

IN THE COURT OF APPEALS OF IOWA

No. 6-621 / 05-1749
Filed October 25, 2006

IN RE THE MARRIAGE OF YEHOSHUA ZELIG ARONOW AND RISE CAROL ARONOW

**Upon the Petition of
YEHOSHUA ZELIG ARONOW,**
Petitioner-Appellant,

**And Concerning
RISE CAROL ARONOW,**
Respondent-Appellee.

Appeal from the Iowa District Court for Allamakee County, James C. Bauch, Judge.

The petitioner in a separate maintenance action appeals the district court's temporary awards of child support, spousal support, and attorney fees.

AFFIRMED AS MODIFIED.

Barry S. Kaplan of Kaplan & Freese, L.L.P., Marshalltown, for appellant.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

In this appeal the petitioner in a separate maintenance proceeding, Yehoshua Zelig Aronow, challenges the amounts of temporary awards of child support, spousal support, and attorney fees by the district court to the respondent, Rise Carol Aronow. We affirm as modified.

On or shortly before October 10, 2005, the parties appeared by counsel for hearing on Rise's motion for temporary child support, temporary spousal support, and temporary attorney fees. The motion was submitted on Rise's motion, Rise's supplement to her motion, and Yehoshua's resistance, each of which was verified and incorporated by reference one or more documents, and the comments of counsel. The hearing was not reported. The district court filed a resulting order on October 10, 2005. The court ordered Yehoshua to pay a child custody evaluator \$3,500 and any additional ongoing expenses, travel expenses for Rise and the parties' children to and from the counselor for the children, \$2,660 per month in temporary child support, \$8,000 in temporary spousal, and \$7,500 in temporary attorney fees, with the temporary attorney fees to be paid within thirty days. Yehoshua appeals.

Our review in this equity action is de novo. See Iowa Code § 598.28 (2005) ("A petition shall be filed in separate maintenance . . . actions as in actions for dissolution of marriage, and all applicable provisions of this chapter in relation thereto shall apply"); *id.* § 598.3 ("An action for dissolution of marriage shall be by equitable proceedings"); Iowa R. App. P. 6.4 ("Review in equity cases shall be de novo.").

We are hampered in our review of this case by the absence of any findings of fact upon which the district court's temporary support orders are presumably based. See Iowa R. Civ. P. 1.904(1) (requiring the court to find the facts in writing). However, Yehoshua does not and could not assign error on this ground as he did not file a motion asking the court to make findings of fact. See *Michael v. Merchants Mut. Bonding Co.*, 251 N.W.2d 531, 533 (Iowa 1977) (concluding a party aggrieved by the trial court's failure to make findings of fact waived error by not filing a motion pursuant to what is now rule 1.904(2)). Nevertheless, we review orders granting temporary support de novo. See, e.g., *In re Marriage of Winegard*, 257 N.W.2d 609, 613 (stating, in dissolution of marriage case, that our scope of review of an order for temporary attorney fees is de novo). We examine the record and adjudicate anew rights on issues properly presented. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993).

The parties were married March 23, 1980. They have seven children, the youngest six of whom were minors at the time of the temporary support hearing. Pursuant to a September 7, 2005 order the children were placed in Rise's temporary physical care. Rise was residing in Brooklyn, New York. Yehoshua resided in Postville, Iowa, where the parties had resided from 1994 until Rise left Iowa with some of the children in early 2005. In June 2005 Rise sought and secured a custody order in New York. However, the courts thereafter determined that Iowa rather than New York was the appropriate forum to litigate the issues involved in this case.

In the affidavits submitted to the court regarding temporary support matters Yehoshua represented that his annual income was approximately \$100,000. Based on that income he calculated his child support obligation for the six children to be \$2,190 per month. He also, however, submitted a statement from his employer. It stated that in the preceding year, 2004, Yehoshua had been paid \$111,600.

In her affidavits Rise stated that Yehoshua had earned \$127,308 in 2004 and was earning \$131,127.24 in 2005. In response to Yehoshua's employer's statement that Yehoshua had been paid \$111,600 in 2004, Rise stated in an affidavit that Yehoshua also receives substantial cash bonuses and free chicken and meat worth about \$750 per month for his family and the families of two of his sisters. Rise had not been employed outside the home for several years and had no income. Based on income of \$131,127 per year for Yehoshua and no income for herself, Rise calculated Yehoshua's child support obligation to be \$2,660 per month, the amount the district court thereafter ordered.

Yehoshua claims that in determining temporary child support the district court should have imputed income to Rise, whom the record suggests may be college educated. An October 17, 2005 order indicates that "This matter is set for trial in January." Based on Rise's responsibility for physical care of the minor children, the long time during which she had not been employed outside the home, and the relatively short time between the order in question and the then-scheduled date of trial, we agree with the district court's implicit decision to not attribute income to Rise.

Yehoshua claims the temporary attorney fee award was excessive, particularly because of Rise's efforts to litigate the issues in New York as well as in Iowa. An award of attorney fees must be fair and reasonable in amount, and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). We review an award of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). An award of attorney fees rests in the sound discretion the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). The trial court's award of temporary attorney fees approaches the upper limits of reasonableness, not only because of Rise's ill-advised attempt to litigate in New York but also because of the order that Yehoshua pay a very large retainer and ongoing expenses to a custody evaluator. However, in view the parties' greatly differing abilities to pay and what the issues appeared to be at the time of the temporary support order, we conclude the district did not abuse its considerable discretion.

Yehoshua also claims the trial court erred in awarding temporary alimony of \$8,000 per month. Although our review is de novo, the trial court has considerable latitude and we will disturb its ruling only when there has been a failure to do equity. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). In determining whether spousal support should be awarded and, if so, what amount should be awarded, the court may consider the amount of child support ordered. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992).

The question of Yehoshua's income has not been determined and remained to be determined at trial, if necessary. It is sufficient to note that his

gross income is between approximately \$9,000 per month and \$11,000 per month. From the parties' child support guidelines worksheets it appears various federal and state taxes reduce his gross income by some twenty-five to thirty percent. It thus appears his net income lies somewhere within the range of approximately \$6,500 per month to approximately \$8,000 per month.

The trial court's order required Yehoshua to pay a child custody evaluator \$3,500 (plus ongoing expenses) and to pay temporary attorney fees of \$7,500, all within the period between the order and trial. If trial were reached as scheduled these payments would amount to approximately \$4,000 per month during that time. The order also required Yehoshua to pay \$2,660 per month in temporary child support, a fact the court may consider in making a temporary spousal support determination. See *id.* Even ignoring any payments to the child custody evaluator and payments of temporary attorney fees, after payment of temporary child support Yehoshua's net income remaining for payment of temporary spousal support would be some \$3,840 to \$5,340 per month. Under such circumstances we find the district court's order for \$8,000 per month of temporary spousal support constitutes a clear failure to do equity. We therefore modify the district court's order by reducing Yehoshua's temporary spousal support obligation from \$8,000 per month to \$3,000 per month.

As modified herein we affirm the district court's orders concerning temporary support and attorney fees. Costs on appeal are taxed one-half to Yehoshua and one-half to Rise.

AFFIRMED AS MODIFIED.