

**IN THE COURT OF APPEALS OF IOWA**

No. 2-346 / 11-1856  
Filed August 22, 2012

**IN RE THE MARRIAGE OF CASEY S. BILDEN  
AND DAWN M. HOLMES BILDEN,**

**Upon the Petition of**

**CASEY S. BILDEN,**  
Petitioner-Appellee/Cross-Appellant,

**And Concerning**

**DAWN M. HOLMES BILDEN,**  
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Linn County, Mitchell E. Turner,  
Judge.

Wife appeals and husband cross-appeals the provisions of the decree  
dissolving their marriage. **AFFIRMED AS MODIFIED.**

Frank J. Nidey of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar  
Rapids, for appellant.

Landon R. Dufoe of Thinnes & Dufoe Law Offices, Cedar Rapids, for  
appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

**MULLINS, J.**

Dawn Bilden appeals from the decree dissolving her marriage to Casey Bilden. Dawn argues the district court erred in the amount of visitation awarded to Casey, in the monthly amount of rehabilitative spousal support, in imputing income to her in determining the child support award, and in requiring her to refinance the marital home and pay Casey his equitable share. Casey cross-appeals arguing the district court erred by granting physical care of the children to Dawn and by granting rehabilitative alimony. We modify the provisions concerning the marital home and affirm on all other issues.

**I. Background Facts and Proceedings.**

Dawn and Casey married in May 1999. They had two sons during their marriage, Connor (born September 1999) and Walker (born December 2004). Dawn also has another son from a previous marriage, Keegan (born July 1996).

On October 13, 2009, Casey filed a petition for dissolution of marriage. In December 2009, a hearing on temporary matters was held and resulted in the district court awarding the parties joint legal custody with physical care of the children to Dawn and liberal visitation to Casey. Casey was also ordered to pay child support and certain other expenses. In addition, the district court recognized a “great deal of animosity” between Dawn and Casey and appointed a guardian ad litem to represent the children’s best interests. Trial was held August 15-17, 2011.

The parties stipulated that the home they had purchased in 2005 had a value of \$147,400 under a comparative market analysis performed by a local

realtor. The home is encumbered by a primary mortgage of \$116,860.15 and a second mortgage of \$12,888.88. At the time of trial, Dawn was living in the home with Connor and Walker, while Casey was renting a home. Casey testified that he planned on purchasing a new home when his lease expired in April.

At the time of trial, Casey was thirty-nine years old. He graduated from the University of Northern Iowa with a bachelor's degree in criminology and sociology, and joined the Cedar Rapids Police Department in July 1995. Although Casey initially worked as a patrol officer, in 2000 he became a certified K9 handler. In the fall of 2008, Casey became the first and only certified K9 trainer for the Cedar Rapids Police Department.

Historically, Casey worked night shifts, but in January 2011, he began working from 8:00 a.m. until 5:00 p.m. Monday through Thursday. However, on two Tuesday nights per month, Casey works until 8:00 p.m. fulfilling his additional K9 training responsibilities. In 2010, Casey earned a gross annual income of \$60,304. Casey received a small cost of living pay increase in July 2011, and the district court determined his gross annual income for 2011 was \$62,691.

Dawn was thirty-eight years old at the time of trial. She graduated from Mount Mercy College in 1995 with a Bachelor of Arts in psychology and sociology. Upon graduation, Dawn briefly worked as a telemarketer for MCI, as the summer school and tutoring director for the McLeod Academy, and as the director of an inpatient unit at Tanager Place. From October 1998 to October 1999, Dawn worked for Hawkeye Area Community Action Program, Inc., in their

Partnership for Safe Families program. She also worked for one-year at St. Luke's Hospital as the director of their Child Abuse Protection Center.

In December 2002, Dawn obtained her teaching degree from the University of Iowa and was licensed to teach in Iowa. From 2002 until 2004, Dawn worked as a substitute teacher in all grades and subject areas for several different schools within the Marion, Cedar Rapids, and Linn-Mar school districts. When Walker was born in 2004, Dawn discontinued her employment and became a stay-at-home mother.

In the fall of 2008, Dawn began working twenty hours a week as a teacher's aide at the Cedar Valley Montessori School (CVMS). The next year, Dawn was offered and accepted a position at CVMS as a lead teacher in the preschool room. Dawn worked 32.5 hours a week for thirty-two weeks a year earning \$23,500 per year plus a fifty percent tuition discount for Walker. In May 2010, CVMS terminated Dawn. CVMS contested Dawn's unemployment claim alleging she was terminated for misconduct based on several incidents of unprofessional behavior, but CVMS did not attend the agency's fact-finding interview. The agency determined that CVMS "did not furnish sufficient evidence to show misconduct" and awarded Dawn benefits. Dawn testified that she had fourteen weeks of unemployment benefits remaining at the time of trial.

Following her termination from CVMS, Dawn decided to return to school to become a nurse. Dawn became licensed as a certified nursing assistant in October 2010, and is currently working toward a registered nursing degree at Kirkwood Community College. Dawn has five more semesters to complete at

Kirkwood, and then she will have to attend one semester at the University of Iowa in order to obtain a Bachelor of Science in Nursing. Dawn is paying for her education with student loans. Dawn also testified that she is not current on her secondary teaching licensure, but could obtain it again by paying a fine.

Dawn has a history of mental health issues. She has been diagnosed with adjustment disorder and a general anxiety disorder with depressed mood. Dawn takes several medications for treatment. Although he had never met her children or observed her parenting abilities, Mr. Gooding, one of her therapists, testified that there is nothing about Dawn's mental health condition that would preclude her from being an effective parent.

The contentious nature of the divorce proceedings resulted in Connor attending counseling sessions. Nonetheless, the evidence shows that Connor and Walker are doing well in school and overall in handling these "contentious" proceedings.

Dawn has two convictions for simple misdemeanor shoplifting charges arising out of events when the children were not present. She also entered an *Alford*<sup>1</sup> plea to stealing funds from the Cedar Rapids Police Department during a fundraising drive that she had helped set up as a part of the Cedar Rapids Women's Auxiliary (an organization consisting of police officers wives) in order to help purchase first aid kits and vests for the dogs in the K9 unit.

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<sup>1</sup> An *Alford plea* is one in which the defendant "voluntarily, knowingly, and understandingly consents to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Casey also presented substantial evidence that Dawn is in a relationship with a twenty-two-year-old, named Adam Thompson. Although Dawn testified that Adam was just “one of [her] best friends,” the testimony of Casey, one of Dawn’s old friends, a neighbor, and Adam’s mother all countered her testimony. Substantial evidence supports the district court’s determination that:

Dawn’s contention that [Adam] continues to be just a platonic family friend can only be countenanced in the “nod nod wink wink” category. . . . [I]t is Dawn’s dogged refusal to acknowledge that this December-May relationship exists, even in the presence of overwhelming evidence, which causes the Court to seriously question Dawn’s judgment and her overall credibility.

The district court entered its decree on October 31, 2011. The district court determined the parties should have joint legal custody of the children, Dawn should be the physical custodian with liberal visitation to Casey, Dawn should be imputed income for the purposes of calculating child support, she should receive rehabilitative spousal support, and she should be awarded the family home. But she was required to refinance the home within ninety days or sell the home in order to pay Casey his equity. The court’s decree contained other provisions from which no appeals were taken.

As set forth below, Dawn has appealed and Casey has cross-appealed the decree.

## **II. Standard of Review.**

We review marriage dissolution decrees de novo, and decide the issues raised on appeal anew. *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). While we must rely on the printed record in evaluating the evidence, the district court has the advantage of also observing firsthand the witnesses’

appearance, conduct, and demeanor. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). Accordingly, we give weight to the district court's factual findings, especially with respect to the credibility of the witnesses. *Fennelly*, 737 N.W.2d at 100.

### **III. Physical Care of the Children.**

Both parties challenge the physical care determination of the district court. Casey contends the district court erred in awarding physical care of the children to Dawn, while Dawn contends the district court awarded Casey too much visitation.

In making physical care determinations, the children's best interests are the overriding consideration. *Id.* at 101. The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2009), as well as other nonexclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Hansen*, 733 N.W.2d 683, 699 (Iowa 2007).

The district court trial lasted three days, during which the court heard the testimony of the parties and others, and observed the demeanor of the parties. The court made extensive findings of fact, and while many findings were critical of various decisions and circumstances in Dawn's life, the court specifically found

she had been the children's primary caregiver and the children are doing well, even in the midst of the strife of the current litigation. After reciting that the question of who should have primary care was "a very close question," the court concluded: "Based on the evidence as a whole, the Court finds that the parties should be granted joint legal custody, and the children's primary residence should continue to be placed with Dawn, subject to liberal and extensive periods of custodial access being granted to Casey." The visitation schedule included every other weekend from Thursday evening to Sunday evening, every Tuesday overnight, equal division of summer vacation from school, and equal division of holidays. The court clearly wanted to assure substantial involvement of Casey in the lives of the children.

After our de novo review of the evidence and giving deference to the credibility findings of the district court, we affirm the decisions of the district court as to custodial and visitation arrangements.

#### **IV. Child Support.**

Dawn next argues the district court erred in imputing income to her in calculating Casey's child support obligation.

"When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). But before the court utilizes earning capacity rather than actual earnings, a finding must be made that, if actual earnings were used, substantial injustice would occur or adjustments would be

necessary to provide for the needs of the child and to do justice between the parties. *Id.*; see also Iowa Ct. R. 9.11(4). In making this determination, we examine the employment history, present earnings, and reasons for failing to work a regular work week. *Nelson*, 570 N.W.2d at 106.

Although Dawn has good reasons for going back to school to become a nurse, that decision nonetheless has a corresponding consequence of voluntarily reducing her income. The district court correctly analyzed this issue and made a conclusion that is in keeping with the Iowa Child Support Guidelines. We affirm on this issue.

#### **V. Spousal Support.**

Both parties also challenge the district court's determination awarding Dawn spousal support in the amount of \$250 per month for forty-eight consecutive months. Casey argues a spousal support award was not appropriate under the facts of this case; while Dawn disputes the amount, contending she should have been awarded \$750 per month in spousal support.

Spousal support is not an absolute right but depends upon the particular facts and circumstances of each case. *Hansen*, 733 N.W.2d at 704. The factors to be considered by a court when determining whether a spousal support award should be made are set forth under Iowa Code section 598.21A(1). These factors include:

- a. The length of the marriage.
- b. The age and physical and emotional health of the parties.
- c. The distribution of property made pursuant to section 598.21.
- d. The educational level of each party at the time of marriage and at the time the action is commenced.

- e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
- g. The tax consequences to each party.
- h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
- i. The provisions of an antenuptial agreement.
- j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1). Although our review is de novo, we give the district court considerable latitude in determining whether to award spousal support based upon the statutory factors. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). “We will disturb that determination only when there has been a failure to do equity.” *Id.*

At first glance it may seem unusual to impute income to Dawn for purposes of child support calculations, which reduces Casey’s child support obligation payable to her, but then require him to pay her spousal support, effectively mitigating the child support result. On closer examination, however, the result is appropriate. As explained above, the child support calculation follows the law. Here, the modest rehabilitative spousal support is appropriate in order to assist Dawn to become educated and trained for a career that has a greater likelihood of helping her be self-sufficient and better able to assist in the support of the children. We affirm the district court on this issue.

**VI. Marital Home.**

“The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of the children, or if the parties have joint legal custody, to the party having physical care of the children” is a factor to consider in making a property award. Iowa Code § 598.21(5)(g). “[P]rovisions which allow the primary physical care parent to remain in the family home are primarily made to provide stability for the children; the economic benefit to the parent is ancillary.” *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999).

The district court awarded to Dawn the marital home valued at \$147,400 and the mortgages totaling about \$129,750. It also ordered a judgment to be entered against Dawn and in favor of Casey in the amount of \$8825.48, representing his half of the equity in the home, payable on the earlier of the sale of the home or November 1, 2015. The court further ordered that Dawn refinance the home within ninety days to remove Casey’s name from the mortgages or immediately list the home for sale for no more than \$147,400 and to then pay to Casey the first \$8825.48 of the net proceeds. The decree provided that the judgment shall accrue interest at the rate of six percent per annum from the date of the decree.

It is undisputed that at the time of trial Dawn was unemployed with no present source of income other than fourteen weeks of remaining unemployment benefits and the child support and spousal support payable to her by Casey as ordered by the court. Even though she is employable, the trial court correctly

considered the fact that she is a student seeking a degree that should result in better, long-term financial security for her. We find the district court correctly awarded to Dawn the family home so that she can fulfill her responsibilities as the parent having been awarded physical care of the children.

Although promptly severing financial ties between the parties is a worthwhile goal, under the facts of this case, the requirement that Dawn refinance the home within ninety days is not realistic. Given her financial circumstances, it is exceedingly unlikely that a lender will refinance nearly \$130,000 in mortgages on a home that has a value of \$147,400, with an unemployed borrower. The alternative that the court provided is for Dawn to sell the home and pay to Casey the first \$8825.48 from a maximum sale price of the house of \$147,400. This alternative negates the idea that Dawn should have possession of the family home for the benefit of the children and provides no consideration for realtor fees and other costs of sale. It would seem that under this alternative, the sale of the home would leave Dawn in a deficit, forcing her to pay money out of her pocket just to accomplish the sale. Neither of these alternatives is in keeping with the goals and objectives that were sought to be attained by the other provisions of the decree.

We hereby modify the decree as follows: the deadline for Dawn to refinance the mortgages is changed from ninety days to November 1, 2015; the deadline for Casey to execute and deliver to Dawn a quitclaim deed is extended to the date she refinances the mortgages to remove him from the obligations; the judgment interest on Casey's share of the equity shall not begin to accrue until

November 1, 2015; and Dawn is not required to sell the home at any time, but if she sells the home, she is not limited as to the sale price. Other provisions relating to the real estate not expressly modified herein remain in effect.

**VII. Appellate Attorney Fees.**

Both parties also request an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within our court's sound discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). When making our determination, we look to the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Applying these considerations, we find an award of appellate attorney fees to either party to be inappropriate.

The costs of this appeal are assessed one-half to each party.

**VIII. Conclusion.**

The provisions relating to the award of the marital home are modified as set forth above. All remaining provisions of the decree are affirmed.

**AFFIRMED AS MODIFIED.**