

IN THE COURT OF APPEALS OF IOWA

No. 9-773 / 09-0725
Filed February 24, 2010

**IN RE THE MARRIAGE OF
KARMEN ROTTINGHAUS
AND MATTHEW ROTTINGHAUS**

**Upon the Petition of
KARMEN ROTTINGHAUS,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
MATTHEW ROTTINGHAUS,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Bremer County, James M. Drew,
Judge.

Matthew Rottinghaus appeals from the district court's award of physical care, division of property, and award of attorney fees. Karmen Rottinghaus cross-appeals from the district court's award of attorney fees and decision not to award alimony. She also requests appellate attorney fees. **AFFIRMED AS MODIFIED.**

Paul W. Demro of Correll, Sheerer, Benson, Engels, Galles & Demro,
P.L.C., Cedar Falls, for appellant.

Dale E. Goeke, Waverly, for appellee.

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

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

Matthew and Karmen Rottinghaus were married September 13, 1997. They had one child during their marriage, Zander, who was five at the time of trial. Both parties were thirty-four and in good health at the time of trial. Karmen worked at home in her photography business; Matthew worked at John Deere. Zander is an active, social boy. Though at first he had trouble with his parents' separation, he now appears to have adjusted.

Matthew moved out of the marital residence on February 1, 2008, and Zander remained with Karmen in the marital home. Karmen filed a petition for dissolution of marriage on May 12, 2008. The parties agreed to a temporary order giving Karmen physical care of Zander subject to parenting time with Matthew. After temporary child support was ordered, Matthew requested shared physical care of Zander.

After high school graduation, Karmen studied photography at Hawkeye Community College in Waterloo, Iowa. She graduated in June 1995 with an associate of applied arts degree in photography. Following graduation, she worked in Waverly for one summer and then returned to her hometown in Indiana with the hopes of starting her own photography business. Karmen worked a third-shift factory job and worked at her photography studio during the days and weekends. At the time, Karmen was dating Matthew, who moved with her to Indiana.

Matthew graduated from high school in 1993 and took a year off before attending Hawkeye Community College. After moving to Indiana with Karmen,

Matthew attended a tool and die program at IV Tech in Fort Wayne. Matthew graduated with a two-year degree in December 1996. After receiving a job offer at Black Hawk Engineering, Matthew moved back to Waterloo in January 1997.

In early spring 1997, Karmen returned to Waverly and rented a photography studio. Matthew attended school on and off from 1998-2008, when he obtained a degree in technology management from the University of Northern Iowa.

The record reflects that during the marriage, Karmen was primarily responsible for Zander's care. Matthew, however, asserts that because he has finished his schooling, he will now have more free time to co-parent Zander.

In 2001, Karmen and Matthew built a combined photography studio and home. Karmen testified that the primary purpose for the buildings was her studio, which occupied roughly sixty-five percent of the square footage of the buildings. Karmen spoke with a real estate agent who estimated the value of the real estate to be \$258,825. Though Karmen believes the actual value of the real estate is lower than that, Matthew believes the real estate is worth more because of a potential for subdivision of the acreage.

At the time of trial, Matthew worked at John Deere, where his estimated annual income was \$41,000. Karmen continued to operate her photography business, where she had business income of roughly \$41,000 in 2006 and \$12,000 in 2007. Karmen explained the drop in income was a result of her decision to focus on children's portraiture, the area in which her expertise lies. The decision eliminated or reduced her previously lucrative wedding photography clients.

The district court's dissolution decree awarded Karmen physical care of Zander with parenting time for Matthew. The court also assigned the marital home along with the debt on that home to Karmen. The court found that it would be in Zander's best interests to remain in the only home he has known and that its unique nature as a combined residence and photography studio warranted Karmen's retention of the marital real estate. The court concluded that, in order for Matthew to receive his share of the marital net worth, Karmen would be required to pay him \$30,000. The court provided that Karmen was to use her best efforts to obtain financing to make the equalization payment within ninety days. If she could not obtain such financing, she would be required to execute a note in Matthew's favor for the principal amount plus annual interest of three percent due when the house is sold or within sixty days after Zander graduates from high school, whichever occurs first.

The court declined to award Karmen alimony, finding that she has all the skills necessary to continue her self-employment at a reasonable level of income. The court explicitly considered its allocation of property and debts in deciding against alimony. The district court ordered that Matthew be responsible for \$4000 of Karmen's attorney fees and reduced his share of the property by that amount.¹ Finally, the district court distributed the remaining assets between the parties.

Matthew now appeals from the district court's award of physical care, allocation of property, including the marital real estate, and award of attorney

¹ A previous order for temporary allowances ordered Matthew to pay an additional \$1000 of Karmen's attorney fees.

fees. Karmen cross-appeals from the district court's award of attorney fees and decision not to award alimony. She also requests appellate attorney fees.

II. Standard of Review

Our standard of review in this equitable proceeding is de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give weight to the district court's findings of fact, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Physical Care

Matthew argues the district court erred in declining to award joint physical care of Zander to both parents. Any consideration of joint physical care must be based on Iowa's traditional and statutorily required child custody standard of the best interests of the child. See Iowa Code § 598.41(5)(a) (2009); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). With this consideration in mind, our supreme court recently devised a nonexclusive list of factors to be considered when determining whether a joint physical care arrangement is in the best interests of the child.

The factors are (1) "approximation"—what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters."

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (quoting *Hansen*, 733 N.W.2d at 697-99). The ultimate objective of a physical care

determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

The district court declined to award joint physical care because of Matthew's past unwillingness to care for Zander and Zander's previous difficulty adjusting to the physical care arrangement. The record establishes that Karmen was primarily responsible for Zander's day-to-day care. Not only was Matthew often too busy to care for Zander, but the record shows that at times, he was unwilling to care for the child when requested by Karmen. In addition, after Matthew moved out of the marital home, Zander struggled to adjust to his parents' separation. The record shows that Zander is now well-adjusted, and we find stability is in his best interests. *See Hansen*, 733 N.W.2d at 697 (“[I]mposing a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest.”). Further, the record establishes that communication between the parties was strained, especially after an incident in which Matthew allegedly pushed Karmen into a wall, after which Matthew was charged with domestic abuse assault and a no-contact order was issued.² We conclude the district court properly considered the relevant factors, and its factual findings were fully supported by the record. Therefore, we affirm the district court's physical care decision.

² These charges were later dismissed.

IV. Marital Residence

Matthew argues the district court's award of the home/photography studio to Karmen, with the delayed equalization payment, inhibits his ability to obtain credit, inequitably obligates him on a mortgage for a property over which he retains no control, and inequitably denies him his share of the marital property potentially for thirteen years. However, Matthew agrees that, ideally, given the unique nature of the marital property, Karmen and Zander should continue to live there. He asks that the property be divided into lots for subdivision or refinanced. Karmen argues the district court's award is in Zander's best interests, as this is the only home Zander has known and is the best financial resolution for Karmen and her business, given that the real estate is dedicated primarily to her photography studio. She is willing to agree to a subdivision of the acreage if Matthew pays for zoning and platting to accomplish that purpose.

Iowa courts do not require an equal division or percentage distribution of property from a marriage. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each circumstance. *Id.*

On our de novo review, we conclude the district court's division of property is equitable to both parties. In dividing marital property, the court is to consider "the desirability of awarding the family home . . . to the party having . . . physical care of the children." Iowa Code § 598.21(5)(g). The district court properly considered the benefit of allowing Zander to remain in the family home. Further, in determining a property award, the district court is to consider the amount and duration of alimony payments between the parties. Iowa Code § 598.21(5)(h).

The district court considered this property allocation in deciding not to award Karmen alimony and to award to Matthew his entire retirement account valued at approximately \$30,000. The district court explicitly stated that the parties could agree to subdivide the property as an alternative method of providing the equalization payment to Matthew. This award is equitable to the parties.

V. Allocation of Personal Property and Debts

Matthew argues the district court erred in valuing the parties' property. We agree with Matthew's contention that, in determining each party's share of the total assets, the district court reversed the values of the parties' cars, valuing Karmen's car \$500 lower than its previously-determined value and valuing Matthew's car \$500 higher than its previously-determined value. We also agree with Matthew's contention that the district court erred in offsetting Karmen's property award by \$2000 for a debt owed to Best Buy. The record shows Karmen received \$2320 of insurance money to replace items damaged by lightning. The \$2000 debt at Best Buy was incurred when Karmen replaced these items. Thus, Karmen received the money to pay this debt from her insurer. The district court should not have considered this debt to offset her property award. To remedy these two errors, we increase Karmen's equalization payment to Matthew by \$1500, to \$31,500.

Matthew contends the district court erred in assigning him both the value of the motorcycle sold during separation as well as the value of the Dodge Neon. He argues that \$2000 of the proceeds from the sale of the motorcycle were used to purchase the Neon; therefore, the district court overvalued his assets. The record does not establish that proceeds from the sale of the motorcycle were

used in purchasing the Neon. Thus, we find the district court's assignment of value was not in error.

Finally, Matthew contends the district court significantly undervalued the photography equipment allocated to Karmen. At trial Matthew admitted a personal financial statement prepared July 27, 2007, which valued the photography equipment at \$26,300. The district court valued the photography equipment at \$7750, which was the value Karmen placed on the equipment. Due to the difficulty in setting the value of assets, appellate courts afford district courts leeway in determining value. *In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa Ct. App. 1993). When a district court's valuation is within the range of evidence, it will not be disturbed on appeal. *See In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987). Because we find the district court's valuation of the equipment to be within the range of evidence, especially when considering the age of the equipment, we find no reason to disturb the district court's value of the photography equipment.

VI. Alimony

Karmen cross-appeals, arguing the district court erred in declining to award her reimbursement and rehabilitative alimony. Alimony "is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1988). Alimony is not an absolute right; any form of alimony is within the discretion of the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21A(1). *Id.* Property division and alimony should be considered together in evaluating their individual

sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). Like the district court, we consider the award of the real property to Karmen in concluding she is not entitled to alimony.

Karmen has not established that she is entitled to rehabilitative alimony, as there is no evidence in the record that she plans to return to school or improve her skills. See *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989) (stating rehabilitative alimony provides means of support for an economically dependent spouse through limited period of education or retraining). There is little difference between the parties' earning capacities. Karmen is capable of supporting herself at a level similar to that enjoyed by the parties during the marriage.

We also affirm the district court's order declining to award reimbursement alimony. Reimbursement alimony is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other spouse. *Id.* at 64. Although Matthew took classes during the marriage, he continued to work while he obtained his degree. Further, Matthew's yearly earnings did not increase substantially after he received his degree, thus Karmen cannot argue that she was deprived of the opportunity to share in the benefits of Matthew's degree. See *In re Marriage of Probasco*, 676 N.W.2d 179, 185-86 (Iowa 2004) (stating reimbursement alimony is typically awarded when spouse seeking support did not have opportunity to share in financial benefit of other spouse's degree).

VII. Attorney Fees

Both parties assert the district court erred in ordering Matthew to pay \$4000 of Karmen's attorney fees through a reduction in his share of the marital

property. Matthew argues that each party is capable of paying his or her own fees and that Karmen's fees were excessive. Karmen argues that the district court erred in failing to grant her substantial attorney fees where Matthew caused unnecessary expense by instituting frivolous claims and refusing to comply with discovery requests.

An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). Finding no abuse of discretion in the district court's award of attorney fees, we affirm the award.

Karmen also seeks an award of appellate attorney fees. An award of appellate 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). 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). Upon consideration of the foregoing factors, we decline to award appellate attorney fees. Costs on appeal are assigned equally between the parties.

AFFIRMED AS MODIFIED.