IN THE COURT OF APPEALS OF IOWA

No. 3-1074 / 13-0861
Filed January 9, 2014

IN RE THE MARRIAGE OF ROLAND STEPHENS AND LAURIE STEPHENS

Upon the Petition of
ROLAND STEPHENS,
Petitioner-Appellant/Cross-Appellee,

And Concerning
LAURIE STEPHENS,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, Judge.

A husband appeals the custody and child support provisions of the district court's dissolution decree. The wife cross-appeals the denial of spousal support and other economic provisions of the decree. Both parties request appellate attorney fees. **AFFIRMED AS MODIFIED.**

Jamie E. Kinkaid of Cordell Law, L.L.P., Omaha, Nebraska, for appellant.

Suellen Overton, Council Bluffs, for appellee.

Heard by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

Roland Stephens appeals the district court's ruling granting physical care of the parties' minor child to her mother, Laurie Stephens. He also appeals the court's calculation of child support, challenging the amount of income attributed to each party. Laurie Stephens cross-appeals the district court's ruling. She maintains the court's property division and distribution of marital assets was inequitable. She also maintains the denial of spousal support was inequitable. Both parties request appellate attorney fees. Upon our de novo review, we conclude Laurie should not be obligated to reimburse Roland for his $85,000 premarital investment in the family residence because more monies were invested in the residence than it is currently worth. We find no merit to the remaining issues and award attorney fees to Laurie. We affirm as modified.

I. Background Facts and Proceedings.

This was a short-term marriage. Roland and Laurie were married in August 2008. Roland filed a petition for dissolution on December 30, 2011. The parties had one child, a daughter, born in June 2011.

At the time of trial, Laurie was forty-five years old. She worked about thirty hours per work as a bookkeeper for her father's business and earned approximately $30,000 annually. Before the parties' daughter was born, Laurie had worked for the United States Department of Justice in Omaha, Nebraska, as a legal assistant. She earned $36,000 and received full benefits. During the marriage, she completed a bachelor's degree in computer information systems but never sought employment in the field. Although Laurie was in good health

and was capable of working fulltime, after the birth of the parties' daughter, she chose to work for her father as she could care for the parties' daughter while she worked from home.

Laurie brought school loan debt of $33,000 into the marriage as well as premarital credit card debt in the amount of $20,000. During the marriage, Roland paid off her credit card debt and paid $10,000 for her to complete her bachelor's degree. At the time of trial, Laurie's school loan debt had been reduced to $27,000. Laurie was also able to contribute $76,480 to her 401(k) retirement account during the marriage.

At the time of trial, Roland was also forty-five years old. He was the co-owner of a technology consulting business, QA Technologies, with the primary office in Omaha, Nebraska. Roland testified he and his business partner started the business in 1995. Both he and his partner received a base salary, and any profits were paid to them in dividends. In 2011, QA Technologies' gross receipts were approximately $6.5 million. That same year, Roland received a salary of $119,231 and a dividend of $331,600. Between 2008 and 2011, Roland's salary decreased but his dividends increased.

In the decree dissolving the parties' marriage, the court awarded Roland and Laurie joint legal custody and Laurie physical care of their minor daughter. The court imputed an income of $36,000 annually to Laurie. The court used the income Roland reported on his child support guideline sheet, $345,727, to

determine his annual income and set his child support obligation at $1443 per month.[1]

Regarding the property of the parties, the district court awarded Roland an $800 laptop his business had purchased and a tractor, valued at $16,000, which he had primarily paid for and used. The court awarded Laurie the parties' Toyota Rav 4, which Roland had made the down payment on before they wed. The court valued the vehicle at $18,000. Roland had purchased the marital home from Laurie's father for $85,000 prior to the marriage and obtained a $236,000 mortgage for renovation of the home, $220,000 of which still existed at the time of the dissolution proceedings. The court awarded Laurie the marital residence, subject to any indebtedness, including Roland's initial investment of $85,000. The court ordered:

> Within 90 days of this decree, Laurie shall refinance the residence to remove Roland Stephens from any responsibility or liability for the home. If Laurie is not able to refinance the home within 90 days, then it shall be auctioned at a public auction. Roland shall be entitled to the first $305,000 in proceeds from the auction, after deducting costs of the auction. If the auction does not generate more than $305,000 after deducting costs of the auction, Roland shall have a lien against the home for any shortage.

Roland was awarded "all right, title, and interest in the stock of QA Technologies, Inc., or any of its subsidiaries, holding companies, assets, and properties of any kind, free of claim by Laurie Stephens." Finally, the parties were ordered to divide any remaining household contents equitably and fairly between them.

---

[1] Laurie believes Roland's income is much higher, but she has not cross-appealed this issue.

Despite requesting otherwise, Laurie was not awarded spousal support and both parties were ordered to pay their own attorney fees.

The matter came before the district court for final hearing on December 28, 2012, and March 1, 2013. Following the December hearing but before a final order was entered in the matter, Laurie instigated a drunken confrontation with Roland that resulted in her being charged with serious misdemeanor domestic abuse assault. Additionally, Roland obtained a temporary domestic abuse protective order that was still in place at the time of the consolidated dissolution proceeding. Roland filed to reopen the record on January 30, 2013, and included an affidavit outlining the confrontation. The district court heard testimony on the reopened record on March 1, 2013. Notwithstanding the additional evidence, the court denied any change of physical care because of Laurie's history of caretaking the child.

Roland appeals the district court's ruling granting physical care of the parties' daughter to Laurie. He also appeals the court's calculation of child support. Laurie cross-appeals both the court's distribution of marital assets and denial of spousal support. Both parties request appellate attorney fees.

II. Standard of Review.

We review equity proceedings de novo. *In re Marriage of Olson*, 705 N.W.2d 312, 313 (Iowa 2005). We give weight to the district court's findings, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). "Precedent is of little value as our determination must

depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Discussion.

A. Physical Care.

On appeal, Roland contends the district court erred by awarding Laurie physical care of the parties' daughter. Roland maintains he should have received physical care of the child, or, in the alternative, the parties should be given joint physical care.

"Our first and foremost consideration in determining custody is the best interest of the child involved." *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *see* Iowa Code § 598.41(3) (2011) (listing factors relevant to determining what custody arrangement is in the child's best interests). In deciding whether joint physical care is appropriate, we consider four nonexclusive factors: (1) the stability and continuity of caregiving for the children; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree in which parents are in general agreement about their approach to daily matters. *In re Marriage of Hansen*, 733 N.W.2d 683, 696-700 (Iowa 2007).

Although both parents are suitable custodians, we do not believe joint physical care is appropriate. The parties did share temporary physical care of their daughter during the dissolution proceedings, but they exhibited such difficulty communicating the court had to get involved to outline each party's parental rights even while they shared the same home. Also, the record

demonstrates a history of tension and conflict between the parties. This culminated with the physical confrontation between Laurie and Roland that led to the court entering a temporary protective order. Thus, we must decide which parent should be awarded physical care of the parties' daughter.

As noted, in determining which caregiver should be awarded physical care, our principle consideration is the best interests of the child. *See* Iowa R. App. P. 6.904(3)(o); *Hansen*, 733 N.W.2d at 695. We use the factors enumerated in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), to determine which of the two parents is most likely to provide an environment that brings the child to health, both physically and mentally, and to social maturity. *See Hansen*, 733 N.W.2d at 695–96. In making our determination, gender is irrelevant, and neither parent has a "greater burden than the other in attempting to gain custody." *In re Marriage of Bowen,* 219 N.W.2d 683, 689 (Iowa 1974).

We believe Laurie was properly awarded physical care of the parties' daughter. As the district court did, we acknowledge Laurie admitted there have been episodes when she drank too much, mostly before the birth of the parties' daughter, although the January 2013 confrontation between her and Roland was also the result of excessive drinking. Importantly, there was no testimony or claim from either party that Laurie has ever drunk in excess while caring for the parties' child. Furthermore, Laurie completed a substance abuse assessment, and her evaluator did not find she met the diagnostic criteria for a substance dependence disorder. We also acknowledge the district court's finding that

Laurie "was the primary aggressor" who "assaulted Rol[and]" in the January 2013 confrontation and note she was ultimately charged with serious misdemeanor domestic abuse assault. Like the district court, we believe Laurie's assault of Roland "was the culmination of the parties' very stressful year of sharing the same residence while pursuing their divorce," and we do not find it likely another physical altercation will take place in the future.

Roland relied upon Laurie to be the primary caregiver for the parties' daughter since birth except for the period of temporary physical care during these proceedings. We acknowledge Roland has taken on more responsibility and a more active role since the couple separated, but Laurie has still been responsible for caring for their child during each workday. Roland also acknowledged that Laurie was a good mother. Another factor supporting the award of physical care to Laurie, the district court noted Laurie's "sincere commitment" to allow Roland and their daughter "to have a strong relationship." *See* Iowa Code § 598.41(5)(b). Even though we are not bound by them, we give weight to the trial court's findings. Iowa R. App. P. 6.904(3)(g).

As noted, the court considers the following factors in determining whether to grant joint physical care: (1) the historical care giving arrangement for the children between the parents; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the spouses, and (4) the degree to which the parents are in general agreement about their approach to parenting. *Hansen*, 733 N.W.2d at 697–99; *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). To date, the parties have not developed the

type of working relationship necessary to share physical care, although we acknowledge Laurie has created some of the difficulties.

For the foregoing reasons, we conclude awarding Laurie physical care of the parties' daughter is in the child's best interests.

B. Child Support.

On appeal, Roland challenges the district court's calculation of child support. Specifically, he maintains that both his and Laurie's incomes were improperly calculated. Roland argues the court should impute a larger income for Laurie based on her education. He also argues the court should have averaged his income and dividends for each year from 2008 to 2011 to determine the appropriate annual wage.

Laurie testified she earns approximately $30,000 annually working thirty hours per week for her father. The district court found she was healthy and able to work forty hours a week, and, noting her previous position earned $36,000 annually, imputed that income to her. *See In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) ("One of the factors we consider in determining if we will use a parent's earning capacity, rather than a parent's actual earnings, in order to the meet the needs of the children and to do justice between the parties is whether the parent's inability to earn a greater income is self-inflicted or voluntary."). Roland contends, as he did at trial, that a yearly income of $62,309 should be imputed to Laurie based upon her recent completion of her computer information systems degree. Roland contends this is the appropriate amount for an entry-level position in the field, but he relies solely on his testimony stating it is

so. No evidence was presented concerning the availability of such positions or the accompanying wage. We believe $36,000 was the appropriate amount of income to impute to Laurie. *See id*. (finding a parent's previous salary should be used because "there was no indication that he could not have continued" in the position).

In the district court's order dissolving the parties' marriage, the court determined Roland's gross annual income was $345,727. In his application to enlarge or amend the trial court's findings of facts or conclusions of law, Roland noted the court had come to this amount by using the highest net wage he had received in the preceding four years. Roland argued, pursuant to *In re Marriage of Robins*, 510 N.W.2d 844, 846 (Iowa 1994), the court should average his income during the same time frame instead. In the responding order, the court stated it had considered averaging his income but, because of the general increase in dividends each year, determined his 2011 wage was a "better measure of Roland's current earnings for child support purposes." However, Roland reported his gross annual income on his child support guideline worksheet to be the figure the court used, $345,727.

We agree with Roland that consideration should be given to averaging his income over a reasonable period.[2] *Robins*, 510 N.W.2d at 846 ("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."). Although the amount of dividends Roland has received

[2] Roland's pre-tax income varies by approximately $170,000 between the lowest and highest salary from 2008–2011.

increased each of the four years considered by the district court, the wages he has received decreased during the same period of time. Roland's gross income was less in 2010 than it was in 2009, and 2008 represents his lowest combined income of wages and dividends of the four years of data provided. In this case, the most reasonable period of time is the last three years from which the court has data because his 2008 income is substantially lower than his 2011 income.[3] *See e.g., In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa Ct. App. 1994) (noting the court averaged three years to determine net monthly income for purposes of applying the child support guidelines); *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992) (noting the court used the average of three years of income for a self-employed farmer to determine the appropriate amount for the child support guidelines). Averaging Roland's income from 2009 to 2011, we determine his annual gross income is $357,297.[4] Because this amount is greater than the amount used by the district court when determining the proper child support obligation, and Laurie did not cross-appeal on the issue of child support, we affirm the district court's finding in this matter.

C. Marital Home and Property Division.

In her cross-appeal, Laurie maintains the district court's requirement that she reimburse Roland for the entire purchase price of the marital home is

---

[3] The district court received tax returns and wage information from the years 2008 to 2011. No tax returns or testimony was provided for the year of 2012, ostensibly because the pair had not yet filed their 2012 taxes at the time of the dissolution proceedings. The district court's March 2013 order dissolving the parties' marriage provided instructions for how they were to proceed with filing their 2012 taxes.

[4] We use Roland's gross income because the district court imputed $36,000 in gross annual income to Laurie. In 2009, Roland's gross income was $318,272; in 2010, $301,440; and in 2011, $452,180.

inequitable. Laurie also contends the district court made an inequitable distribution of marital assets. However, Laurie's latter argument is premised upon the district court's resolution of the marital home issue. Laurie has no complaint in respect to the overall equity of the property division if she is not obligated to reimburse Roland the amount he paid for the purchase price of the marital home.

It is undisputed Laurie lived in the home rent-free for years before Roland purchased the home from Laurie's father for $85,000. Roland bought the property before he and Laurie were married. It is also undisputed Roland took out a mortgage on the property, of which $220,000 was still due at the time of the dissolution proceedings, for renovations on the property. Laurie offered an appraisal of the property at the proceedings. The appraisal had been completed in March 2012 and listed the value of the property as $220,000.

In the dissolution decree, the district court awarded Laurie the marital home "subject to any indebtedness." The court explained its decision, stating, "Because the court determined [the parties' daughter] should be placed in Laurie's primary physical care, and because the marital home had previously been in Laurie's extended family for years before Rol[and] bought it, the court concludes it is equitable to award the home to Laurie . . . ."

We agree with the district court that Laurie should be awarded the home, subject to the mortgage. Although we acknowledge Roland paid $85,000 for the purchase of the home, in light of the substantial increase in the value of his

business[5] and the assets distributed to him, we believe it is equitable to award the house to Laurie subject only to the mortgage. *See In re Marriage of Fennelly*, 737 N.W.2d 97, 103 (Iowa 2007) ("Property may be 'marital' or 'premarital,' but it is all subject to division except for gifts and inherited property.").

We acknowledge Roland disputes the appraised value of the home, but he presented no independent appraisal to controvert the fair market value of the home. Unlike Roland's business, his investment in the home has not been a successful venture, and its failure should not fall upon Laurie's shoulders. Simply because substantial monies were invested in the home, including $85,000 in premarital monies, does not make it equitable for Roland to claim all the appreciation in the profitable assets and not share in the unsuccessful investments. We find it equitable to award the family home to Laurie subject only to the mortgage and modify the decree accordingly.

D. Division of Assets.

In her cross-appeal, Laurie contends the district court made an inequitable distribution of marital assets. However, Laurie's argument is premised upon the district court's resolution of the marital home issue. In light of our ruling that she not be obligated to pay Roland his initial $85,000 investment in the home, we conclude Laurie has no dispute with the overall equity of the property division.

---

[5] Relying on Roland's answers to interrogatories, his share of the business increased $154,933 in value during the parties' marriage.

E. Spousal Support.

In her cross-appeal, Laurie maintains the district court should have awarded her spousal support. She asks that we award her $1000 a month for a period of thirty-six months.

Spousal support is not an absolute right. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Whether spousal support is proper depends on the facts and circumstances of each case. *Id*. Iowa law recognizes three forms of alimony—traditional, rehabilitative, and reimbursement—and each has a different aim. *In re Marriage of Becker*, 759 N.W.2d 822, 826 (Iowa 2008). Rehabilitative spousal support is meant to support an economically-dependent spouse for a limited time in order to provide an opportunity for that spouse to become self-supporting through re-education or retraining. *Id*. Reimbursement spousal support provides the receiving spouse with a share of the other spouse's future earnings as repayment for the contributions made to the source of that income. *Id*. Finally, traditional spousal support is "payable for life or so long as a spouse is incapable of self-support." *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989).

Iowa Code section 598.21A provides the relevant factors in considering whether spousal support is appropriate, which include (1) length of marriage, (2) age and emotional and physical health of the parties, (3) property distribution, (4) educational level of the parties at the time of marriage and when the dissolution action is commenced, (5) earning capacity of the party seeking alimony, including educational background, training, employment skills, work

experience, and length of absence from the job market, and (6) feasibility of the alimony-seeking party to become self-supporting with a reasonably comparable standard of living to that enjoyed during the marriage. *See also Hansen*, 733 N.W.2d at 704.

In this case, we note the marriage was of short duration, less than four years between the marriage and the filing of the petition for dissolution. We also note Laurie left the marriage with more education, having finished her bachelor's degree during the marriage. Both parties were forty-five years old at the time of the dissolution proceedings and in good health.

It was proper for the district court to deny Laurie's request for spousal support. Rehabilitative support is not appropriate, as Laurie was able to complete her degree during the parties' marriage. Reimbursement alimony is also not appropriate. Reimbursement alimony is proper when one party has contributed to the increased earning capacity of the other during the marriage. *See In re Marriage of Probasco*, 676 N.W.2d 179, 185 (Iowa 2004). ("[Reimbursement] alimony is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other."). Laurie did not point to any economic sacrifices made by her during the marriage. In fact, she was the one who completed a degree during the marriage. She also testified she was encouraged and able to put her entire wage in her thrift spending account during the marriage because the parties did not need it to live on. Finally, we also do not believe traditional alimony is appropriate in this case. Laurie testified she would be able to take on the cost of

the home herself. She also chose to take a lesser-paying job with her father although higher paying options were available.

F. Appellate Attorney Fees.

Both Roland and Laurie ask we award them appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Oakland*, 699 N.W.2d 260, 270 (Iowa 2005). Factors to be considered in determining whether to award attorney fees include: "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 Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Because of the disparity in incomes and Roland's greater net worth, we award Laurie $2500 in appellate attorney fees.

IV. Conclusion.

We affirm the district court's determinations regarding physical care of the parties' daughter, Roland's child support obligation, and spousal support. We affirm as modified the provision regarding the parties' marital home. Costs on appeal are assessed to Roland.

AFFIRMED AS MODIFIED.