IN THE COURT OF APPEALS OF IOWA

No. 8-981 / 08-0297
Filed January 22, 2009

IN RE THE MARRIAGE OF LUELLA MAE STOAKS
AND BRIAN EUGENE STOAKS

Upon the Petition of
LUELLA MAE STOAKS,
Petitioner-Appellee,

And Concerning
BRIAN EUGENE STOAKS,
Respondent-Appellant.

Appeal from the Iowa District Court for Montgomery County, Charles L. Smith, Judge.

Brian Stoaks appeals from the child support and property division provisions of the decree dissolving the parties' marriage. **AFFIRMED.**

Richard Crotty, Council Bluffs, for appellant.

DeShawne L. Bird-Sell of DeShawne L. Bird-Sell, P.L.C., Glenwood, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Brian Stoaks appeals from the child support and property division provisions of the decree dissolving the parties' marriage. He claims the district court erred in calculating his child support obligation and in dividing the parties' property. We affirm the judgment of the district court.

Brian and Luella Stoaks were married in February 2003. They have two children together: Paige, born in March 1994, and Kahner, born in July 1997. Luella filed a petition for dissolution of marriage in May 2007. The petition came before the district court for trial in January 2008.[1]

Brian was employed at Featherlite, a plant in Shenandoah, Iowa, during the parties' marriage. He testified he grossed approximately $29,000 from Featherlite in 2006. Brian lost his job at Featherlite in June 2007 due to the plant closing. After he lost his job, Brian cashed in the retirement account he had at Featherlite for $14,457.70. He gave $12,000 to his girlfriend, Michelle Mount, kept $457 in cash, and deposited the rest into a checking account that he opened after separating from Luella. Brian subsequently purchased a 2005 Jeep Wrangler for approximately $20,000 with monthly payments of $425.91.

Brian testified he was unemployed at the time of the trial and receiving unemployment benefits in the net amount of $306 per week. Luella, however, testified that her children had informed her Brian was working at Mount Farms, a farming operation owned by the father of Brian's girlfriend. She also testified that

[1] Prior to the trial, the parties agreed the children should be placed in their joint legal custody and in Luella's physical care. Thus, the contested issues before the court at the trial concerned the amount of Brian's child support obligation and the division of the parties' assets and debts.

her brother, who works at a "tractor farming place," told her Brian "comes in there for parts as well as his boss." Brian received $2650 from Mount Farms in November 2007, which he testified was a gift from Michelle's father. Michelle testified that although Brian had "done a few odd jobs" for Mount Farms, the $2650 he received from them in November 2007 was given to Brian by her father to "help[ ] us out."

Luella was employed at the time of the trial and earned approximately $31,000 in gross annual income. She remained in the parties' marital home with their children after the parties separated. Luella testified that the assessed value of their home was $42,760. They owed $41,415.45 on the first mortgage on the home and an additional $25,127.50 on a second mortgage. Luella testified they took out the second mortgage on the home to pay "a couple credit card bills . . . but the majority was [used] to buy a boat" valued at $15,000 that was in Brian's possession at the time of the trial.

The parties also owned a 1999 Chevrolet pickup valued at $6285, which was in Luella's possession at the time of the trial. Luella testified she encumbered that vehicle with a loan of $5000 after the parties separated to help pay for household bills and attorney fees. Luella also had credit card debt in the amount of $1769 at the time of trial, while Brian owed $1078 on a credit card in his name alone. The parties additionally owed $7599 on two joint credit cards.

The district court entered a decree dissolving the parties' marriage in January 2008. The court determined Luella earned approximately $31,000 per year in gross income and imputed an annual gross earning capacity of $29,000 to Brian. Brian was accordingly ordered to pay child support in the amount of

$535 per month. Luella was awarded the marital home and ordered to pay the first mortgage on it. Brian was awarded the boat and ordered to pay the second mortgage on the home, which the parties had primarily used to finance the purchase of that boat. The 1999 Chevrolet pickup and its accompanying debt was awarded to Luella, and Brian was awarded the 2005 Jeep Wrangler with its associated debt. Finally, the court determined Luella should be responsible for her credit card debt in the amount of $1769, while Brian should be responsible for his credit card debt of $1078 in addition to the parties' remaining joint credit card debt of $7599. Brian appeals.

Our scope of review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

Brian first claims the district court erred in using an earning capacity rather than his actual earnings to determine his child support obligation. We do not agree. "In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). But, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id.*

In this case, the district court found that deviation from the child support guidelines was appropriate because (1) Brian's "statement that he is not . . .

employed does not resonate with the court due to the deposits from [Mount Farms] into his personal bank account"; (2) "he voluntarily moved to a much smaller community decreasing his chances of obtaining employment at a level commensurate with his experience and prior earning capacity"; and (3) he was "aware of his financial obligation to support his children when he incurred additional debt in the amount of $425.91 per month for a brand new vehicle." We agree based upon our de novo review of the record.

One of the factors we consider in determining if we will use earning capacity, rather than actual earnings, "in order to meet the needs of the children and do justice between the parties is whether the parent's inability to earn a greater income is self-inflicted or voluntary." *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006); *see also In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003) (stating "[u]nder our case law, 'a party may not claim inability to pay child support when that inability is self-inflicted or voluntary'" (citation omitted)). While Brian's loss of employment in June 2007 was involuntary, his decision to move to a "much smaller community" with fewer employment opportunities was voluntary. *See McKenzie*, 709 N.W.2d at 534 (stating a father was "not free to plan his future without regard to his obligation to his former wife and child"); *Flattery*, 537 N.W.2d at 803 (finding a father's "decision to remove himself from the job market and not actively look for employment was voluntary"). Furthermore, Brian's efforts to secure new employment do not appear to have been genuine.

When asked what specific places he sought employment at after being let go at Featherlite, Brian initially responded, "Factories." He then could not recall

"offhand" how many jobs he had applied for after losing his job at Featherlite. Brian adamantly denied being employed at Mount Farms by his girlfriend's father despite being confronted with evidence of a check made out in his name for $2650 from Mount Farms. Luella also testified that she had been told by her children and her brother that Brian was working at Mount Farms. We agree with the district court that Brian's statement that he was not employed was simply not credible in light of the contradictory evidence presented at the trial. *See In re Marriage of Behn*, 385 N.W.2d 540, 541 (Iowa 1986) (stating that although our review is de novo, we must "pay close attention to the trial court's credibility determinations and give considerable weight to its findings of fact"); *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986) ("Because trial court was present to listen and observe the witnesses, we give weight to its findings.").

Accordingly, we conclude the district court did not err in using Brian's earning capacity to determine his child support obligation in order to provide for the needs of the child and do justice between the parties. We agree with the court that it would be unfair and result in substantial injustice to the parties' minor children and to Luella to determine Brian's support obligation based only on his current income from unemployment benefits. The district court did not err in finding Brian has an earning capacity of $29,000 per year gross income based upon the income he earned in 2006 when he was employed for purposes of determining his child support obligation.

Brian next claims the district court's property division in this case was not equitable because he was ordered to pay a total of $8677 in credit card debt while Luella was only ordered to pay a total of $1769. Although the court strives

to make a division that is fair and equitable under the circumstances, an equal division or percentage distribution is not required; rather, the decisive factor is what is fair and equitable in each particular case. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). In determining what division would be equitable, courts are guided by the criteria set forth in Iowa Code section 598.21(5) (2007). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). The district court is afforded wide latitude, and we will disturb the property distribution only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

We do not believe there was a failure to do equity in this case when we look at the economic provisions of the decree as a whole and the circumstances present in this case. *See In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002) *(*stating that in assessing the equity of the property division we look to the economic provisions of the decree as a whole). After the parties separated, Brian cashed in his retirement account at Featherlite, which had been worth $19,686. After incurring $5228 in tax penalties, he received $14,457 from his retirement account, none of which was shared with Luella or his children. *See In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996) ("Under Iowa law pensions are characterized as marital assets, subject to division in dissolution actions just as any other property."). He gave $12,000 to his girlfriend, kept $457 in cash, and deposited the remainder in his checking account. In light of the foregoing, we conclude that the district court did not err in requiring Brian to be responsible for the parties' joint credit card debt. *See In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999) (stating we give "strong deference to

the trial court which, after sorting through the economic details of the parties, made a fair division supported by the record").

Both parties request an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *Sullins*, 715 N.W.2d at 255. In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id*. Applying these factors to the circumstances in this case, we award Luella $1800 in appellate attorney fees and decline Brian's request for appellate attorney fees. Costs on appeal are assessed to Brian.

The judgment of the district court is affirmed.

AFFIRMED.