IN THE COURT OF APPEALS OF IOWA

No. 9-305 / 08-1806
Filed June 17, 2009

IN RE THE MARRIAGE OF BRENDA M. CLOYD AND JEFFREY M. CLOYD

Upon the Petition of

BRENDA M. CLOYD,
Petitioner-Appellee,

And Concerning

JEFFREY M. CLOYD,
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Jeffrey M. Cloyd appeals from the decree dissolving his marriage to Brenda M. Cloyd. **AFFIRMED AS MODIFIED.**

Dorothy Dakin of Kruse & Dakin, L.L.P., Boone, for appellant.

Joseph R. Cahill of Cahill Law Offices, Nevada, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Jeffrey M. Cloyd appeals from the decree dissolving his marriage to Brenda M. Cloyd. He contends that (1) the district court should have awarded the parties shared care of their two children, (2) the district court did not use the proper incomes in computing child support, (3) the medical support provision should be modified, (4) the property division was not equitable, and (5) he should have been awarded alimony. We affirm as modified.

STANDARD OF REVIEW. Our standard of review is de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). We give weight to the findings of the district court, especially to the extent credibility determinations are involved. *Id.*

BACKGROUND. The parties were married in June of 1989. They both are graduates of Iowa State University and live in Ames, Iowa. Jeffrey, who was forty-three years old at the time the decree was entered, works for George White Chevrolet-Pontiac and is responsible for reconditioning prior-owned cars and getting them ready for sale. He does not work evenings and weekends. Brenda, who was forty-one at the time the decree was entered, works for Hunziker & Associates in Ames as a realtor. She works some nights and weekends. The parties have a son who was born in 1992 and a daughter who was born in 1997. The parties have both worked outside the home during the marriage. Brenda's income in the five years prior to 2008 was substantially more than Jeffrey's. Both parties have shared household chores and assumed responsibilities for their two children. The children are involved in several activities. The children also have

four grandparents living in Ames who have a close relationship with the children and have assisted with their care. At the time of the trial the parties lived in the same town and the same school district.

SHARED CARE. Jeffrey asked the district court to order shared care of the children and he contends here that it should have been granted. The district court found both parents to be fit and proper persons to have primary custody of the children, a conclusion with which we agree. The district court then found the children should be in the joint legal custody of Jeffrey and Brenda with Brenda having primary physical care. Jeffrey was given visitation every other weekend from 6 p.m. Friday evening until 6 p.m. Sunday evening as well as each Wednesday night beginning at 6 p.m. and concluding at 8 a.m. Thursday morning. Jeffrey was given two separate two-week periods during the summer months when he had exclusive visitation and Brenda was given one when she had exclusive visitation. In alternating years the parents' have exclusive visitation during spring break and either the first or second half of the Christmas vacation. Scheduled holiday visitation was to take precedence over regularly-scheduled visits. Jeffrey was given a fifteen percent reduction in child support because of his extensive visitation.

Our supreme court has said that joint physical care is most likely to be in the best interest of the child (1) where both parents have historically contributed to physical care in roughly the same proportion, (2) have the ability to communicate with each other and show mutual respect, and (3) there is no

serious conflict between the parents. *See In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007).

There are factors here the district court recognized that would support the award of shared care. The parties live in the same school district and in close proximity to each other. The older child is in his mid-teens and the younger child will soon be of teen age. The children spend much of their time in school and activities. While they require supervision, they do not require the constant care required by younger children. Both parents have worked outside the home during the marriage and both have been involved in the children's lives. Jeffrey works during the day and Brenda is frequently absent from the home in the evening and on weekends showing homes. The court's primary reason for its custody decision was that it determined the parties had different attitudes towards discipline and the court determined Brenda more closely monitors the children's rules and enforces them. On our de novo review we come to the same conclusion and affirm.

CHILD SUPPORT. Jeffrey contends the district court did not correctly determine child support. For purpose of child support the court considered that Brenda's income as a realtor fluctuates from year to year. The court then calculated her income for child support purposes to be $3766.38 a month. The court determined Jeffrey's net monthly income for child support purposes to be $2,949.00 not including his yearly bonus. The court determined under these findings that Jeffrey would be required to pay $815.00 monthly child support, but reduced it by a fifteen percent extensive visitation credit, requiring him to pay

$693 a month. The court then determined if Jeffrey received a bonus it should be reduced by thirty percent and he should then pay as additional child support 23.5 % of the reduced amount.

Jeffery contends that for child support purposes Brenda's income shows a three year average of $81,458.00 and a five year average of $75,667.60, and that a three year average of his income is $41,311.33. He supports his argument with income figures from tax returns for years 2003 through 2007. He does not provide us the monthly child support amount these figures if adopted would support.

Brenda contends that the incomes determined by the district court are supported by the record and should be affirmed. She further argues that at the time of trial in September of 2008 her net income from real estate sales was only $27,280.00,[1] the real estate market had collapsed, and she did not expect receiving any more commissions before the end of the year. There was also testimony from Brenda's mother, a long-time realtor in Ames, that it was not projected that the real estate market would improve for some time. On our de novo review we consider both Brenda's earnings from 2003 through 2007 and her earnings to date of trial in 2008 as well as evidence that it is unlikely that her future income will reach the levels she enjoyed in earlier years in the immediate future. Having done so, we find no reasons to disagree with the ultimate child support figure reached by the district court and we affirm on this issue. While we, as does Brenda, recognize that where a party's income fluctuates from year to

[1] She showed commissions to date at $55,495, expenses through September 30, 2008 at $19,265, and projected expenses until the end of the year at $8950.

year it is equitable in many circumstances to average it. Averaging income for child support purposes is an appropriate and accepted practice when an individual has a history of fluctuating income. *See In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). However, we must determine a parent's current income from the most reliable evidence presented. *See In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). We find no basis to rely only on average past years' income to determine income for child support purposes where here the evidence is that in the current economy, past income will not continue in the future, and the ability to continue at past income levels is not likely. We find no basis to decrease Jeffrey's child support under the current record and affirm the child support he was ordered to pay.

MEDICAL SUPPORT. Jeffrey was ordered to maintain "a full and comprehensive medical and hospital insurance policy for the benefit of the minor child as long as his employer offers such a program." The court further ordered,

> that of any non-insured or deductible medical or dental expenses, not covered by insurance, the first $250 shall be paid by Brenda and thereafter all such non-insured or deductible medical and dental expenses shall be paid fifty percent by Brenda and fifty percent by Jeffrey.

Jeffrey contends that the amount Brenda should first pay in uncovered expenses is $250 a child and the uncovered expenses in excess should be paid by the parents in proportion to their respective net incomes. Brenda does not respond to this argument.

Iowa Court Rule 9.12 provides as to "uncovered medical expenses" meaning all medical expenses not paid by insurance that: "The custodial parent shall pay the first $250 per year per child up to a maximum of $500 per year for

all children shall be paid by the parents in proportion to their respective net incomes."

We therefore modify the decree to provide that Brenda shall pay the first $250 per child up to a maximum of $500 for the two children. We determine Brenda's proportion of income for child support purposes to be approximately fifty-five percent and Jeffrey's to be forty-five percent. They shall share the medical expenses in excess of those Brenda is ordered to pay in these percentages.

PROPERTY DIVISION. Jeffrey contends the property division should be modified only to the extent that the net proceeds from the sale of the parties' home should be divided in half and from Brenda's half she should pay him $7450.00. Brenda concedes that Jeffrey's proposal is fair and equitable and agrees that we should adopt this resolution of the property division. We adopt it and modify the decree accordingly.

ALIMONY. The district court denied Jeffrey's request for alimony. He contends he should have been awarded alimony, arguing that this is a marriage of nearly twenty years, in recent years Brenda's annual income has been about twice what his is, and that she has a greater earning capacity than does he. He notes that during the marriage she obtained and maintained her realtor licenses and additional certification. He argues he has assisted with her professional growth by caring for the children in the evenings and on weekends. He further argues that he needs alimony to maintain his standard of living and asked for

$500 a month for five years. He points out that in considering an alimony award we are directed to ignore the gender of the person requesting it.

Brenda contends the district court was correct in denying Jeffrey's request for alimony. She points out that he is forty-three years old and in good health, that he has a B.S from Iowa State University, and he has been working for his current employer since 1985 and was a manager at the time of trial. She also noted that at the time of trial the parties had assets valued in excess of $550,000 and that he received one-half of that amount. She argues that he earned $20,000 more than she did in 2008, as the real estate sales were shrinking and there was no evidence that the real estate market would improve in the near future.

Iowa provides statutorily that spousal support can be ordered paid to either spouse. We ignore gender in assessing the alimony issue. *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992). To do otherwise would be contrary to Iowa Code chapter 598 (2007), and would be constitutionally impermissible. The United States Supreme Court, in determining an Alabama statute imposing alimony obligations only on men was unconstitutional, said:

> In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme "provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.

Orr v. Orr, 440 U.S. 268, 278-79, 99 S. Ct. 1102, 1111, 59 L. Ed. 2d 306, 318-19 (1979) (citations omitted).

We address Jeffrey's contention that he should have been awarded alimony under a gender-neutral classification and are careful in our consideration to avoid sexual stereotypes. *See id.*, 440 U.S. at 283, 99 S. Ct. at 1113-114, 59 L. Ed. 2d at 321; *Bethke* 484 N.W.2d at 607.

When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa Ct. App. 1983). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21A (2007). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa Ct. App. 1983). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa Ct. App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984). Considering all these factors, especially the evidence that it is most likely that Brenda's income will continue to decrease, we affirm the district court's denial of alimony.

APPELLATE ATTORNEY FEES. Jeffrey requests appellate attorney fees. Brenda contends he has received sufficient assets to pay his own fees.

We award no appellate attorney fees. Costs on appeal are taxed one half to each party.

AFFIRMED AS MODIFIED.