IN THE COURT OF APPEALS OF IOWA

No. 1-494 / 10-1499
Filed September 8, 2011

IN RE THE MARRIAGE OF JUNE MARIE SCHRADER AND DANIEL RAYMOND SCHRADER

Upon the Petition of

JUNE M. SCHRADER,
Petitioner-Appellee/Cross-Appellant,

And Concerning

DANIEL R. SCHRADER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Benton County, Ian K. Thornhill, Judge.

The husband appeals and the wife cross-appeals the economic provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Sasha L. Monthei of Scheldrup, Blades, Schrock, Smith & Aranza, Cedar Rapids, for appellant.

Michael McDonough of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

We filed our decision in this appeal on August 10, 2011. The appellee/cross-appellant June M. Schrader subsequently filed a timely petition for rehearing, requesting that we review and modify the portion of our decision taxing appellate costs. We granted the petition for rehearing. Our August 10 decision is therefore vacated and this decision replaces it, modifying only the taxation of appellate costs.

I. Background Facts & Proceedings

Daniel and June Schrader were married in 1990. They have two children. The oldest child, Patrick, was eighteen years old and attending a two-year program in diesel mechanics at Northeast Iowa Community College. The youngest child, Nicholas, was born in 1993 and is still a minor. June filed a petition for dissolution of marriage on July 14, 2009. The district court awarded the parties joint legal custody of Nicholas, with June having physical care. The custody provision of the dissolution decree has not been challenged in the present appeal.

Daniel was forty-eight years old at the time of the dissolution hearing. He lives with his mother and pays her $600 per month. He had been employed as a truck driver and then as a press operator at Cryovac. Daniel lost his employment when Cryovac closed. He received severance payments until November 6, 2009. He took advantage of federal funding for education that was available to him when the plant closed, and began attending a two-year program in diesel mechanics at Kirkwood Community College. He is currently employed part-time

as a school bus driver, where he earns about $12,500 per year. Daniel also receives unemployment benefits. He has been diagnosed with diabetes. Furthermore, he injured his neck in a car accident in November 2009.

June was forty-five years old at the time of the dissolution hearing. She and Nicholas lived in the marital home, which the parties had purchased from June's parents. She has received training in cosmetology and as an assistant in a chiropractor's office. June is employed as a school cook and a school bus driver. She additionally has a part-time job as a school assistant. Her income from these all of these jobs is about $34,000 per year. June is in good health.

The district court issued a dissolution decree for the parties on August 18, 2010. The court found Daniel had an earning capacity of $52,591 per year, while June had annual income of $31,564. Based upon these incomes, the court ordered Daniel to pay child support of $567 per month for Nicholas. Additionally, Daniel was ordered to pay one-third of Patrick's college expenses. He was also ordered to pay one-third of any future college expenses incurred by Nicholas. Daniel was ordered to pay alimony of one dollar per month for seventy-two months. The alimony obligation will cease if June remarries, or either party dies.

The court awarded June the marital residence. The court found that $34,400 of the value of the home was due to gifts to June from her parents. The court found the remaining equity in the home was $41,304 and factored this amount into the distribution of assets. June was made responsible for the

indebtedness on the home. The court awarded certain assets to each party,[1] and ordered Daniel to pay an equalization payment to June in the amount of $8000, payable in four annual payments of $2000 each. Daniel appeals and June cross-appeals the dissolution decree.

II. Standard of Review

In this equity action our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*). 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).

III. Child Support

Daniel contends the district court improperly calculated his child support obligation by using his potential future income. He asserts his child support obligation should have been based on the income he was earning at the time of the dissolution hearing. He claims his future income after he graduates from Kirkwood is speculative. At trial, June claimed Daniel could earn between $50,000 and $60,000 per year as a truck driver, but in her appellate brief she states that the amount of income imputed to Daniel by the district court was accurate.

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[1] In addition to the marital residence, valued at $41,304, June was awarded assets worth about $105,093, giving her $146,397. The court ordered Daniel's Sealed Air Defined Benefit Plan to be divided between the parties by means of a Qualified Domestic Relations Order. The court awarded Daniel assets worth about $163,380, which included his other retirement plans.

We endeavor to ascertain the current monthly income of the parents from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). In some circumstances, we may use a parent's earning capacity rather than the parent's actual earnings. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). Earning capacity may be used where "substantial injustice would result or . . . adjustments would be necessary to provide for the needs of the child and to do justice." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). We examine the employment history, present earnings, and reasons for the current employment. *In re Marriage of Nielsen*, 759 N.W.2d 345, 348 (Iowa Ct. App. 2008).

We agree with the district court's conclusion that Daniel's earning capacity rather than his actual earnings should be used in calculating his child support obligation. We find that using Daniel's actual income would result in substantial injustice to the parties' minor child. We reach this conclusion after considering Daniel's employment history, his current income from part-time employment as a school bus driver, and the reasons he returned to school to learn a new career.

We disagree, however, with the court's conclusion that Daniel's earning capacity is $52,591 per year. Daniel testified he expected to earn between $25,000 and $30,000 when he got out of school. Patrick, who was taking a similar course of study, testified a diesel mechanic could earn between $30,000 and $50,000 per year, but with the amount dependent on experience. Using the most reliable evidence presented, we find Daniel could earn $30,000 per year when he finishes his schooling. To this amount should be added his income from

driving a school bus, which the court found was $12,591. We determine Daniel's earning capacity is $42,591 per year. We also note the court found June earned $34,535 in 2009, but set her income at $31,564 per year for child support purposes. We believe that Daniel's child support obligation should be based on his earning capacity of $42,591 per year and June's income of $31,564 as found by the district court. We modify the decree to set Daniel's earning capacity at $42,591 per year and remand to the district court for a new calculation of Daniel's child support obligation.

IV. Postsecondary Education Subsidies

Daniel asserts the district court should not have required him to pay a portion of the children's college expenses. He first claims he should not be required to pay for the children's college education when they refuse to have anything to do with him. Under Iowa Code section 598.21F(4) (2009), "[a] postsecondary education subsidy shall not be awarded if the child has repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner." Patrick testified he did not believe he had disowned his father. He stated he did not screen his calls in order to avoid talking to his father, and he had called his father on his birthday. We conclude Daniel has not shown he was repudiated by Patrick within the meaning of section 598.21F(4).

Daniel also claims the court's order regarding the postsecondary education subsidy for Patrick was excessive. In ordering a postsecondary education subsidy, a court should consider the amount a child may reasonably

be expected to contribute. Iowa Code §598.21F(2)(b). The court should consider a child's financial resources, including "the availability of financial aid, whether in the form of scholarships, grants, or student loans, and the ability of the child to earn income while attending school." *Id*.

The record shows that as part of his diesel mechanics program Patrick would work fifty hours per week for twelve weeks of on-the-job training each year, and be paid $8.25 per hour, for a total of $4950 each year. He had a student loan of $2750, and a scholarship of $1200.[2] Thus, Patrick received a total of $8900 for his 2009-10 school year. His education costs for that school year were $8781. It is apparent Patrick has the ability to pay almost all of his education costs himself. We modify the provision in the dissolution decree requiring Daniel to pay $2927 for Patrick's 2009-10 college expenses and one-third of Patrick's 2010-11 college expenses.[3] After considering the amount Patrick may reasonably be expected to contribute, as required by section 598.21F(2)(b), we conclude Daniel should be required to pay $1000 each of Patrick's two years of schooling and modify the decree accordingly.

We note the record shows Nicholas was a junior in high school at the time of the dissolution hearing. It is unknown at this time whether Nicholas will be attending college, or if he does, what his expenses will be. Nicholas refused to

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[2] June testified Patrick received total scholarships of $1200. She stated this was not a scholarship for each semester, but was a one-time gift. She also testified Patrick may not receive this total amount, based on his grade point average.

[3] The decree provides "Respondent shall *also* pay one-third of Patrick's 2009-2010 college expenses directly to Patrick . . . ." (Emphasis added). We believe this is a typographical error, and the court meant to provide that Daniel should pay one-third of Patrick's college expenses in the next school year, 2010-11.

engage in visitation with his father, and would not accept his telephone calls. Because the dissolution hearing occurred more than a year before Nicholas might begin college, and at the time of the hearing it could not be clear whether section 598.21F(4) might apply, we modify to eliminate the portion of the dissolution decree that requires Daniel to pay one-third of any future college expenses incurred by Nicholas. The district court will have jurisdiction of this issue to address it at an appropriate future point in time, taking into consideration developments that have occurred by the time of any hearing.

V. Medical Expenses

The district court ordered Daniel to provide COBRA health insurance for Nicholas, so long as it was available to him. The court went on to find that if Daniel could not provide COBRA health insurance and neither parent had health insurance available through their employment, then the parties should obtain health insurance for Nicholas with June paying thirty percent and Daniel paying seventy percent. The court went on to find that the first $250 of uncovered medical expenses per year should be paid by June. Any uncovered medical expenses above the first $250 each year should be paid thirty percent by June and seventy percent by Daniel.

Daniel argues it costs him $764 per month to provide COBRA health insurance for Nicholas, and that this requirement is completely unfair and a huge financial burden. He also argues that he should not be required to pay seventy percent of all out-of-pocket medical expenses. Based on our findings regarding the parties' relative incomes or earning capacities, we modify the dissolution

decree to provide that if COBRA health insurance is not available and neither party has insurance available through their employment, then June should pay forty percent and Daniel sixty percent of any premiums for health insurance for Nicholas. Additionally, any uncovered medical expenses over the first $250 per year should be paid forty percent by June and sixty percent by Daniel.

VI. **Property Division**

Daniel claims the district court failed to divide the parties' assets equitably. In matters of property distribution, we are guided by Iowa Code section 598.21. Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is clear and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). In considering the economic provisions in a dissolution decree, we will disturb a district court's ruling "only when there has been a failure to do equity." *In re Marriage of Smith*, 573 N.W.2d, 924, 926 (Iowa 1998) (citations omitted).

A. Both before and during the marriage June received United States treasury bonds as gifts from her family. The court set aside to June as her individual property those bonds, worth $19,527. Also, the parties purchased the marital residence from June's parents, but were not required to pay the full purchase price. The court found June was entitled to $34,400 of the equity in the home, which represented a gift to her alone towards the purchase price of the house. Daniel asserts these gifts to June should have been divided as marital assets.

A court is required to divide all property in a marriage, except inherited property and gifts received or expected by a party. Iowa Code §598.21(5). Generally, this property is "awarded to the individual spouse who owns the property, independent from the equitable distribution process." *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). Inherited and gifted property may be divided only "upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." *Id*. at §598.21(6).

In considering whether it would be in equitable to refuse to divide gifted property, we consider these factors:

> (1) contribution of the parties toward the property, its care, preservation or improvement;
> (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
> (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
> (4) any special needs of either party;
> (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

In re Marriage of Goodwin, 606 N.W.2d 315, 320 (Iowa 2000). The length of the marriage is also an important factor to consider in making this determination. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989).

June's mother, Janet Parr, testified that June's grandmother, Dorothy Elenz, gave the same gifts of bonds to all ten of her grandchildren, and these gifts were never made to married couples jointly. She also testified that she and her husband, Glen Parr, gave the same gifts of bonds to all of their children. The same is true considering the credit June received towards the purchase price of

the house; her parents gave similar gifts to each of their children. We affirm the district court's conclusion that these gifts were made to June alone. The court's refusal to divide this property was not inequitable. *See* Iowa Code §598.21(6).

B. Daniel claims the district court should have awarded him the marital residence. He stated he wanted to open his own repair shop in the large machine shed on the property and raise some livestock. The home was purchased from June's parents, and it had been her home for most of her life. We note that Daniel has not raised livestock on the property since 2005 or 2006. Furthermore, there was no evidence Daniel actually would be able to operate a business out of the machine shed. We agree with the court's decision to award the property to June.

C. The court awarded all of the contents in the marital residence to June for a value of $2300.[4] Daniel states the parties had previously agreed that the contents of the marital residence should be divided equally. He asks us to modify this provision and remand the matter to the district court to allow the parties to divide the assets equally within thirty days. During the dissolution hearing June testified she would be agreeable to dividing the marital assets with Daniel. The court stated, however, that the parties should have done that before the hearing, and it was up to the court at that point to divide the parties' assets. The value of the property in the marital residence was part of the

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[4] Daniel also appears to argue that the court improperly valued the personal property in the marital residence at $2300. "A trial court's valuation of an asset will not be disturbed when it is within the permissible range of evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). To the extent the issue is raised, we find the valuation by the court was within the permissible range of the evidence.

overall property distribution. We find the property distribution as a whole is equitable and we affirm. *See In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002) (finding that we do not look at issues in isolation, "but must look to the economic provisions of the decree as a whole in assessing the equity of the property division").

D. In her cross-appeal, June contends the court should have made an additional equalizing award because Daniel wasted or concealed marital assets. She attempted to show Daniel earned over $22,000 that was never deposited into his bank accounts. The dissipation of assets is a proper consideration when dividing marital property. *In re Marriage of Fennelly*, 737 N.W.2d 97, 104 (Iowa 2007). We consider whether payments made by a spouse are a reasonable and expected aspect of the marriage. *In re Marriage of Burgess*, 568 N.W.2d 827, 829 (Iowa Ct. App. 1997).

During the time in question, Daniel was using his income to pay child support, health insurance premiums, the mortgage payments on the marital residence, and his own expenses, such as rent. The district court took this into consideration, finding "Dan has been making temporary support payments and has incurred his own living expenses over the last year." We determine June is not entitled to an additional equalization payment due to dissipation of assets by Daniel.

VII. Alimony

The district court ordered Daniel to pay the nominal amount of alimony of one dollar per month for seventy-two months. Daniel claims this award is

inequitable, asserting that June has the ability to be self-supporting. He states she has the ability to earn about $34,000 per year and there is no need for rehabilitative alimony.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *Id*. In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1). *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). We give the district court considerable discretion in awarding alimony, we will disturb the court's ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

The district court found:

> Based upon the length of the marriage, June's role as the primary caretaker for the children, and June's dated professional skills, the Court finds rehabilitative alimony is warranted to assist June in becoming self-sufficient. However, Dan's current employment status and his other financial obligations from this Decree make it inequitable to grant a meaningful amount of alimony at this time. Therefore, the court does find June's request for nominal alimony should be granted.

We note that Daniel's earning capacity exceeds that of June. In the event Daniel's income improves more than anticipated after he completes his classes, June's right to seek modification of the alimony award is preserved. We affirm the nominal alimony award.

VIII. Attorney Fees

A. The district court denied June's request for attorney fees, finding "Petitioner and Respondent will each pay their own attorney fees." An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 767 (Iowa 1997). We find the district court did not abuse its discretion in requiring the parties to pay their own trial attorney fees.

B. June also requests attorney fees for this appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2 90, 94 (Iowa Ct. App. 2007). Considering these factors, we determine each party should pay that party's own attorney fees for this appeal.

IX. Conclusion and Disposition.

We affirm the distribution of property, the alimony award, and the denial of trial attorney fees. We determine Daniel's child support obligation should be modified and we remand to the district court for a new child support order. We also determine that Daniel's obligation for Patrick's college expenses should be reduced. We vacate the requirement that Daniel pay a portion of Nicholas's college expenses, finding that issue should be addressed at a future time. Additionally, we modify Daniel's responsibility for medical expenses. Finally, we

affirm the district court's order concerning trial attorney fees and deny June's request for appellate attorney fees.

Appellate costs are taxed forty percent to Daniel and sixty percent to June. In taxing appellate costs we have considered each of the several issues and sub-issues presented by the parties, and whether the party presenting each was successful or unsuccessful on it. *See* Iowa R. App. P. 6.1207.

AFFIRMED AS MODIFIED AND REMANDED.