IN THE COURT OF APPEALS OF IOWA

No. 2-347 / 11-1903
Filed July 11, 2012

**IN RE THE MARRIAGE OF ANGIE JO TERRY
AND TROY D. TERRY**

Upon the Petition of

ANGIE JO TERRY,
Petitioner-Appellee,

And Concerning

TROY D. TERRY,
Respondent-Appellant.

Appeal from the Iowa District Court for Montgomery County, J. C. Irvin, Judge.

Troy Terry appeals the decree dissolving his marriage to Angie Terry. **AFFIRMED AS MODIFIED AND REMANDED.**

Drew H. Kouris, Council Bluffs, for appellant.

Norman L. Springer, Jr. of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellee.

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

MULLINS, J.

Troy Terry appeals the decree dissolving his marriage to Angie Terry, arguing the district court erred by: (1) not granting the parties joint physical care of their minor child, (2) considering his overtime in setting his child support obligation, (3) granting Angie a portion of his retirement savings plan, (4) granting Angie trial attorney's fees, (5) awarding Angie alimony, and (6) ordering him to pay Angie $4000 as part of the court's distribution of assets. Troy also contests Angie's request for appellate attorney's fees. For the reasons stated below, we affirm as modified and remand.

I. Background Facts and Proceedings

Troy and Angie were married in May 2006. They had one minor child together during their marriage, Jaxon, born March 2007. Angie's son Alec also lived with Angie and Troy for the duration of their marriage and had a close relationship with Jaxon. Due to the large number of overtime hours Troy worked, Angie was the primary caretaker of Jaxon throughout the marriage. At the time of the trial, Angie was thirty-two and living in the marital home in Red Oak, Iowa, with both Jaxon and Alec, ages four and eight, respectively. Troy was forty-one and living with his father, also in Red Oak, Iowa.

The parties' marriage experienced problems from the very beginning. Angie and Troy underwent two separations totaling nearly a year and a half during less than five years of marriage. During each separation Angie provided primary care for Jaxon. Even when they were living together, both parties described their marriage relationship as "on again, off again." Angie also testified

that there were occasions when Troy would become physical with her, resulting in a split and bleeding lip in one incident. The police were not called in connection with any incidents prior to January 14, 2011. On that date, Troy and Angie engaged in an argument, during which Troy verbally abused both Angie and Alec. Angie called her sister and brother-in-law to come assist her in talking with Troy. When they arrived, Troy brandished a shotgun to intimidate them, and he engaged in a "shoving fight" with Angie's brother-in-law. All of this occurred within earshot of Jaxon and Alec. Meanwhile, Angie's sister called the police to intervene. Troy was charged with and later pleaded guilty to two counts of assault, and was fined and ordered to complete anger management classes. Angie obtained a no-contact order against Troy, effective until March 2012.

Throughout their marriage, Angie was employed as a cook at a daycare, and earned $12,337 in 2010. Troy was employed as a wire-winder at a factory, and earned $89,824 in 2010. In order to earn this level of income Troy averaged 37 hours a week in overtime over the course of 2010. In 2009 Troy earned $63,550, and in 2008 he earned $53,990. His base salary with a 40 hour work-week was approximately $38,000. At the time of trial, Troy continued to work large amounts of overtime hours, and the trial court found that his annual earnings were $89,800.

Angie filed her petition for dissolution of marriage on February 10, 2011. A temporary order awarded Angie physical care, granted Troy supervised visitation with Jaxon, and ordered Troy to pay child support. The case was tried in June 2011, and a decree of dissolution of marriage was entered on August 17,

2011. In the decree of dissolution issued by the district court, Angie was awarded the marital home with little or no equity, a 2011 Chevy Malibu with a negative net value of $4755, and a camper with a net value of $728. Troy was awarded his 2005 Chevy Silverado worth $5090. The court awarded Angie a $4000 equalization payment to offset the value of the property awarded to Troy. Troy had a retirement savings plan, to which he had not contributed during the marriage, but which had appreciated during the course of marriage. The court awarded Angie half of the increased value of the retirement savings plan. Troy was also ordered to pay child support in the amount of $839 per month for Jaxon, as well as alimony to Angie in the amount of $250 a month for 36 months. After the court ruled on post-trial motions, Troy timely filed a notice of appeal.

II. Standard of Review

Dissolution decrees are equitable proceedings, so we review de novo. *In re Marriage of Shanks*, 805 N.W.2d 175, 177 (Iowa Ct. App. 2011). While not bound by them, we give weight to the district court's findings of fact, especially regarding the credibility of witnesses. *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We review a district court's award of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Physical Care

In matters of child custody, the first and governing consideration of the court is the best interest of the child. Iowa R. App. P. 6.904(3)(o). The Iowa Code provides a nonexclusive list of factors to be considered in determining a custodial arrangement that is in the best interest of a child. Iowa Code §

598.41(3) (2011); *In re Marriage of Hansen,* 733 N.W.2d 683, 696 (Iowa 2007). Four additional non-exclusive factors are to be considered in awarding joint physical care. *Hansen*, 733 N.W.2d at 697. If the trial court denies a request for joint physical care, it is required to make "specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child." Iowa Code § 598.41(5)(a).

The first of the *Hansen* factors is the approximation principle, or "the general rule that custodial responsibility should be allocated 'so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation.'" *Hansen.* 733 N.W.2d at 697 (citations omitted). The second factor is the ability of the spouses to communicate and demonstrate mutual respect. *Id*. at 698. Third, we consider the degree of conflict between the parents, as joint parenting requires significant ongoing interaction between the parties. *Id*. Fourth and finally, we consider the degree to which parents agree on a general approach to daily matters. *Id*.

Angie was the primary physical caretaker of Jaxon for the duration of the marriage. Troy asserts that he shared in the caretaking duties and contributed to caring for all of Jaxon's needs, but admits that he was often absent due to his long hours of work, leaving Angie to provide the majority of Jaxon's care. Therefore, the approximation test favors granting sole physical care to Angie.

Further, the record raises serious doubts about Troy and Angie's ability to communicate effectively. From the very beginning of their marriage, Troy and

Angie have experienced breakdowns in communication severe enough to lead to two extended periods of separation. The communication difficulties culminated in the argument on January 14, 2011, resulting in a no-contact order. While the no-contact order expired in March of 2012, the events leading to it establish a long pattern of failures in communication between Angie and Troy. Troy argues that the parties are able to communicate in matters concerning Jaxon, and cites two specific recent instances of successful communication—filing a joint tax return and Angie's arrangement of an early pick-up of Jaxon from his supervised visitation with Troy. Both of these events necessarily involved contact through intermediaries because the no-contact order was in place. There is no evidence indicating the parties can communicate effectively in person.

The conflict between Angie and Troy involved both verbal and physical altercations, summarized above. Domestic abuse, as defined in Iowa Code Section 236.2, is an important factor to consider in determining whether to award joint physical care. Iowa Code § 598.41(3)(j). The no-contact order is evidence of the significant degree of conflict and abuse in Troy and Angie's relationship. The trial court was not convinced that the mere expiration of the no-contact order would reduce or eliminate the conflict between the parties, and neither are we.

There is some testimony that Angie and Troy shared common methods of discipline, but the record contains little other evidence regarding the compatibility of Troy and Angie's approach to the daily matters of parenting.

Troy produced a number of witnesses at trial who testified that he is a good father and that it is in Jaxon's best interest for Troy to share joint physical

care. We give considerable weight to the sound judgment of the trial judge who had the benefit of hearing their testimony firsthand and did not weigh it heavily in his decision. *In re Marriage of Vrban*, 359 N.W.2d 420, 423–24 (Iowa 1984).

Angie has been the primary caretaker, and the record shows long-term communication problems between the parents and a history of domestic abuse that would be substantial obstacles to a joint physical care arrangement. Based on our de novo review of the evidence and upon consideration of the statutory and non-statutory factors governing joint physical care determinations, we find that Jaxon's best interests are served by his being in the physical care of Angie. Accordingly, we affirm the order of the district court awarding Angie physical care.

IV. Child Support

Troy claims that the district court improperly considered his overtime income in calculating his child support obligations. Ordinarily, overtime wages are included in gross income used in calculating net monthly income for child support purposes, unless they are "an anomaly or uncertain or speculative." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005). However, a court need not adhere strictly to the guidelines regarding overtime pay if doing so results in injustice between the parties. *Id., see also* Iowa Ct. R. 9.11. "Income, for purposes of guidelines, need not be guaranteed. History over recent years is the best test of whether such a payment is expected or speculative." *Seymour v. Hunter*, 603 N.W.2d 625, 626 (Iowa 1999). A parent's child support obligation should not be so burdensome that they are required to

work overtime to satisfy it. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). "Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over a reasonable period when determining the current monthly income." *In re Marriage of Powell*, 474 N.W.2d 531, 533–34 (Iowa 1991).

The record shows that during 2010, Troy averaged 37 hours a week in overtime. His pay stubs through the time of trial in 2011 continue to show overtime regularly exceeding thirty hours in a single week. He argues both that he physically cannot keep up that level of work and that he no longer wishes to work such long hours. Troy argues that he only worked such long overtime hours to support his family; however, we find he worked overtime prior to his marriage and continued to work long hours up to the time of trial. Troy also testified that some of the overtime was mandatory, with three out of four Saturdays including at least some mandated overtime. At the time of trial, Troy claimed he would only make his base income of $38,000 in the future, but he had already earned more than $37,000 through May 19, 2011. The district court therefore found his claimed income "difficult to believe" and determined his expected annual earnings to be $89,800. We agree with the district court finding that Troy is likely to continue to work substantial overtime hours, especially where some portion of his overtime work is mandatory. We also defer to the district court's credibility finding that Troy's claim he will reduce his work week to forty hours is unpersuasive.

We must, however, carefully consider all of the circumstances relating to a parent's income. *Powell*, 474 N.W.2d at 534. Troy's base income has been stable, but his overtime, and therefore his total income, has fluctuated over the last several years. While it is all but certain that Troy will work some amount of future overtime, we find that it is too burdensome to set Troy's child support based on an expectation that he work approximately 80 hours per week. Mandating such long work weeks would then *require* that he continue to work such hours in order to satisfy his obligations. Over the long haul this would work an injustice to both Troy and Jaxon, and perhaps even Angie by negatively impacting reasonable opportunities for visitation time between Troy and Jaxon.

Based on this unique set of facts, we find that justice can best be served by calculating Troy's child support obligation based on an average of his last three years of gross income. We therefore remand this issue to the district court to re-calculate Troy's child support obligation.

V. Division of Retirement Savings Account

Troy claims the district court erred in granting Angie 50% of the appreciated value of his retirement savings plan. In dividing marital assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The factors to be considered in making this determination are listed in Iowa Code section 598.21, including the length of marriage, the earning capacity of the parties, the contribution of each party to the marriage, and property brought by each party into the marriage. A premarital asset is not necessarily

separated from the divisible estate and is not automatically awarded to the spouse that previously owned it. *Sullins*, 715 N.W.2d at 247. In dividing appreciation of premarital property, it does not matter whether the property has appreciated fortuitously or by the efforts of the parties. *Fennelly*, 737 N.W.2d at 104. Everything owned by the parties is subject to division except gifts and inheritances, regardless of a distinction between "marital" or "pre-marital" property. *Id*. In considering the economic provisions in a dissolution decree, we will disturb a district court's ruling "only when there has been a failure to do equity." *In re Marriage of Smith*, 573 N.W.2d, 924, 926 (Iowa 1998) (citations omitted).

It is undisputed that Troy did not contribute to his retirement savings plan during the marriage. At the beginning of their marriage, the savings plan had a value of $58,253, less an outstanding loan of $5246.52, for a net value of $53,006.48. At the end of their marriage, it had appreciated in value to $92,684.90, less an outstanding loan of $8309.48, for a net value of $84,375.42. The district court awarded half of the increased value to Angie. The net increase in value is $31,368.94, of which Angie is entitled to half, or $15,684.47. Angie does not request an award of half the total value of the savings plan, only half of the appreciated value. Under the facts and circumstances of this case, we see no compelling reason to disturb the reasoning of the district court in dividing what is clearly a marital asset. To the extent that this opinion varies from the formula articulated by the district court in its post-trial order, we affirm as modified.

VI. Alimony

Alimony is not an absolute right; instead the facts and circumstances of each case are analyzed to determine whether an award is appropriate. *Shanks*, 805 N.W.2d at 178. In deciding whether to award alimony, the court must consider the earning capacity of the parties, the present standard of living, and the payor's ability to pay balanced against the needs of the recipient spouse. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App.1996). While our review is de novo, we will disturb the district court's ruling only when there has been a failure to do equity. *In re Marriage of Okland*, 699 N.W.2d 260, 263 (Iowa 2005).

The factors to be considered in making an award of alimony are contained in Iowa Code section 598.21A. Factors of particular importance in this case include the length of the marriage, the distribution of property, the earning capacity of the parties, and the feasibility of the party seeking maintenance becoming self-supporting at a standard of living comparable to that enjoyed during marriage. Angie estimates her monthly expenses at $2284 and her total income with child support at $1708.41. The district court properly considered all of these factors in deciding to make the award of $250 a month for thirty-six months. We find the award equitable under the facts and circumstances of this case and affirm this provision.

VII. Property Equalization Payment

As discussed above in the issue of the division of Troy's retirement savings account, economic distribution in a marriage dissolution is very fact

specific, and the court strives to make a division of assets and debts that is fair and equitable under the circumstances. *Russell*, 473 N.W.2d at 246. Prior cases have very little precedential value, and each case must be decided on its own particular facts. *Vrban*, 359 N.W.2d at 422.

According to the valuation of assets in the district court's decree, Angie was awarded assets with a negative net value of $4027, and Troy awarded assets with a net value of $5090. Troy argues that the district court erred in awarding Angie a $4000 equalization payment because he took loans to pay for household goods during the marriage. Any loans he took were marital obligations and were paid with marital funds, and all remaining debt was considered by the district court. He also contends that since Angie is receiving the majority of household goods, no equalization payment should be made. However, the record shows that neither Angie nor Troy assigned a value to these household goods at the time of the trial. Troy's reply brief mentions TVs, furniture, and a dryer specifically as being given a value by Angie. However, the dryer mentioned had an encumbrance of its entire value, and Troy received every TV and most of the furniture he requested in the dissolution order. We find the district court properly divided every asset that was given a value by the parties and ordered an equitable equalization payment based on the facts and circumstances of this case.

VIII. Attorney's Fees

Troy also argues that the court erred in awarding $1000 in trial attorney's fees to Angie. An award of attorney fees, or denial of such a request, lies in the

discretion of the trial court. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App.1997). The decision should be based on the abilities of the parties to pay and the reasonableness of the fees. *Sullins*, 715 N.W.2d at 255.

At the time of trial, Angie owed approximately $3700 in attorney's fees. In its dissolution decree, the district court noted the large discrepancy in income between Angie and Troy and stated that Angie demonstrated a need for assistance. We find that the trial court did not abuse its discretion in awarding Angie attorney's fees.

Angie requests appellate attorney's fees in the amount of $5000. An award of appellate attorney's fees rests in our discretion. *Applegate*, 567 N.W.2d at 675. "[W]e consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal." *Id*. Given the circumstances of this case, we believe that an appellate attorney fee award to Angie of $2500 is equitable, and assess the costs of this appeal to Troy.

IX. Conclusion

We find that the district court properly awarded Angie physical care. Because Troy's income fluctuates and child support was calculated based on a large amount of overtime income, we remand to recalculate his income for the purposes of computing child support based on a three-year average. We also find the district court did not err in dividing Troy's savings account, ordering short-term alimony, or requiring an equalization payment.

AFFIRMED AS MODIFIED AND REMANDED.