IN THE COURT OF APPEALS OF IOWA

No. 1-609 / 11-0332
Filed October 5, 2011

IN RE THE MARRIAGE OF TIFFANY JO CHRISTENSEN AND CHRISTOPHER HAROLD CHRISTENSEN

Upon the Petition of
TIFFANY JO CHRISTENSEN,
Petitioner-Appellee,

And Concerning
CHRISTOPHER HAROLD CHRISTENSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Cherokee County, Nancy L. Whittenburg, Judge.

A respondent appeals from the district court's decree of dissolution. **AFFIRMED AS MODIFIED.**

Michael R. Bovee of Montgomery, Barry, Bovee & Barry, Spencer, for appellant.

Elizabeth A. Rosenbaum, Sioux City, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

VOGEL, P.J.

Christopher Christensen appeals from a district court ruling that placed physical care of the parties' children with their mother, Tiffany Christensen, and ordered Chris to pay $20,000 toward Tiffany's attorney fees. Chris also appeals the district court's sustaining of an objection to enter into evidence the deposition of Tiffany. Upon our review, we agree with the district court's granting of primary physical care to Tiffany. We also find that although the district court should have admitted the deposition subject to Tiffany's objection, because Chris failed to make an adequate offer of proof, error was not preserved and there is nothing for us to review. We do, however, find that the district court abused its discretion in ordering Chris to pay $20,000 toward Tiffany's attorney fees. We therefore affirm as modified and reduce the attorney fee award to $5000.

I. Background Facts and Proceedings

Chris and Tiffany were married on January 24, 2004. At the time of trial, Chris was thirty-one years old and employed at Christensen Brothers, his family's bridge construction business. Tiffany was thirty-two years old and a self-employed chiropractor. The parties have two children, T.C. born in 2004, and K.C. born in 2006.

Tiffany filed a petition for the dissolution of marriage in August 2009 and after considerable discovery, trial was held on July 28, 2010. The district court granted the parties joint legal custody of the children with primary physical care granted to Tiffany, ordered Chris to pay child support in the amount of $764 per month, divided the parties' property, and ordered Chris to pay $20,000 toward Tiffany's attorney fees. Chris appeals.

II. Standard of Review

Our review of dissolution decrees is de novo. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). While we are not bound by the district court's factual findings, we do "give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying." *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). We review an award of attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Analysis

A. Joint Physical Care

On appeal, Chris argues the district court should have granted the parties joint physical care of the children. In determining whether joint physical care is appropriate, our primary consideration is the best interests of the children. *See In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) ("Any consideration of joint physical care . . . must still be based on Iowa's traditional and statutorily required child custody standard—the best interest of the child."). Moreover, in making a physical care determination it is our intention to place children in the environment that is "most likely to bring them to health, both physically and mentally, and to social maturity." *Id.*

Our supreme court has articulated several factors courts are to consider when determining if joint physical care is in the best interests of the child. First, where there are two suitable parents, consideration is given as to the stability and continuity of caregiving, which "tend[s] to favor a spouse who, prior to divorce, was primarily responsible for physical care." *Id.* at 696. A second factor

is the ability of the spouses to communicate and show mutual respect. *Id.* at 698. The third factor is the degree of conflict between the parents, because joint physical care requires "substantial and regular interaction between divorced parents on a myriad of issues." *Id.* The court has also noted where one party objects to joint physical care, the likelihood of its success is reduced. *Id.* A fourth factor is the degree to which the parties agree about their approach to daily matters concerning the children. *Id.* at 699. While these four factors are significant to determining the appropriateness of joint physical care, they are not exclusive, and we must consider "the total setting presented by each unique case." *Id.*

In this case, it is evident that both parents love their children very much. However, we agree with the district court's decision that Tiffany should be granted primary physical care of the children. Tiffany has historically been the primary caregiver of the children, providing food and clothing, establishing a morning routine to prepare the children for the day ahead, accompanying them to medical appointments, and taking them to soccer, dance classes, and swimming lessons. Moreover, Tiffany works four days a week at her own business, where she has the flexibility to adjust her own schedule and to attend to the children as needed. The district court deemed Chris and Tiffany to have "average" communication skills, and we recognize that Tiffany's objection to joint physical care could make it less successful than granting one parent physical care. While Chris is certainly a loving father and has recently been more involved in the daily care and routines of the children, he has not historically been the primary caretaker of the children. Further, although Tiffany was granted physical care,

Chris received liberal visitation rights, including every Wednesday night and alternating weekends during the school year, five consecutive weeks in the summer, and alternating holidays. A continuity of caregiving by Tiffany, paired with her historical role as the children's primary caregiver, and liberal visitation with Chris, will provide the children with a stable environment that will contribute to their ability to become mentally, physically, and socially mature adults. *Id.* at 695. We therefore affirm the district court's granting of primary physical care to Tiffany.

B. Admission of Deposition

Chris next contends the district court erred in refusing to admit into evidence Tiffany's deposition taken on December 18, 2009. He further specifies the district court's ruling sustaining the objection to offer the deposition constitutes prejudicial error. Tiffany responds that Chris did not make an offer of proof at trial nor did he set forth how error was preserved on this issue.

Tiffany testified at trial, first being questioned by her attorney, Elizabeth Rosenbaum, followed by cross-examination by Chris's lawyer, Michael Bovee. Directly before resting his case—and three witnesses after Tiffany testified—Mr. Bovee offered Tiffany's deposition as part of Chris's evidence.

> MR. BOVEE: Your Honor, the only further thing I have is, I would offer the deposition—original deposition of Tiffany Jo Christensen taken on December 18, 2009, as part of respondent's case.
>
> THE COURT: Ms. Rosenbaum?
>
> MS. ROSENBAUM: I'm not sure of the necessity or if Mr. Bovee is asking her to read the deposition or—
>
> THE COURT: She's here live today.
>
> MR. BOVEE: We've made reference to it.
>
> THE COURT: I don't see any need to receive the deposition if she gave live testimony today. If you wished to impeach her, you

> should have done so when she was on the stand. So there's an objection?
>
> MS. ROSENBAUM: Yes, your Honor, I object.
>
> THE COURT: It's sustained.
>
> MR. BOVEE: We have nothing further, your Honor.

While Mr. Bovee referenced the deposition twice during Tiffany's cross-examination—once while discussing Tiffany's belief that Chris is "somewhat reckless and has a temper" and once while discussing the preparation of the parties' 2009 tax returns—he provided no substantive reason for later offering the deposition at trial, and only stated "we've made reference to it."

Our case law provides that even where evidence should have been admitted, "without an offer of proof, there is nothing for us to review." *See In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa Ct. App. 1998) (noting that although the appellant correctly identified that in an equity proceeding he should not have been precluded from introducing evidence, without an offer of proof there was nothing for the appellate court to review). An offer of proof is necessary to preserve error in the exclusion of evidence. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 n.2 (Iowa Ct. App. 1997). Further:

> An offer of proof serves both to give the trial court a more adequate basis for its evidentiary ruling and to make a record for appellate review. An offer of proof provides a record because the reviewing court cannot predicate error upon speculation as to what testimony would have come into the record had the objection not been sustained. The burden of making an offer of proof to preserve error is on the party that urges the evidence should have been admitted.

Strong v. Rothamel, 523 N.W.2d 597, 599 (Iowa 1994) (citations omitted). Of note, however, is that an offer of proof is unnecessary if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Iowa R. Evid. 5.103(a)(2).

Here, Chris had the burden of making an offer of proof. *Daniels*, 568 N.W.2d at 55 n.2. Tiffany's deposition was offered into evidence, but there was no indication regarding the substance of the evidence in the deposition. Chris notes the deposition was referenced twice while Tiffany was being cross-examined. The first reference concerned Tiffany's belief that Chris was reckless and had a temper:

> Q: What did you actually do in regard to Exhibit 7? What are you trying to say here? A: That I believe that [Chris is] somewhat reckless and has a temper.
>
> Q: And weren't you asked during your deposition about that and, basically, testified that all of these events were premarital? A: I don't know that all of them were, sir.
>
> Q: Well, we'll talk about the deposition in a minute.

Mr. Bovee then continued with Tiffany, reviewing Exhibit 7, a record of Chris's past infractions with the law, making no further mention of the deposition at that time. The deposition was referenced a second time at the end of Tiffany's cross-examination, with respect to the parties' 2009 tax return filings.

> Q: And you didn't like the results, so you went to the other [tax return] preparer? A: I hadn't had an answer on what to do.
>
> Q: Well, we talked about it in your deposition. We'll—I will offer that when we're done here. But you and I talked about that problem in the deposition, did we not? A: I—It's been six months ago. I suppose we probably did.
>
> Q: I have no further questions. Thank you.

Although we recognize the district court should have admitted the deposition subject to Tiffany's objection, because we find Chris failed to make an adequate offer of proof, error was not properly preserved on this matter such that we have anything to review. *Wersinger*, 577 N.W.2d at 868 (noting that absent an offer of proof, the appellate court has nothing to review).

C. Attorney Fees

We review an award of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. In addition, the fees must be fair and reasonable." *Witten*, 672 N.W.2d at 784.

The district court ordered Chris to pay $20,000 toward Tiffany's attorney fees, which totaled approximately $24,000 at the time of trial. Chris argues the trial court abused its discretion in awarding Tiffany attorney fees based on Chris's "superior" financial position and the "disparate financial circumstances" of the parties. Tiffany, citing several examples, asserts she incurred "excessive legal and expert fees to fight for the ongoing physical care of T.C. and K.C., protect herself from Chris, fairly value her chiropractic practice, and to obtain financial information that she was entitled to."[1]

In ordering Chris to pay $20,000 to Tiffany in attorney fees, the district court did not reference any pre-trial matters. It did, however, focus on Chris's involvement in a family business, where he has been gifted ownership shares and other assets that put him in a superior financial situation. The district court reasoned:

[1] In her appellate brief, Tiffany lists five examples of legal fees and expert fees she incurred, including: (1) filing a resistance to an application for conciliation because Chris himself admitted the marriage was strained and the parties had tried counseling twice in the past, (2) filing a motion for a protective order from Chris's discovery requests relating to Tiffany's chiropractic practice which would violate Tiffany's patient privacy requirements under state and federal law, (3) filing a motion to compel to obtain discovery information Tiffany properly requested from Chris six months earlier, (4) filing an application for sanctions due to Chris's ongoing failure to provide financial information during discovery proceedings, and (5) hiring an expert to value her chiropractic practice because of statements Chris made regarding his retention of someone in Minnesota who would value the practice at $200,000.

> Chris' financial position is superior to Tiffany's. He has never been required to make any capital contribution to his employment or the family business that employs him. He has been gifted ownership shares in that business that generate income for him and he has been gifted other assets that enable him to leave the marriage in a sound financial position. On the contrary, Tiffany is heavily indebted for the education that she obtained to enable to start and operate her professional practice. She is solely responsible for repayment of this debt and must depend upon the revenues from her practice to provide the revenue stream to meet her student loan repayment obligations. Other than the income she generates from her practice, Tiffany has insignificant assets from which she can pay her attorney the sums incurred for her representation.

Chris contends the district court's justification for awarding Tiffany attorney fees conflicts in part with the provisions of Iowa Code section 598.21(6), which states in pertinent part:

> Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Iowa Code § 598.21(6) (2009). Although this code section does not have a direct bearing on the factors we consider when reviewing the district court's award of attorney fees other than the overall financial positions of the parties, Chris correctly asserts the district court should not have considered "gifts" he has received in the form of his family's business in making a determination as to his ability to pay Tiffany's attorneys fees. Moreover, while Chris's family business involvement may have equipped him with the ability to pay *his own* attorney fees, such involvement does not require him to pay Tiffany's attorney fees. *Compare Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978) (stating that the district court, which has considerable discretion in the allowance of attorney fees, considers "one spouse's financial needs and the other spouse's ability to satisfy them" in

awarding attorney fees), *with In re Marriage of Goodwin*, 606 N.W.2d 315, 324 (Iowa 2000) (finding the district court did not abuse its discretion in ordering a wife to pay her own attorney fees and recognizing the wife's inheritance as a source of funds which made her "well equipped" to pay *her own* attorney fees (emphasis added)).

We next look to the record to review the economic positions of the parties. Tiffany's affidavit of financial status, which was later stipulated to by the parties, shows her gross annual income at $52,104, and her net income at $39,336. It shows Chris's gross annual income at $46,800, and his net income at $37,386. After deductions are accounted for each year, Tiffany's net income exceeds Chris's net income by $1950 per year.

Chris's affidavit of financial status shows his average net monthly income at $3116 per month, for a total net income of $37,392 per year ($6 higher than stated in Tiffany's affidavit). It shows Tiffany's average net monthly income at $3218 per month, for a total net income of $38,616 per year ($720 less than stated in Tiffany's affidavit).

Because both affidavits of financial status confirm the parties have roughly equal net incomes, the respective abilities of the parties to pay for their attorney fees is also roughly equal. Moreover, Tiffany's income has increased at a rate of approximately ten to fifteen-percent per year, in all but one year, since 2003, and she testified this trend reflects her growing practice.

While we recognize that Chris failed to comply with discovery requests regarding certain financial statements, Chris was sanctioned and ordered to pay $500 toward Tiffany's attorney fees. Our review of Tiffany's Exhibit 13, "Affidavit

of Attorney Fees," indicates that the additional expenses Tiffany incurred as a result of this failure to comply with discovery proceedings, as well as the cost of her attorney's review of the business valuation, does not support the $20,000.

Tiffany also testified at trial that she had already paid approximately $17,000 in attorney fees, and still had an outstanding balance of $7000. She testified that the $17,000 already paid was "possibly" taken from a checking account, which would have been available for distribution had she not used it to pay her attorney fees. If the $17,000 Tiffany used to pay her attorney fees had been available for distribution, Chris would have received an additional $8,500 in the distribution of marital assets. However, the pretrial stipulation, which the district court referred to as reflecting "Form B," shows Tiffany is indebted to Cherokee County State Bank in the amount of $18,234. The "Form B Stipulation of Assets" describes a loan to Tiffany from the same bank as a "Chiropractic business loan," in the amount of $24,234. At oral arguments, both parties agreed the payment source for the $17,000 Tiffany already paid her attorney was unclear—which underscores our limitation in tracing the funds and determining whether the attorney fees were paid from otherwise divisible marital assets. Mr. Bovee stated at oral arguments that Chris had not paid any attorney fees incurred by Chris to date. Because we find the parties have relatively equal net incomes, Tiffany's income and chiropractic business continues to grow, the attorney fees Tiffany incurred as a result of Chris's failure to comply with discovery and the valuation of Tiffany's business were much lower than $20,000, and the uncertainly as to the origin of the $17,000 already paid, we find the

district court abused its discretion in ordering Chris to pay $20,000 toward Tiffany's attorney fees. We therefore reduce the attorney fee award to $5000.

D. Appellate Attorney Fees.

Finally, Tiffany requests appellate attorney fees, and her attorney has submitted an affidavit itemizing her services to date. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the requesting party, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *Id.* Upon consideration of these factors and in light of our resolution of the claims, we decline to award appellate attorney fees. Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.