

IN THE COURT OF APPEALS OF IOWA

No. 9-228 / 08-1012
Filed May 29, 2009

**IN RE THE MARRIAGE OF JEFFREY T.
ZOELLE AND OY ZOELLE**

**Upon the Petition of
JEFFREY T. ZOELLE,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
OY ZOELLE,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E.
Hoffmeyer, Judge.

Jeffrey Zoelle appeals the district court's award of alimony and division of uncovered medical expenses for the parties' children. Oy Zoelle cross-appeals, asserting the district court erred in declining to award her attorney fees and asking for an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

Elizabeth A. Rosenbaum, Sioux City, for appellant.

Michele M. Lewon of Kollars & Lewon, Sioux City, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Jeffrey and Oy Zoelle met while working at a meatpacking plant in Kansas in 1986. The parties were married in November 1987. Jeffrey was taking college classes at the time to obtain his undergraduate degree. Oy was born in Thailand and moved to the United States when she was twelve years old. English is Oy's second language. She struggles with reading and writing, but is able to speak well, though she speaks with a distinct accent. Oy worked at various jobs until 1991, when the parties had their first child.

Jeffrey and Oy have four children, born in 1991, 1996, 1997, and 2001. When their first child was born, the parties agreed that Oy would stay home to raise the children. She has worked as parent and homemaker since 1991 and is an accomplished bowler. Jeffrey attained his bachelor's degree in 1992. He continued to work and also attended classes at the University of Kansas Medical School. He graduated in May 1998, and the family moved to Sioux City where Jeffrey began his full-time residency. He completed his residency in July 2001 and got a job with St. Luke's Regional Medical Center (St. Luke's).

In September 2002, Jeffrey was given the opportunity to take over the Riverside Family Practice Center, which was managed by St. Luke's. Jeffrey was the only physician at the clinic. He successfully rebuilt the patient base and had a significant obstetric practice, which is a high income practice.¹

¹ Jeffrey is paid according to procedure codes assigned by Medicare. Under this system, Medicare determines the relative value unit (RVU) for each medical procedure, with some procedures having a higher RVU than others. His RVUs are then multiplied by a conversion factor, which is determined by St. Luke's, to arrive at Jeffrey's salary.

In 2005, St. Luke's closed the Riverside Clinic and relocated Jeffrey to the Sergeant Bluff Clinic. Jeffrey became one of five physicians working at the Sergeant Bluff Clinic. St. Luke's recognized that this was not a financially favorable move for Jeffrey and anticipated a drop in his income when he moved. Accordingly, St. Luke's gave Jeffrey one year of guaranteed salary, agreeing to match his 2005 salary in 2006.

Jeffrey's obstetric practice decreased significantly at Sergeant Bluff. Also, in 2007 he was informed he would no longer be reimbursed for tending to hospitalized patients. Two of Jeffrey's partners left the Sergeant Bluff office in September 2007, which increased Jeffrey's income for the remainder of the year. Jeffrey's income in 2002 was \$242,172. In 2003, his first full year at Riverside Clinic, he made \$206,092. In 2004 he earned \$276,890. In 2005, Jeffrey made \$316,368. In 2006, Jeffrey received a guaranteed salary of \$350,739. In 2007, the first year reflecting Jeffrey's actual income at Sergeant Bluff, he earned \$258,593.

Jeffrey filed a petition for dissolution of marriage on July 10, 2006. The parties agreed to a partial settlement. The remaining issues, including alimony, payment of the children's uncovered medical expenses, and attorney fees, were tried to the court on January 31 and February 1, 2008. Oy was forty-five at the time of trial; Jeffrey was forty-six.

At the time of trial, Oy was not employed outside the home. She was interested in working as a para-educator, or teacher's aide, a position that paid \$9.20 per hour or \$19,136 per year. She pursued this position, but was informed that she would need more education to qualify. Oy went to Western Iowa

Technical Community College to enroll in the necessary classes but learned she would be required to take remedial courses in English before she could attend para-educator classes. While Oy's pre-evaluation test indicated that she had good speaking and vocabulary skills, she needed to improve her skills in the areas of reading and reading comprehension. At the time of trial, Oy was attending the necessary courses and intended to earn her para-educator license.

Jeffrey hired a vocational counselor, Roseanne Olsen, to testify regarding Oy's ability to obtain employment. Olsen concluded that Oy was immediately employable in various positions in the Sioux City area. Olsen testified that Oy could earn up to \$14.50 per hour, or \$30,160 per year. Though Olsen never spoke with Oy to directly evaluate her ability to communicate, she testified that a number of the positions did not require fluency in the English language.

The district court awarded Oy alimony of \$5000 per month until she turns sixty-six, remarries, or dies, whichever occurs first.² The district court found that this amount, when combined with child support, would meet Oy's expenses. As the child support decreased when the children graduated from high school, the district court found the decreased amount would "serve as a motivator" for Oy to seek employment. In making this determination, the district court found that Oy will be employable and imputed to her \$7.25 per hour of income earning potential.

In calculating Jeffrey's obligation to pay child support and alimony, the district court used a five-year average of Jeffrey's income. The district court

² Both parties agreed that Jeffrey should provide alimony payments of \$5000 per month to Oy. The parties disagreed, however, as to the duration of the alimony payments.

stated that Jeffrey “should be able to get back to [the] higher income figures [earned in the past] by either his clientele and/or renegotiation of his contract.” In its order responding to Jeffrey’s motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904, the district court stated there were many variables that made it difficult to accurately assess Jeffrey’s income. The district court did not accept Jeffrey’s claim that his income would decrease further when two other partners were hired to replace those that had left the practice.

The district court found that the children’s uncovered medical expenses should be shared by the parties, with Jeffrey paying seventy percent and Oy paying thirty percent. The district court initially ordered Jeffrey to pay \$10,000 of Oy’s attorney fees. However, in response to Jeffrey’s motion to reconsider, the district court determined that Jeffrey and Oy should each pay their own attorney fees.

Jeffrey appeals, arguing the district court erred in: (1) imputing only \$7.25 per hour of income earning potential to Oy; (2) averaging Jeffrey’s income over five years; (3) awarding alimony of \$5000 per month for up to twenty-one years; and (4) determining the proportion of uncovered medical expenses to be paid by Jeffrey and Oy. Oy cross-appeals, arguing: (1) the district court erred in vacating its previous award of attorney fees in the amount of \$10,000; (2) she should be awarded appellate attorney fees.

II. Standard of Review

We review equity cases de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the district

court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Because each decision in a dissolution action is dependent on the unique facts of the case, we “accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling ‘only when there has been a failure to do equity.’” *Smith*, 573 N.W.2d at 926.

III. Oy’s Imputed Earning Potential

In considering whether to award alimony, one factor we are to consider is 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.

Iowa Code § 598.21A(1)(e) (Supp. 2005).

Jeffrey argues the district court erred in concluding that Oy’s earning capacity was only \$7.25 per hour. Jeffrey asserts the district court should have concluded that, based on Olsen’s report, Oy had an earning capacity of at least \$23,400 per year. The district court found Olsen’s report was not as credible as Oy’s experiences in searching for a job. Olsen testified that Oy could walk out of the courthouse and obtain a job as a para-educator. However, Oy learned that she was unqualified for that position when she tried to apply.

We agree with the district court. At the time of trial, Oy had not been employed for roughly seventeen years. While we acknowledge Jeffrey’s argument that Oy has successfully navigated many difficult situations in spite of

her language barriers, we agree with the district court that her language difficulties will affect her employability. In this case, Oy's experiences in actively attempting to gain employment are more convincing than Olsen's report. The district court properly imputed an earning capacity of \$7.25 per hour to Oy.

IV. Jeffrey's Averaged Earnings

Jeffrey argues the district court erred in averaging his income over a five-year period for purposes of awarding alimony and child support. He asserts the district court should have used his income from 2007, \$258,593. The district court instead imputed to Jeffrey an income of \$282,000, a five-year average of his income.

In calculating Jeffrey's child support obligation, the district court limited Jeffrey's net income to a maximum of \$10,000 per month pursuant to Iowa Court Rule 9.26, which grants the court discretion to determine the appropriate amount of support when a party's net monthly income is over \$10,000. Because the district court chose to cap Jeffrey's income, the child support calculations were not affected by the district court's use of his averaged earnings. Further, the difference between the two figures does not affect our determination of the proper alimony award. Therefore, we decline to consider whether the district court erred in averaging Jeffrey's income.

V. Alimony Award

Jeffrey argues the district court erred in awarding alimony to Oy of \$5000 per month for a period of up to twenty-one years. Alimony is not an absolute right. *Anliker*, 694 N.W.2d at 540. The district court may grant alimony at its discretion after considering the particular facts of the case and the factors listed

in Iowa Code section 598.21A. *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007). These factors include: (1) the length of the marriage; (2) the age and physical and emotional health of the parties; (3) the property distribution; (4) the educational level of each party at the time of the marriage and at the time the action is commenced; (5) the earning capacity of the party seeking alimony; (6) 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; and (7) tax consequences to each party. Iowa Code § 598.21A.

There are three different types of alimony: traditional, rehabilitative, and reimbursement.³ *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). Traditional alimony is “payable for life or so long as a spouse is incapable of self-support.” *Id.* (internal quotations omitted). Rehabilitative alimony is “a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.” *Id.* (internal quotations omitted). The goal of rehabilitative alimony is self-sufficiency, and its duration may be limited or extended “depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses.” *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989). “In a marriage of long duration, alimony can be used to compensate a spouse who leaves the marriage at a financial disadvantage,

³ Oy agreed to waive any right to receive reimbursement alimony in exchange for Jeffrey’s agreement to be solely responsible for his student loans on which he pays \$1200 per month.

especially where the disparity in earning capacity is great.” *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998).

The district court did not specify the purpose of alimony awarded. However, the district court did state that as child support decreased, it would “serve as a motivator for [Oy] to seek outside employment.” The district court also stated that “it expects Oy to pursue her education and to work towards employment and if not, alimony could be lowered due to her inactivity.” While the court does not have to characterize the type of support it awards and may award a combination of traditional and rehabilitative alimony, these statements suggest the award was intended to support Oy through re-education and create an incentive for her to become self-supporting. *See In re Marriage of Becker*, 756 N.W.2d 822, 827 (Iowa 2008) (stating the court does not have to designate which type of alimony it awards and may award a combination of different types of alimony).

Equity requires that we decrease the duration of Oy’s rehabilitative alimony so as to give Oy time to work toward full employment without eliminating her incentive to do so. We modify the district court’s decree and award Oy rehabilitative alimony of \$5000 per month for ten years or until Oy remarries or dies. This will give Oy the time and income necessary to finish her English classes and also complete the required classes in the para-educator program. This award will give Oy ample time to pursue her education and become integrated in the job market.

We also conclude that equity requires an award of traditional alimony. After the tenth year, alimony will continue at \$2000 per month until Oy reaches

age sixty-six, remarries, or dies. After considering the length of the parties' marriage, the parties' ages, the parties' levels of education, Oy's substantially lower earning capacity, and the fact there is very little likelihood Oy will be self-supporting at a standard of living comparable to the one enjoyed during the marriage, we conclude this combination of rehabilitative and traditional alimony is equitable.

VI. Uncovered Medical Expenses

Jeffrey argues the district court erred in requiring that he pay seventy percent of the children's uncovered medical expenses. He asserts that he should pay only fifty percent. Iowa Court Rule 9.12 dictates that uncovered medical expenses "shall be paid by the parents in proportion to their respective net incomes." We find that the district court properly applied this rule in determining that Jeffrey should pay seventy percent of the children's uncovered medical expenses.

VII. Attorney Fees

Oy argues the district court erred in denying its award of \$10,000 in trial attorney fees to her. An award of attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We reverse the district court's award of attorney fees only if we find an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Because we find no abuse of discretion, we agree with the district court that Oy should pay her own trial attorney fees.

Oy also argues that Jeffrey should pay her appellate attorney fees. The court considers the needs of the party making the request, the ability of the other

party to pay, and whether the party making the request is obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We find that each party can and should pay his or her own appellate attorney fees.

VIII. Conclusion

The district court properly imputed wages to Oy of \$7.25 per hour. The use of Jeffrey's averaged earnings did not affect the amount of Jeffrey's child support obligation or the alimony award. We modify the district court's decree to award Oy rehabilitative alimony of \$5000 for ten years followed by permanent alimony of \$2000 per month until Oy reaches age sixty-six, remarries, or dies. The district court properly allocated the children's uncovered medical expenses according to Jeffrey and Oy's monthly incomes. Both Jeffrey and Oy should pay their own trial and appellate attorney fees. Costs are assessed to Jeffrey.

AFFIRMED AS MODIFIED.