

IN THE COURT OF APPEALS OF IOWA

No. 2-302 / 11-1371
Filed June 13, 2012

**IN RE THE MARRIAGE OF
JOANN LEA DECOOK AND
GARY LEE DECOOK**

**Upon the Petition of
JOANN LEA DECOOK,**
Petitioner-Appellant,

**And Concerning
GARY LEE DECOOK,**
Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson,
Judge.

A wife appeals (A) the spousal support provision of a dissolution decree,
(B) the district court's imputation of income to her for purposes of calculating
child support, and (C) the district court's allocation of uncovered medical
expenses. **AFFIRMED AS MODIFIED.**

David D. Dixon of Heslinga, Dixon, Moore & Hite, Oskaloosa, for
appellant.

Greg A. Life of Life Law Office, Oskaloosa, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Joann DeCook appeals (A) the spousal support provision of a dissolution decree, (B) the district court's imputation of income to her for purposes of calculating child support, and (C) the district court's allocation of uncovered medical expenses.

I. Background Facts and Proceedings

Gary and Joann DeCook married in 1979 and divorced almost thirty-two years later. They had three children, one of whom was still a minor at the time of the divorce. The teen lived with Joann while the dissolution action was pending, and the parents agreed Joann would continue to serve as primary physical caretaker following the dissolution.

Gary was fifty-five years old at the time of trial, with a high school education. Gary had no health concerns. He had worked at a manufacturing plant for over eighteen years and, at the time of trial, was earning \$17.06 per hour. His hours varied, resulting in fluctuating earnings in the range of \$24,000 to \$51,000 annually during the previous five years.¹ Gary projected that he would earn between \$41,000 and \$44,000 in 2011, and the district court found he earned \$40,000 annually.

Joann was fifty years old at the time of trial and had a high school education with one year of post-high school cosmetology training. She held various jobs during the marriage, including a position at the plant where her husband worked and a position as secretary and bookkeeper at a seed company. The most she earned was \$11 per hour.

¹ This range does not include 2008, for which the parties lost their income tax returns.

In 2010, Joann left her job with the seed company after five years. Although there was some disagreement about her reason for leaving, Joann testified she could not handle the position any longer due to chronic back pain.

Joann sought and obtained various forms of treatment to manage the pain. She discontinued all treatment in April 2009, out of apparent frustration with conflicting medical diagnoses and a failure on the part of some health care professionals to take her complaints seriously. At the time of trial, she had also discontinued all medication, not because the pain had subsided but, again, out of apparent frustration.

Following trial of the dissolution action, the district court awarded Joann rehabilitative spousal support of \$300 per month until her now seventeen-year-old daughter graduated from high school or turned nineteen. The court also ordered Gary to pay Joann child support of \$550 per month, after imputing to Joann annual income of \$13,065. The court next required Gary to provide health insurance for the child, and required the parents to equally divide any uncovered medical expenses attributable to the child. The court divided the parties' minimal assets and ordered Gary to pay Joann \$28,617.50 as an equalization payment through a distribution of his 401(k) retirement plan. Joann appealed.

II. Analysis

A. Spousal Support

Spousal support or alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). This appeal raises a choice between traditional spousal support, payable for life or so long as a spouse is incapable of self-support, or

rehabilitative spousal support, payable through a limited period of reeducation or retraining. See *id.* at 540–41.

The district court acknowledged that “[s]pousal support is a difficult issue in this case.” In opting for rehabilitative spousal support, the court reasoned as follows:

[A]lthough Joann has significant back pain issues, she is not currently receiving medical attention for them, nor is she now medicated. At a minimum, Joann is capable of employment on a part-time basis and of being somewhat self-supporting. She is young enough to attempt to rehabilitate herself to obtain meaningful employment. In addition, she is receiving half of Gary’s 401K, which will assist her financially, at least in the short term.

Joann contends the court acted inequitably in declining to grant her traditional spousal support. She asserts her medical condition is permanent and any attempt at retraining or rehabilitation would yield few, if any, positive results. Our review of this issue is *de novo*. Iowa R. App. P. 6.907.

There is no question Joann experienced chronic back pain that restricted her ability to engage in full-time employment. Gary conceded as much, testifying her pain affected her ability to perform functions she used to perform. The real question is whether she could work on a part-time basis. The evidence on this question was mixed.

Joann testified it would be “awesome to have maybe a part time job eventually,” but stated she did not think she would be able to because of her ongoing back pain, the associated stress, and her inability to “multi-task anymore.” At the same time, Joann was only fifty years old and there was no evidence that her pain was so debilitating as to qualify her for social security disability or other permanent disability benefits.

That said, Joann only made about \$16,000 annually in her best years and, given her health issues, her earning capacity was unlikely to increase with retraining. In light of the difference in the spouses' earning capacities, the length of the marriage, and Joann's health problems, we conclude Joann was entitled to traditional spousal support. See Iowa Code § 598.21A(a), (b), (e) (2009) (setting forth the criteria for determining spousal support, including the length of the marriage, the age and health of the parties, and the earning capacity of the party seeking maintenance).

Next, we must determine the amount of support. Gary had net monthly income of \$1911.67, after deducting taxes, health insurance premiums of \$355.83, and certain other items. He also voluntarily assumed the \$140 per month uncovered cost of his daughter's medication and he had outstanding debts to pay, including a loan he obtained from his employer. Without Joann's income, the family home in which he was living with his adult son became the subject of foreclosure proceedings. In sum, with the child support payment, Gary had little cash to spare.

Gary's financial situation was nonetheless more stable than Joann's. She had no earnings and was living on food stamp payments, monthly child support, and the good graces of a cousin. The \$550 per month in child support together with \$300 per month in spousal support still left her with insufficient funds to make ends meet.

We conclude Joann should receive \$450 per month in traditional spousal support until Gary's child support obligation ends, at which time that sum shall increase to \$600 per month. This support payment shall terminate upon Joann's

remarriage; upon the death of either party; or when Joann turns sixty-five or begins to receive social security retirement benefits. If Joann receives social security disability benefits in the interim, Gary will be entitled to seek a modification of his spousal support obligation.

B. Child Support—Imputation of Income

Joann contends the court should not have imputed income to her in calculating child support. This issue is governed by Iowa Court Rule 9.11(4), which states:

The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

Although the district court did not explicitly make the findings prescribed by this rule, the court did explain why it was imputing income to Joann and how it arrived at the child support obligation:

The Court finds that Joann could work part time and earn at least \$10.00 per hour and that she should be imputed gross annual income of \$13,065, which results in net monthly income for guideline purposes of \$998.00. The Court finds that, although his income varies, Gary earns approximately \$40,000 per year. His net monthly income is \$2800. This results in child support obligation payable by Gary to Joann for [the minor child] in the amount of \$550.

Given the court's finding that Joann was at least able to work part time, we conclude substantial injustice would inure to Gary if income were not imputed to her. Accordingly, we affirm this aspect of the district court decree.

C. Uncovered Medical Expenses

Joann next argues the court should not have ordered the parties to split the cost of the minor child's uncovered medical expenses. On this issue, the district court stated:

Gary shall obtain and maintain health insurance to cover [the minor child] so long as he is required to pay child support for her. For any medical, dental, orthodontic, visual or other health/medical expenses of [the minor child] not covered by insurance, Joann and Gary shall each be responsible for and pay one-half.

Joann points to a rule contained within the child support guidelines that authorizes the division of uncovered medical expenses based on the parties' respective incomes. See Iowa Ct. R. 9.12(5). That rule states in pertinent part:

"Uncovered medical expenses" means all medical expenses for the child not paid by insurance. The custodial parent shall pay the first \$250 per year per child of uncovered medical expenses up to a maximum of \$800 per year for all children. Uncovered medical expenses in excess of \$250 per child or a maximum of \$800 per year for all children shall be paid by the parents in proportion to their respective net incomes.

We agree this rule governs the division of uncovered medical expenses.

Under the rule, Joann, as custodial parent of the child, is obligated to pay the first \$250 per year in uncovered medical expenses. Beyond that sum, the expenses are to be divided in proportion to the parents' incomes. The district court imputed to Joann annual income of \$13,065 and found Gary's income to be \$40,000 per year. Based on these figures, Joann is obligated to pay twenty-five percent of the child's uncovered medical expenses above \$250 annually, and Gary is obligated to pay seventy-five percent. We modify the decree to hold Joann responsible for the first \$250 of the child's uncovered medical expenses, including her prescription medication, and to prorate beyond the first \$250, as

prescribed, including a proration of the prescription medication expense Gary voluntarily assumed.

III. Appellate Attorney Fees

Finally, Joann contends she is entitled to appellate attorney fees of \$2500. “Appellate attorney fees are not a matter of right, but rather rest in this court’s discretion.” *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005).

Joann prevailed on the spousal support and uncovered medical expense issues. However, with the additional financial obligation placed on Gary, we are not convinced he is in a position to assume the responsibility for Joann’s appellate attorney fees. Accordingly, we order the parties to bear their own appellate attorney fees.

IV. Disposition

We affirm all aspects of the dissolution decree except the spousal support and uncovered medical expense provisions.

We modify the spousal support provision to provide that Gary shall pay Joann \$450 per month in traditional alimony until his child support obligation expires and then \$600 per month. This support payment shall terminate upon Joann’s remarriage; upon the death of either party; or when Joann turns sixty-five or begins to receive social security retirement benefits. If Joann receives social security disability benefits in the interim, Gary may seek a modification of the spousal support obligation.

We modify the uncovered medical expense provision to provide that Joann shall pay the first \$250 per year of uncovered medical expenses. For amounts above that figure, Joann shall be responsible for twenty-five percent of

the expenses and Gary shall be responsible for seventy-five percent of the expenses.

Costs on appeal are assessed to Gary.

AFFIRMED AS MODIFIED.