation of the retirement assets awarded to [Lisa] can serve as a disincentive or deterrent to [Lisa] engaging in further waste of the property awarded to her. For those reasons, the court declines to modify the property division previously decreed.

As Lisa points out, the net value of marital property awarded to her was $126,423. The value of marital property awarded to Daniel was $126,924. Considering the criteria set forth in section 598.21(1), we find the court's division to be equitable, and therefore affirm on this issue.

C. Primary Physical Care.

Finally, Lisa contends the court erred in not awarding the parties shared care of their child. Again, we disagree.

"When considering the issue of physical care, the child's best interest is the overriding consideration." *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in section 598.41(3), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in section 598.41(3) apply equally to physical care determinations). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *Id*. at 700. The following nonexclusive factors are to be considered when determining whether a joint physical care arrangement is appropriate: (1) "approximation," or what has historically been the care giving arrangement for the children between the parents; (2) the ability of the parents to "communicate and show mutual respect"; (3) the "degree of conflict" between the parents; and (4) the ability of the parents to be in "general

agreement about their approach to daily matters." *Id*. at 697–99; *see also In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

If the court denies a request for joint physical care, "the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child." Iowa Code § 598.41(5)(a). The court shall then determine placement according to which parent "can minister more effectively to the long range best interest of the child." *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *Hansen*, 733 N.W.2d at 695; *see also In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) ("The critical issue in determining the best interests of the child is which parent will do better in raising the child[ren]; gender is irrelevant, and neither parent should have a greater burden than the other.").

With the foregoing principles in mind and our de novo review of the record, we find the district court was correct in placing the child in Daniel's physical care. Although the court acknowledged Lisa had been Taylor's primary caregiver for the majority of his life, it determined placement with Daniel was in Taylor's best interests, explaining:

> [T]he relationship between [Lisa] and the child at present is severely strained. The child and [Daniel] have a good parent-child relationship, and they share many outdoor interests together.
>
> [Lisa] asserts that [Daniel] may be poisoning her relationship with the child; however, the evidence before the court does not support that assertion. The court finds the testimony of [Daniel] on those issues to be completely credible, having observed the

> demeanor of both parties throughout the trial. In the court's view, [Lisa] simply has not come to an understanding of the negative impact her own actions have had on the child's view of her and the child's relationship with her. Given the child's extreme animosity towards [Lisa], the court concludes that the best interests of the child are served by awarding [Daniel] the primary physical care of the child subject to reasonable and liberal visitation by [Lisa].

We agree with the district court's assessment. Considering the objective of placing Taylor in the environment most likely to bring him to health, both physically and mentally, and to social maturity, it was in Taylor's best interests that Daniel be awarded primary physical care. We therefore affirm on this issue.

***D. Appellate Attorney Fees*.**

Lisa requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *Berning*, 745 N.W.2d at 94. We consider the needs of the requesting party, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *Id*. Upon consideration of these factors and in light of our resolution of the claims, we decline to award appellate attorney fees. Costs on appeal are assessed to Lisa.

***IV. Conclusion*.**

We have carefully considered all of the claims raised by Lisa. Those not addressed specifically in this decision are either disposed of by our resolution of other claims or are without merit. For the reasons stated above, we affirm the district court's ruling dissolving the parties' marriage in all respects.

AFFIRMED.