IN THE COURT OF APPEALS OF IOWA

No. 2-234 / 11-1293
Filed April 25, 2012

IN RE THE MARRIAGE OF
ADAM MICHAEL BATES
AND LAURA KAY BATES

Upon the Petition of
ADAM MICHAEL BATES,
Petitioner-Appellee,

And Concerning
LAURA KAY BATES,
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Kurt J. Stoebe, Judge.

Laura Bates appeals from the custody, physical care, and financial provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Christine R. Keenan, Ames, for appellant.

Stephen M. Terrill of Terrill, Richardson, Hostetter & Madson Law Offices, An Association of Sole Practitioners, Ames, for appellee.

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

POTTERFIELD, J.

After a four-day dissolution trial, the district court awarded Laura and Adam Bates joint legal custody of their two children with the restriction that Adam was to have the exclusive right to make health care decisions for the children. The court awarded Adam physical care of the children. Laura appeals from both decisions as well as from the court's division of property, its assessment of court costs, and its denial of alimony and attorney fees. Both parties request appellate attorney fees.

I. Background Facts and Proceedings

Adam and Laura Bates married in December 1997. They had two children during the marriage—Zachary, age eleven at the time of trial, and Haley, age nine.

Laura was thirty-nine at the time of trial. She graduated from Iowa State University in 1999 with a degree in psychology, but she had never used her degree to work in this field. From approximately 1993 to 2003, Laura operated a small daycare out of her mother's home, always caring for fewer than five children. Once her children were born, Laura took them to the daycare with her. Laura testified that she ran the daycare, though her mother assisted at times. Around the beginning of 2003, Laura ended the daycare business when she and Adam agreed she could stay home with the children. Laura has not worked nor applied for a job since that time. She receives $200 per week as a gift from her parents and had also received that money during the marriage.

Adam was thirty-six years old at the time of trial. He graduated from Iowa State University in 1999 with a degree in finance and in 2001 with a second

degree in management information systems. He worked at Mary Greeley Medical Center, where he has been employed for thirteen years. Adam testified his gross salary in 2010 was $73,000.

The parties separated in July 2009 after an incident that resulted in each party filing a petition for relief from domestic abuse and obtaining a temporary protective order. The parties later agreed to dismiss these actions and agreed to the entry of a no-contact order that was in effect through the time of trial.

After the separation, Adam remained in the parties' marital home, and Laura moved into her parents' home. The parties shared joint legal custody and joint physical care of the children. The court ordered Adam to pay Laura $200 per month in temporary child support. At Laura's request, the court appointed Doctor Arthur Konar to perform a child custody evaluation.

Trial was originally set for April 27, 2010, but was canceled when the parties informed the court on April 26, 2010, that they had reached a stipulated agreement. However, this agreement fell apart within four hours, and trial was rescheduled.

After the parties' settlement failed, Adam filed an application to modify temporary custody based on Dr. Konar's conclusions that Laura was not suitable to have joint legal custody or physical care and Adam's assertion that Laura was engaging in conduct to "alienate the affections of the children from their father." Laura filed an application for the appointment of a new custody evaluator and the appointment of a guardian ad litem. Laura asserted in her application that Dr. Konar had acted as a therapist for the children and had gone outside his role as a custody evaluator in an effort to mediate a settlement between the parties.

She asserted Dr. Konar had become "inextricably entwined" in the case, rendering him incapable of fulfilling his role as an independent custody evaluator.

The district court denied Adam's request for modification of temporary custody, but noted the children were suffering from the custody battle, especially given the prolonged pendency of the action caused by the failed settlement. The court denied Laura's request for appointment of a second child custody evaluator but appointed a guardian ad litem to represent the children, given the "increasingly strident nature of the parties' conduct in this litigation and the adverse effects of that conduct on the children."

The parties' explanations of what led to the breakdown of the marriage are conflicting. Laura asserts Adam emotionally abused her and was controlling and critical of her. She states that as a result of the constant emotional abuse, she gradually became more dependent on him. In addition, she testified she had numerous physical ailments that worsened as her emotional state deteriorated. These physical ailments included irritable bowel syndrome, chronic migraines, and chronic neck pain. She testified that her physical ailments rendered her "incapacitated" from 2007 to 2009.

Laura testified, however, that once she moved out of the marital home, her physical and mental health improved greatly. Doctor Matthew Baughman, Laura and the children's primary care physician, testified Laura's health had improved dramatically since July 2009. Dr. Baughman testified he had no concerns regarding Laura's ability to parent her children. Laura testified that by the time of trial, she had decreased her medical regimen from eight different medicines down to only one. She testified she had not had a migraine in two years.

However, she testified that she had been emotionally incapable of obtaining employment from 2007 to 2011.

Laura hired Doctor Eva Christiansen to consult regarding her mental health and the extent to which it impaired her ability to function as a parent. Dr. Christiansen testified she believed Laura was competent to parent the children, and she did not have concerns about Laura's parenting abilities. Dr. Christiansen testified that Laura's anxiety had been debilitating to her at times but not always. She further testified that her impression at the time she conducted her evaluation was that Laura's ability to care for the children was dependent upon the supportive setting she was in at her parents' home. However, Dr. Christiansen ultimately testified she believed Laura was able to parent the children independently from her parents. The district court found Dr. Christiansen's testimony to be unpersuasive.

Adam testified that Laura's heavy intake of pain medications rendered her unable to function, often restricted to the couch or bed. He testified that because of Laura's condition, caused by both medical issues and pain medications, he had been the primary caretaker of the children since Zachary was six months old. He testified he was responsible for getting the children up and ready in the morning, taking them to daycare or school, picking them up, and putting them to bed. Adam testified that even since the parties' separation, Laura was only able to parent the children with the help of her parents, with whom she still lived at the time of trial.

Adam's testimony was supported by the testimony of Dr. Konar. Dr. Konar testified that during his evaluation period, which covered November

2009 through April 2010, Laura was in crisis and not functioning well. He testified that although there was a definite bond between Laura and the children, Laura's physical illnesses prevented her from being an active parent. He also testified that Laura engaged in parental alienation of Adam. He concluded that this had been Laura's situation for at least ten years, though he made clear that he could not testify as to whether anything had changed after he completed his evaluation in April 2010. The district court found Dr. Konar to be a "very credible and incisive witness."

Adam's testimony was also supported by the testimony of Catheryn Hockaday, a parenting expert for the State of Iowa who testified as a non-expert in this case. Hockaday interacted with the Bates family through her child who was friends with and involved in many of the same extracurricular activities as Zachary. Hockaday testified that Adam provided entirely for the children. She stated she would be concerned if Laura were in a custodial role because she did not believe Laura was a present, engaged parent. The district court found Hockaday to be "one of the most informed and credible witnesses in the trial," relying in part on its incorrect statement that Hockaday had previously testified as an expert on parenting, which she had not.

The district court awarded Laura and Adam joint legal custody of the children with the restriction that Adam was to have the exclusive right to make health care decisions for the children. The court awarded Adam physical care of the children. Laura appeals from both decisions as well as from the court's division of property, its assessment of court costs, and its denial of alimony and attorney fees. Both parties request appellate attorney fees.

II. Scope 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, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* at 51.

III. Legal Custody

Laura asserts the district court erred in limiting her rights as a joint legal custodian. "Legal custody" carries with it certain rights and responsibilities, including but not limited to "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(5) (2009). When parents are awarded joint legal custody, "neither parent has legal custodial rights superior to those of the other parent." *Id*. § 598.1(3).

The court is required to order a custody award "which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents" insofar as such an award is "reasonable and in the best interest of the child." *Id.* § 598.41(1)(a). Under this presumption, if the district court does not grant joint legal custody, the court must cite clear and convincing evidence, according to the enumerated factors listed in Iowa Code section 598.41(3), that joint legal custody is unreasonable and not in the children's best interests "to the extent that the legal custodial relationship between the child and a parent should be severed." *Id*. § 598.41(2)(b). In awarding legal custody, the district court

carefully analyzed each of these factors and concluded that allowing both parents the right to make medical decisions for the children would place the children at significant risk. We agree.

During the pendency of these proceedings, there was much dispute regarding the children's medical health. The record shows that at least twice Laura obtained prescription medicine for the children without informing Adam or providing the medicine to Adam when the children were in his care. As a result, the children received the prescribed medicine only when they were in their mother's care, not consistently as directed. We disagree with Laura's assertion that Adam admitted he knew the children were on certain medications. The record reflects that Adam knew the children had been on the medication in the past but believed they had stopped taking the medication and so did not administer the medication to the children. However, Laura either continued to give the children the medication or restarted the children on the medication without informing Adam or providing him the medicine to administer to the children. We do not find Adam's testimony in this regard to be inconsistent. Further, Dr. Baughman, whose nurse had spoken with Adam about such an incident, testified he was never concerned that Adam was failing to follow medical advice for prescriptions.

In addition, Adam testified that medical records showed Laura did not consistently fill the children's prescriptions. Laura also emailed Adam informing him she had given Haley medicine that had been prescribed to Laura. At trial, Laura denied this, claiming she was on drugs that had rendered her mind unclear

at the time she sent the email.[1] The district court found Laura's testimony was not credible, noting that "her memory was evasive when confronted with specific events that reflected badly on her." We find this to be an example of such evasive conduct and, like the district court, do not find the testimony credible.

We believe the record shows that throughout the two-year pendency of these proceedings, Laura gave the children different, sometimes unauthorized medicines, often without informing Adam such medicines had been prescribed. We agree with the district court that this has created a dangerous situation that places the children at risk. We disagree with Laura that this situation could be resolved by requiring the parties to follow the recommendation of their family physician. This was not a case where the parties disputed what medication should be given, but rather a case where Laura failed to inform Adam that medication had been prescribed. Given the parents' inability to communicate[2] regarding the children's medical issues, it is in the children's bests interests that one parent have the sole responsibility for decisions involving their medical care. For all the reasons stated above, Adam is the best parent for this. We affirm the district court's conclusion that clear and convincing evidence shows joint legal custody as it relates to health care decisions is not in the children's best interests.

[1] On appeal, Laura claims the email had "clearly been altered," though at trial she claimed the email was a result of unclear thinking due to medicine.

[2] We recognize that a no-contact order was in place, but the parents communicated about many things through third parties. Further, as joint custodians, the parents needed to ensure their children were at least receiving the proper medications.

IV. Physical Care

Laura asserts the district court erred in granting physical care of the children to Adam. "Physical care" involves "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." *Id*. § 598.1(7). "The parent awarded physical care maintains the primary residence and has the right to determine the myriad of details associated with routine living, including such things as what clothes the children wear, when they go to bed, with whom they associate or date, etc." *In re Marriage of Hansen*, 733 N.W.2d 683, 691 (Iowa 2007).

Our supreme court has articulated several nonexclusive factors to consider when determining if joint physical care is in the best interests of the children. First, where there are two suitable parents, consideration is given as to the stability and continuity of caregiving, which "tend[s] to favor a spouse who, prior to divorce, was primarily responsible for physical care." *Id*. at 696. The court noted,

> [W]e believe that joint physical care is most likely to be in the best interest of the child where both parents have historically contributed to physical care in roughly the same proportion. Conversely, where one spouse has been the primary caregiver, the likelihood that joint physical care may be disruptive on the emotional development of the children increases.

Id. at 697–98 (internal citations omitted). A second factor is the ability of the spouses to communicate and show mutual respect. *Id*. at 698. The third factor is the degree of conflict between the parents, because joint physical care requires "substantial and regular interaction between divorced parents on a myriad of issues." *Id*. The court has also noted where one party objects to joint

physical care, the likelihood of its success is reduced. *Id*. A fourth factor is the degree to which the parties agree about their approach to daily matters concerning the children. *Id*. at 699. While these four factors are significant in determining the appropriateness of joint physical care, they are not exclusive, and we must consider "the total setting presented by each unique case." *Id.* We are also guided by the factors in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). *Id.* at 696. The district court considered these factors and found Adam should have physical care of the children. We agree.

First, we agree with the district court's conclusion that Adam was the children's primary caregiver. Laura admitted that she was incapacitated for several years during which Adam assumed all duties related to the children. The record is clear that until the time of the parties' separation, Adam had provided for the children's needs since Zachary was six months old because Laura was unable.

Once the parties separated, Laura gradually took on more responsibilities as the parties shared temporary joint physical care during the roughly two years the dissolution action was pending. However, we are unable to conclude that Laura's gradual turnaround over the last two years erased the effects of her near total absence for years of the children's lives. Further, the record suggests Laura's parents were heavily involved in caring for the children once Laura moved into her parents' home. Several witnesses testified they never saw Laura without her parents. While we recognize the children are very close with Laura's parents and reportedly enjoy spending time with them, we find Laura's reliance on their assistance belies a finding that Laura contributed to the children's care in

the same proportion as Adam. Further, witnesses testified that oftentimes the children would not attend activities on days when Laura was caring for the children. Laura herself testified that she was emotionally incapable of obtaining employment from 2007 to 2011, suggesting she was not capable of providing joint physical care for the children.

We also find that because of the high degree of conflict between the parents, they were unable to communicate effectively. We agree with the district court's conclusion that the parents had not effectively communicated since the separation. As discussed above, Laura failed to communicate with Adam regarding the children's medications. Certainly, this situation was complicated by the no-contact order, but the fact that a no-contact order was necessary throughout the last two years in and of itself evidences an inability to communicate. This lack of communication existed primarily because of the large degree of conflict between the parents. Again, the necessity of a no-contact order evidences the high degree of conflict, as does the fact that the separation began with dueling protective orders and an email from Laura telling Adam, "You will never feel so much pain when I'm done with you. . . . I'm going to embarass [sic] you make the kids hate you." Also evidencing conflict between the parties was the fact that the parties' settlement agreement broke down on the same day it was reached—after Laura reported to one of the children that the settlement did not provide for a 50/50 split of physical care. Adam testified the child then called him and said he wanted to kill him and wanted him dead because the split in physical care was not equal. Because of this, the settlement fell apart and the parties' conflict intensified.

Further, Dr. Konar reported Laura's behavior constituted "some of the most blatant and destructive parental alienation" he had ever seen.[3] Though Laura took issue with Dr. Konar's process, his opinion evidences clear conflict between the parties. We believe this is exactly the "stormy" type of relationship described by the court in *Hansen* that presents a "significant risk factor" in awarding a joint physical care arrangement. *See id.* at 698.

Finally, we believe the record demonstrates differences in parenting styles. Adam suggested Laura was overly protective of the children, allowing the children to avoid activities when they were uncomfortable. This testimony was supported by Dr. Konar's testimony that Laura transferred her fears to her children. In contrast, Adam felt it was important to support the children and encourage them to participate even if they were uncomfortable. Laura also testified Adam was more physical when he disciplined the children than she would be. *See id.* at 700–01 (noting differing approaches to discipline in considering differences in parenting styles).

Given our consideration of these and other relevant factors and our careful analysis of the entire record, we conclude joint physical care is not in the children's best interests. Having decided this, we agree with the district court that Adam should be awarded physical care of the children. *See id.* at 700 ("Once it is decided that joint physical care is not in the best interest of the children, the court must next choose which caregiver should be awarded physical care."). "In making this decision, the factors of continuity, stability, and

[3] At trial, Laura disputed the admission of Dr. Konar's report. This issue was not raised on appeal.

approximation are entitled to considerable weight." *Id.* As discussed above, these factors all weigh in Adam's favor. Further, the "parent awarded physical care is required to support the other parent's relationship with the child." *Id.* We find Adam has proven himself to be more capable of supporting the other spouse's relationship with the children. Laura posted on Facebook that the children "have a really bad father." Whether or not Laura understood how Facebook works, this post was viewable by Zachary, who was active on Facebook. Further, as discussed above, Laura had emailed Adam threatening to alienate him from the children, including an email that stated, "When this is over you'll be lucky if you get to talk to the kids on the phone." While we acknowledge this email was sent in a time of high stress, we note that Adam did not make such threats. Given Laura's emotional and physical reactions to stress, we believe her behavior during stressful times is relevant in determining whether she could support Adam's relationship with the children at all times. We conclude she would not.

It is evident that both parents love their children very much. However, the reality of this situation is that for years, Laura was physically and emotionally unable to care for her children. We agree with the district court's decision that Adam should receive physical care of the children.

V. Alimony

Laura appeals the district court's decision denying her request for alimony. Laura argues she should receive $1000 per month in rehabilitative alimony for a period of five years to allow her the opportunity to attend nursing school and reenter the workforce.

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 Iowa Code section 598.21A(1). *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). 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).

> Rehabilitative spousal support is 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. The goal of rehabilitative spousal support is self-sufficiency and for that reason such an award may be limited or extended depending on the realistic needs of the economically dependent spouse.

In re Marriage of Becker, 756 N.W.2d 822, 826 (Iowa 2008) (internal citations and quotation marks omitted).

We agree with Laura that the district court's opinion as to her potential success at nursing school is not a relevant consideration. We believe a consideration of the factors listed in Iowa Code section 598.21A necessitates an award of alimony in Laura's favor. The parties were married for over thirteen years. Laura had struggled with many physical ailments and also had emotional health issues. While she had a bachelor's degree in psychology, she had never used this degree and would likely struggle to find employment after so many

years without working in the field. Without re-education, Laura's earning capacity is low and she is unlikely to be able to support herself at the standard of living enjoyed during the marriage. Accordingly, we modify the district court's decree to award Laura $500 per month in rehabilitative alimony for five years.[4]

VI. Property Division

Laura asserts the district court's property division was inequitable. Marital property is to be divided equitably, considering the factors outlined in Iowa Code section 598.21(5). *Hansen*, 733 N.W.2d at 702. Equitable distribution is not necessarily an equal division and depends upon the circumstances of each case. *Id.* Laura disputes the division of Adam's IPERS account as well as the general equitability of the property division.

The district court ordered Adam should retain his IPERS account and should compensate Laura for one-half of the value of the account through a lump sum payment made from proceeds from the sale of a lot the parties owned in Minnesota. There are two accepted methods of dividing pension benefits: "Parties can agree the non-member will receive [an immediate] share based on the present worth of the pension, or receive a share of the pension benefits at some point in the future when they become payable to the pensioner." *Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007). "The division of a defined-benefit pension plan, such as IPERS, under the present value [immediate] method requires the use of actuarial science." *Id.* at 8. Because of this, "it is normally

[4] We note that Laura is not required to pay child support under the district court's decree, a provision that neither party appealed.

desirable to divide a defined-benefit plan by using the percentage method." *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006).

"Under the percentage method, the non-pensioner spouse is awarded a percentage (frequently fifty percent) of a fraction of the pensioner's benefits (based on the duration of the marriage), by a qualified domestic relations order (QDRO), which is paid if and when the benefits mature." *Id.* at 250. We determine that absent actuarial evidence regarding the present value of the pension, the district court should have applied the percentage method to divide Adam's IPERS account. We therefore direct that Adam's IPERS account be divided under the percentage method using a QDRO.

We modify the decree and order Laura to present to the district court a QDRO equal to fifty percent of Adam's IPERS pension earned or accumulated during the marriage up until the date of trial. *See id.* We otherwise find the district court's property distribution to be equitable and therefore affirm the remainder of the property distribution.

VII. Guardian ad Litem Fees

The district court ordered, "Adam shall pay the entire fee for the child custody evaluation . . . [and] Adam shall pay all remaining court costs." Laura asserts the district court erred by failing to specifically include the costs of the attorney/guardian ad litem as court costs. Iowa Code section 598.12(5) provides for the payment of an attorney/guardian ad litem and states, "The court shall enter an order in favor of the . . . guardian ad litem . . . for fees . . . and the amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent . . . ." In addition,

in the court's order for court-appointed custody evaluator, the court stated, "At the time of a decree in this matter, the costs of the evaluation will be assessed as court costs." We conclude guardian ad litem fees are included in "court costs."

We therefore modify the decree to provide that Adam shall pay all remaining court costs, including the fees of the guardian ad litem.

VIII. Attorney Fees

Laura asserts the district court erred in declining to award her attorney fees. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). Finding no abuse of discretion in the district court's decision not to award attorney fees, we affirm.

IX. Appellate Attorney Fees

Both parties request appellate attorney fees. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the 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 Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We decline to award either party appellate attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.