IN THE COURT OF APPEALS OF IOWA

No. 1-710 / 11-0200
Filed November 9, 2011

IN RE THE MARRIAGE OF
DAWN LYN GROTH AND
TROY JAMES GROTH

Upon the Petition of
DAWN LYN GROTH,
Petitioner-Appellee/Cross-Appellant,

And Concerning
TROY JAMES GROTH,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Crawford County, Edward A. Jacobson, Judge.

Troy Groth appeals and Dawn Groth cross-appeals from the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

Maura Sailer of Reimer, Lohman & Reitz, Denison, for appellant.

Dee Ann Wunschel of Wunschel Law Firm, P.C., Carroll, for appellee.

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

POTTERFIELD, J.

I. Background Facts and Proceedings

Dawn and Troy Groth were married in 1989. In 1992, the parties moved to Denison. The parties separated in May 2008, and in June 2009, Dawn filed a petition to dissolve the parties' marriage. At the time of trial, both parties were in their mid-forties and in good health.

The parties have two children, ages eighteen and fifteen at the time of trial. The parties stipulated that Dawn would have physical care of the parties' youngest child, subject to Troy's right of visitation. The parties disputed primarily the financial terms of their dissolution. They do not agree as to each other's net monthly incomes.

Dawn graduated from Iowa State with a major in fashion merchandising and a minor in advertising. Except for short periods of time, Dawn was employed throughout the parties' marriage. At the time of trial, Dawn was employed by Walmart in the pharmacy. The parties agree that Dawn's gross income is $32,279 per year and includes wages, employer contributions to her 401(k), and employer contributions to her health savings account. Dawn worked approximately thirty to thirty-two hours per week, and she testified no additional hours were available to her.

Troy graduated from Iowa State with a major in engineering. Troy also obtained his master's degree. Troy has worked as a consulting engineer for Sundquist Engineering since 1993. Troy asserted his gross income for 2010 would be $80,756.80, which he stated includes his base pay, an expected contribution by his employer to his retirement account, and actual and projected

dividends received from his stock ownership in Sundquist. Troy also receives an annual bonus at the end of the year based on company and employee performance.

After a trial on July 15, 2010, the district court entered a decree dissolving the parties' marriage. The court ordered Troy to pay alimony in the amount of $1550 per month commencing October 1, 2010, and ending after sixty-six payments have been made. The court also ordered Troy to pay Dawn child support of $1000 per month commencing October 1, 2010. The court specifically found this amount complied with the child support guidelines, though the court declined to calculate Troy's exact net monthly income. The court also ordered, "Dawn shall maintain health insurance for herself and [the parties'] two sons."

As part of its property division, the court ordered Troy to pay Dawn the following amounts, totaling $17,650: (1) $8200 for Dawn's half of the parties' joint bank account that the court found Troy "cashed in, and apparently disposed of without any good cause for doing so"; (2) $5500 for Dawn's half of the parties' federal tax refund that the court found Troy received and kept; (3) $2000 for Troy's half of a heat pump Dawn paid to replace in the marital home; and (4) $1950 for Troy's half of the youngest child's braces, for which Dawn paid. In addition, the court ordered Troy to pay Dawn $3000 in attorney fees.

Dawn filed a motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904(2) contending the court should have ordered Troy to pay child support beginning July 15, 2010, the date of trial. Dawn also asked the court to direct which party should pay for health insurance and uncovered medical expenses, stating the court failed to provide such direction in its order.

Troy also filed a rule 1.904(2) motion asking the court to rule specifically on: (1) whether his net monthly income at the time of trial was $4915.62, as he asserted; (2) whether Dawn should be required to refinance the marital home; (3) whether Dawn should be ordered to provide him with information concerning the parties' youngest child; and (4) whether Dawn should be required to ensure the youngest child participates in family counseling with Troy. Troy filed a separate motion requesting that the court incorporate into its order the parties' agreement to alternate income tax exemptions. Dawn's reply to Troy's 1.904 motion requested alimony to be increased to ten years in duration.

In its ruling on the motions to reconsider, the district court declined to modify the start date of the child support. Regarding Dawn's request that the court clarify its ruling as to which party should pay health insurance, the court stated, "[T]he decree is easily understood that Dawn should provide health insurance and pay for the same." The court declined to specifically determine Troy's net monthly income, referencing statements in the decree that the parties were not candid with regard to their income and that of their former spouses. The court found the following issues were not presented at trial and therefore could not be presented though a post-trial motion: (1) whether the home should be refinanced; (2) whether Dawn should provide information to Troy concerning the youngest child; and (3) whether Dawn should be required to ensure the parties' youngest child participates in counseling.

Troy appeals, asserting the district court erred in: (1) determining Troy's child support obligation without first determining the parties' actual incomes, without considering the alimony award, and by deviating from the child support

guidelines; (2) ordering Troy to pay Dawn alimony in an amount that was inequitable; (3) failing to rule on his requests that Dawn be required to ensure the youngest child attend counseling and that Dawn be required to share information, requests he alleges were raised at trial; (4) awarding Dawn a "reimbursement" payment for her share of the parties' joint bank account and tax return and his portion of the payments for the heat pump and the child's braces; (5) not specifically awarding Troy an investment account the parties had stipulated belonged to him; (6) not requiring Dawn to refinance the marital home; (7) not incorporating the parties' agreement on the tax dependency exemption into its final decree; and (8) awarding Dawn attorney fees. Troy requests appellate attorney fees.

Dawn cross-appeals, asserting the district court erred in: (1) failing to increase the amount and duration of her alimony; (2) failing to award child support beginning July 15, 2010; and (3) failing to provide for the payment of the youngest child's uncovered medical expenses. Dawn 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. 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. Child Support

Both parties assert the amount of the child support award should be adjusted in their favor. Troy also asserts the district court erred in failing to determine each party's income before calculating his child support obligation. In calculating the child support award, the district court noted,

> The court finds specifically that the amount of $1000 per month complies with the child support guidelines promulgated by the supreme court, although it appears to the court that each party has attempted to intentionally minimize their assets and income and maximize those of the other party, to the extent that the court cannot absolutely guarantee that the true figures would fall within the guidelines. However, Troy calculates child support in the amount of $828 and Dawn calculates child support in the amount of $1106.33 and the court believes that if both parties had used accurate figures in their child support calculation, the $1000 figure would have been almost exactly correct, but most certainly within the margin of error allowed by the guidelines.

"In determining child support under the guidelines, the court must determine both the custodial and noncustodial parent's net monthly income." *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). "The guideline charts are designed to determine the amount of child support based upon the number of children and the current net monthly income of the custodial and noncustodial parent." *Id.* at 534. We find that the court reasonably placed the child support obligation equidistant from the positions of the two parties and that the decree implicitly finds the parties' net monthly incomes to be somewhere between their disputed figures.

Troy also asserts the district court erred in not considering the alimony award when calculating child support and in deviating from the child support guidelines without written findings that application of the guidelines would be

inappropriate, as required by Iowa Court Rule 9.11. The district court specifically determined its child support award did not deviate from the guidelines. Further, while the district court may consider the alimony award when deciding whether to deviate from the guidelines, the court is not required to do so absent a finding the alimony would render the child support award unjust or inappropriate under the criteria listed in rule 9.11. *See In re Marriage of Lalone*, 469 N.W.2d 695 (Iowa 1991) (finding that while the child support guidelines do not provide a deduction from income for the amount of alimony paid, it may be considered by the court in an attempt to do justice between the parties).

Dawn asserts the district court erred in declining to commence Troy's child support obligation as of July 15, 2010, the date of the trial. Dawn asserts this is the day the parties were "officially divorced." The district court did not file its dissolution decree until September 23, 2010, which is when the parties' divorce became final. *See In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009) (stating a divorce decree is final when entered). Further, the district court properly noted that if Dawn wished to receive child support before the dissolution decree was entered, it would come in the form of temporary child support, not a retroactive award of child support. We find the district court did not err in commencing child support as of October 1, 2010.

IV. Alimony

Both parties assert the district court erred in determining the amount and duration of alimony. Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). 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 (2009). *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007). Although our review of the alimony award is de novo, we give the district court "considerable latitude" in making this determination based on the statutory criteria. *Anliker*, 694 N.W.2d at 540. "We will disturb that determination only when there has been a failure to do equity." *Id.*

We consider the factors relevant to the present case. The parties' marriage was one of long duration, lasting roughly twenty years. Both parties were educated, though Dawn was not working in her desired field. In regards to the property distribution, the district court noted, "[T]o some extent both parties, but especially Troy, have attempted to minimize the value of the assets that they believe they will receive and maximize the value of the assets that they believe the other will receive." In spite of the parties' noted lack of candor, the record shows Dawn was awarded approximately half of the marital assets, including the marital home.

In assessing the parties' earning capacities, the district court noted that Troy "calculates Dawn's earnings 33 percent higher by virtue of calculating 40 hours, although only 30 hours are available to her, [and] downplays his own income rather dramatically." The district court also noted the possibility that Troy's income would be "somewhat reduced in 2010" due to the downturn in the economy, but concluded, "[C]learly [Troy's] earning potential is at least five times greater in Denison, Iowa, than is Dawn's." While we find this figure may be a stretch, it is clear that Dawn's earning capacity is considerably less than Troy's. It is also clear that Dawn is not likely to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. "In a marriage

of long duration, alimony can be used to compensate a spouse who leaves the marriage at a financial disadvantage, 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 properly considered the relevant factors in determining its alimony award. After a thorough review of the factors and their application to the facts of this case, we conclude the district court's award was equitable and should not be disturbed on appeal.

V. Issues the District Court Determined were not Presented at Trial

Troy contends the district court erred in failing to rule on his requests that: (1) Dawn be required to ensure the youngest child attend counseling with Troy, (2) Dawn be required to share information with Troy concerning the youngest child, and (3) Dawn be required to refinance the marital home. In its ruling on the parties' post-trial motions, the district court found these issues were not presented at trial. We agree with Troy that these issues were presented at trial and merit a decision.

A. Counseling

We conclude an order requiring Dawn to ensure the parties' youngest child attends counseling with Troy is unnecessary. Troy is entitled to visitation with the child, and the court sees no reason why Troy could not schedule counseling during this time. Further, the record shows no reason why Dawn would not act in her child's best interests and encourage the child to take steps to improve his relationship with his father.

B. Sharing Information Regarding the Child

This court finds an order requiring Dawn to share with Troy information about the parties' youngest son is unnecessary. Troy and Dawn agreed to joint legal custody of this child. Because the parties share joint legal custody of the child, Troy has the right to request information and notices from the school. We agree with Dawn that Troy has the ability to request such information and that it is his responsibility to do so.

To the extent Troy seeks information to which he does not have access or would not know to seek access, Dawn has a responsibility as the parent with physical care to communicate information to Troy when joint decisions need to be made. *See In re Marriage of Hoksbergen*, 587 N.W.2d 490, 492–93 (Iowa Ct. App. 1998) ("Except for emergency situations, the parent then having physical care has a responsibility of communicating to the other parent the need to make the decision and making the necessary information available."). Troy has a right to equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. *See* Iowa Code § 598.1 (establishing the rights and responsibilities of joint legal custody). No additional court order is required to ensure that Dawn communicate with Troy regarding these decisions. The parties' agreement to and the district court's grant of joint legal custody presupposes the parties can communicate with each other regarding the upbringing of the child. *See In re Marriage of Gensley*, 777 N.W.2d 705, 715 (Iowa Ct. App. 2009) (stating inability to communicate is a factor weighing against joint legal custody). The parties are expected to exercise this ability to communicate to make sure each parent is informed regarding

issues over which joint legal custodians have responsibilities and rights. Further, the child, who was age fifteen at the time of trial, is old enough to share information with his father and hopefully, as the father-child relationship improves, the child will do so.

C. Refinancing the Marital Home

Troy requested the marital home be refinanced within ninety days or, if Dawn was unable to refinance, that the home be sold. If Dawn does not refinance, Troy will remain liable on the mortgage without any ownership interest in or control over the property. This gives Troy no protection in the event of a foreclosure.

However, we must balance this concern against Iowa Code section 598.21(5)(g), which directs the court when dividing the property of a marriage to consider the desirability of awarding the family home for a reasonable period to the party having physical care of the child. "Such an award provides some stability of a home situation for the children and allows them to stay in the same school district and maintain contacts with friends." *In re Marriage of Lovetinsky*, 418 N.W.2d 88, 89 (Iowa Ct. App. 1987).

As part of determining what was fair and equitable in this case, the district court awarded the home to Dawn in its overall property division. *See In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991) (stating the court's determining factor in making a property distribution should be what is fair and equitable). We understand Troy's concerns about remaining liable on the mortgage long-term; however, we agree it is desirable to allow the child to remain

in the marital home. We therefore find Dawn should not be required to refinance or sell the marital home.

VI. Stipulated Issues

Troy asserts the district court erred in failing to incorporate in its order two issues stipulated to by the parties pre-trial—which party could claim the parties' youngest child as a tax exemption and which party should have ownership of Troy's Thrivent investment account. The district court did not address either issue in its order. In his post-trial motion, Troy did not ask the court to rule on the Thrivent account and therefore did not preserve the issue for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

Troy did, however, preserve the tax exemption issue for our review. We agree with Troy that the district court erred in failing to rule on this issue. Though the district court was not bound by the parties' agreement, we believe the agreement is equitable and the district court therefore should have incorporated this agreement into its decree. *See In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa Ct. App. 1995) (stating that, absent assent by the court, a stipulation between parties is not binding on the court). We award Troy the youngest child's federal and state dependency exemptions in odd-numbered years provided that he is current in paying his child support obligation. Dawn is entitled to the dependency exemption in the even-numbered years.

VII. Reimbursement Payment

Troy asserts the district court erred in awarding Dawn a "reimbursement" payment consisting of: Dawn's half of the parties' joint bank account, Dawn's half of the parties' 2008 tax refund, Troy's share of the cost of a heat pump for the marital home, and Troy's share of the cost of braces for the parties' youngest child.

A. Joint Bank Account

We first examine the parties' joint bank account. The district court ordered Troy to pay Dawn "the sum of $8200 for her half of the joint savings account, which he cashed in, and apparently disposed of without any good cause for doing so." The record shows Troy removed $16,400 from the joint account. Troy testified he used $6100 to pay off one of the parties' credit cards, $5900 to pay his attorney, and the rest for household payments, electricity, communications, garbage, other credit card bills, and the mortgage payment on the marital home. We disagree with the district court's findings that the money from the joint bank account was disposed of "without any good cause." The record clearly shows that Troy spent $6100 to pay off one of the parties' joint credit cards. The record also reflects Troy paid a significant amount of marital expenses, including the mortgage on the marital home, in which Troy has not lived since June 2008. Troy should not be required to reimburse Dawn for this money, which was used to pay marital expenses.

However, Troy must reimburse Dawn for the $5900 he used to pay attorney fees. "Attorneys' fees incurred in dissolution proceedings are not marital debt." *Hansen*, 773 N.W.2d at 703. Troy incorrectly classifies his attorney fees

as marital debt rather than as his own personal liability. *See id.* Troy asserts Dawn also used marital funds to pay $1000 of attorney fees. Though Dawn denies this, we find the record shows it to be true. Accordingly, we find Troy must reimburse Dawn for her share of the $4900 he improperly used to pay his attorney fees,[1] which were his personal liability. We therefore conclude Troy is required to reimburse Dawn $2450 for money from the joint bank account, rather than the $8200 ordered by the district court.

B. Tax Refund

Troy received approximately $11,000 in April 2009 as a refund for the parties' 2008 taxes. Troy asserts this money was transferred to a joint checking account, which Dawn used to pay marital expenses. We find the district court erred in concluding that Troy "kept the entire [refund] amount, although [the parties] had agreed to split it." A review of the record reflects that in addition to paying marital expenses from his account, Troy transferred significant funds into the joint checking account, which was used to pay marital expenses. Because Troy used this money to pay marital expenses, we conclude he should not have to reimburse Dawn for her share of the tax refund.[2]

Troy also takes issue with the district court's finding that Dawn was allowed to keep her tax refund because it was "small" and was used to support the family. The record reveals Dawn's tax refund was for 2009, when the parties filed separate tax returns. Therefore we believe it should be treated differently

[1] We subtract the $1000 Dawn used to pay her attorney fees from the $5900 Troy used to pay his attorney fees in determining Troy's reimbursement payment.

[2] In making this finding, we acknowledge that, contrary to the district court's findings and Dawn's assertions, Troy did not forge Dawn's signature on a tax refund check. The record establishes the refund was deposited directly into the bank account.

than the 2008 tax refund when the parties filed their taxes jointly. The district court properly allowed Dawn to keep her 2009 tax refund.

C. Heat Pump and Braces

Troy asserts the district court erred in requiring him to pay half of the bill for replacing a heat pump in the marital home and half the cost of the youngest child's braces. We find this to be equitable.

We therefore modify the district court's decree to require Troy to reimburse Dawn in the amount of $6400, rather than the $17,650 ordered by the district court, for the joint bank account, the tax refund, the heat pump, and the braces.

VIII. Uncovered Medical Expenses

Dawn asserts on cross-appeal the district court erred in failing to provide for the payment of the youngest child's uncovered medical expenses. This issue was properly preserved, though the district court failed to rule on this issue. Dawn, as the custodial parent, shall pay the first $250 of uncovered medical expenses each year. *See* Iowa Ct. R. 9.12(5). Any amount over the first $250 shall be paid seventy-five percent by Troy and twenty-five percent by Dawn. Dawn shall submit a copy of the billing record or receipt to Troy, who shall provide reimbursement for his share within thirty days of receiving notification of the amount due. All payments for medical expenses shall be made directly between the parties.

IX. Attorney Fees

Troy asserts the district court erred in requiring him to pay $3000 of Dawn's attorney fees. He asserts Dawn is leaving the marriage with greater

assets and, because of her receipt of child support and alimony, Dawn is in a better cash position to pay her own attorney fees. We find no abuse of the district court's discretion, and therefore affirm the award of attorney fees to Dawn. *See In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006) (stating the standard of review for attorney fees is for abuse of discretion).

X. Appellate Attorney Fees

Both parties request an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We decline to award attorney fees. Costs on appeal are assessed equally between the parties.

AFFIRMED AS MODIFIED.