IN THE COURT OF APPEALS OF IOWA

No. 1-760 / 11-0125
Filed November 23, 2011

IN RE THE MARRIAGE OF BRENT JOSEPH RYLAND AND GLORIA RAQUEL RYLAND

Upon the Petition of

BRENT JOSEPH RYLAND,
Petitioner-Appellant,

And Concerning

GLORIA RAQUEL RYLAND,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (South) County, John G. Linn, Judge.

Brent Ryland appeals from the decree dissolving his marriage to Gloria Ryland. **AFFIRMED.**

Curtis Dial of Law Office of Curtis Dial, Keokuk, for appellant.

Marlis J. Robberts of Robberts & Kirkman, L.L.L.P., Burlington, for appellee.

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

SACKETT, C.J.

Brent Ryland appeals from the decree dissolving his marriage to Gloria Ryland. Brent contends the district court erred in failing to award the parties shared physical care of their minor son, born in 2005; the district court made an inequitable division of a medical bill; and it should not have awarded Gloria attorney fees. The facts support an award of physical care to Gloria. The division of the medical bill was equitable. The district court did not abuse its discretion in awarding Gloria trial attorney fees. We affirm.

I. BACKGROUND AND PROCEEDINGS. Brent and Gloria were married in May of 2005. They have a son who was born in March of 2005. Brent filed a petition seeking dissolution of the marriage in September of 2009. The matter came on for trial in November of 2010. At the time of the hearing Brent was twenty-nine years old and Gloria was twenty-five years old. Brent was in good health. Gloria had some health problems and had been diagnosed as having lupus. Brent, who is a high school graduate, had been working for Roquette America, Inc. in Keokuk since 2005. At the time of the dissolution hearing in November of 2010, he was on unemployment because he and his coworkers were striking and had been locked out of the workplace. As a result, Brent was receiving unemployment compensation of about $390 a week, which translated to an annual income of approximately $20,000.[1] Gloria, who had stayed home and cared for the parties' child and an older child of hers from a prior relationship,

[1] His annual income prior to the strike was estimated at over $60,000.

entered the workplace. She was working at a nursing home. Her annual income was about $15,000 a year.

The parties agreed to a division of their assets and certain liabilities, which the district court approved in its decree. In October of 2010, Gloria had become ill and was hospitalized after the parties' separation and during the time Brent was on strike. She accrued a hospital bill in the amount of $20,000. Because of the strike and lockout there was a question what part, if any, of the bill would be paid by the health insurance Brent had through his employer.

The parties both sought primary physical care of their son, with Brent contending that if the district court did not award primary physical care to him, the court should enter a decree ordering the parties to share custody of their son. The district court found Gloria should have physical care of the parties' child. Specified visitation was provided for Brent. Brent was ordered to pay child support of $73.85 a week and $15.60 a week for medical support until such time as the lockout ended. At that time the court found that Brent should pay $161.85 a week and he should be required to carry health insurance through Roquette for the benefit of the parties' child. Support was to continue until the child reached eighteen, or became emancipated, unless the child was engaged full-time in completing high school graduation or equivalent requirements and if the child was expected to complete said requirements before he reaches the age of nineteen, then support should continue through high school graduation or the equivalent requirements.

The court approved the parties' agreement as to division of assets and debt and this is not in dispute.[2] The court found the parties had agreed they would be equally responsible for all unpaid medical bills with the exception of the $20,000 in medical bills incurred during the month of October 2010 due to Gloria's medical emergency. The court found that any of those expenses not covered by medical insurance[3] should be allocated 80% to Brent and ordered Brent to pay $2000 towards Gloria's attorney fees.

II. STANDARD OF REVIEW. We review dissolution cases de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). "Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses." *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). Instead we base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. SHARED CARE. Brent contends the parties should have been awarded shared physical care of their son. Brent contends in assessing this issue we need to look at Iowa Code section 598.41(5) (2009), for in this section the Iowa legislature has set forth a nonexclusive list of factors to be considered in

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[2] It appears that other than a pension plan and an unencumbered vehicle, the parties had few assets.

[3] It appeared that perhaps some of the expenses could be covered by the couple by seeking to be covered under COBRA.

custody decisions. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). Brent contends we should also look at certain factors set forth in *Hansen* such as the suitability of the parents, the quality of parental communications, the geographic proximity, and the safety of the child. *See id.* Brent also points out that the Iowa legislature has set forth factors to be considered when one party requests shared physical care. *See* Iowa Code § 598.41(5)(a). This section includes considerations such as how the child's time will be divided, how the parents will facilitate the time the child has with the other parent, the parties' communications, as well as how the parties will resolve major changes or disagreements. *Id.* Brent contends, and we agree, that these factors are considered in determining whether shared care of the child should be awarded.

Brent notes that he resides in Keokuk, Iowa, and Gloria resides in Montrose, Iowa. He contends the driving time between the two locations is about ten minutes, so the location of the parties does not prohibit a shared physical care arrangement. Brent also advances that while he lives in Keokuk and the child will be attending the Central Lee school district, this does not present any problems because when he and Gloria were still living together they resided in his current residence, and during this time Gloria's older son attended school in the Central Lee school district.

Brent also argues another issue to be considered is the parenting time the parties will use. Brent proposed that each party have the child in their care for two weeks at a time. Brent advances this is a standard schedule commonly used when parties share physical care, it allows the child to be with each parent

exactly half of the time, and it allows the child stability in each home. Brent contends we must also look at the care each party gave the child prior to their separation. Brent points out he testified that prior to separation, both he and Gloria shared the responsibility for their son, which included cooking and bathing. He noted by the time of trial he and Gloria had been separated for over a year and during that year they both attended to the child's needs. Brent testified that after the separation he was more involved in his child's life and more of a custodial parent than he had been before.[4]

Brent contends another major consideration is that by the time of trial the parties' schedules had changed substantially. Brent points out he has gone from working a swing shift that required him to work at odd hours at the time of the temporary order to a situation that would allow him to spend significantly more time with his son. Brett also notes Gloria's work schedule has changed and she went from being unemployed outside the home or only working part-time jobs to working a full shift. Brent notes the parties have basically flipped their work schedules to the point of making a shared care physical arrangement doable.

Brent also notes that the manner in which the parties communicate goes a long way in determining whether or not there should be shared care. *See In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007) ("The critical question in deciding whether joint physical care is . . . appropriate is whether the parties can

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[4] A temporary order was entered after the district court considered affidavits of the parties. The district court awarded the parties' temporary joint legal custody and gave Gloria temporary physical care. The temporary order provided that Brent should have liberal visitation and a schedule was constructed that took into consideration Brent's working hours at the time of the temporary hearing.

communicate effectively on the myriad of issues that arise daily in the routine care of a child."). He acknowledges there were problems with communication between him and Gloria, but he advances that the parties, through communication, have solved some of their issues. While admitting he and Gloria argue a lot, he says they are able to cope. He also points out that both parties seem to acknowledge the communications will improve once the dissolution decree is entered.

Gloria points out that the district court, in its findings awarding her primary physical care, considered the statutory factors in section 598.41. She contends she has been responsible for the child's primary care. She points out there is a presumption that siblings, even half-siblings, should not be separated. *See In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) (noting siblings or half-siblings should be separated only for compelling reasons). She argues her work schedule provides her with the ability to provide day-to-day care for the child. She points out the parties' difficulties in communicating with each other, Brent's lack of patience with her, and his past use of alcohol.[5] She notes the district court rejected Brent's request for joint physical care citing the fact that siblings should not be separated,[6] Brent's work schedule, Brent's lack of appropriate plans for child care, Brent's lack of past caretaking, Brent's lack of making educational and medical decisions for their son in the past, as well as Brent's use of alcohol. She further notes that Brent's girlfriend is pregnant, and

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[5] Apparently Brent wrecked a car while under the influence of alcohol.

[6] Gloria's older child, who is developmentally disabled, attends the regular program at Central Lee, though earlier he was in special education. The child considers Brent his father.

he intends to marry her when the dissolution is final, which will create an additional conflict for their son.

Gloria also points out that the district court provided Brent with reasonable and liberal visitation, including visits on alternate weekends from 5:00 p.m. on Friday to 5:00 p.m. on Sunday, every Wednesday overnight from 5:00 p.m. until 8:00 a.m. on Thursday, alternate holidays, as well as three weeks in the summer time.

Both parties are good parents and care for their son. Gloria has spent more time with the child as, until the parties separated, she had limited employment outside the home. But by the time of trial, she was out of the home and used child care for a number of hours each week. Brent was, at the time of the dissolution hearing, much more available for child care because of the strike; however, while he waits in limbo, we cannot assume his future employment will follow the same pattern it did before the strike.[7] Brent will soon have another child, and it will be as important that the child at issue have a relationship with his yet to be half-sibling, just as it is important that the child at issue has a good relationship with his older half-sibling. The parties both have child care assistance from their respective mothers; however, it appears that Gloria's mother is more involved with the child than is Brent's mother.

We affirm the district court's decree granting physical care of the parties' child to Gloria as she had been the parent exercising primary care before the

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[7] On October 7, 2010, Brent filed an application to modify temporary physical care and support based on the fact he lost his employment to a lock out by his employer, Roquette. The court did not address his application, but rather found there was a trial date scheduled early in November and determined those issues could be raised then.

dissolution action was filed. While Brent has made efforts to take a more active role in the child's life while he has been unemployed due to the strike, we find his employment situation is likely temporary and past performance is indicative of the quality and quantity of future care that a parent is capable of providing. *See In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992).

III. MEDICAL BILL. Brent contends it was unfair for the district court to order him to pay 80% of Gloria's $20,000 medical bill. He recognizes he is responsible for Gloria's medical bills, but takes issue with how the court determined the bill should be divided. He points out the district court rulings stated the medical bill should be divided "based on the respective incomes of the parties." Brent believes this is the proper way to divide this medical bill; however, he disputes the court's use of his income before the strike in deciding this issue.

He says it is documented and not disputed that his income at the time of trial was $20,280 a year and Gloria had an annual income of $15,000 a year. He argues if the court is going to use the income of the parties to divide the bill, he should be responsible for 58% of the bill and Gloria should be responsible for 42% of the bill. He notes that the bill was incurred in October 2010, and in October of 2010 he was not employed and his income was $20,280 a year. He contends he lost his prior income through no fault of his own, and that the court seems to be imputing income to him but gives no factors to justify doing so. He asks that we vacate the order requiring him to pay 80% of the bill and order that it be divided so he pays 58% of the bill.

We affirm the district court's allocation of the medical bill. While Brent's income was temporarily reduced due to the strike, we find it inequitable to Gloria to allocate a substantial portion of the bill to her, when Brent's income will likely return to pre-strike levels shortly. Just as a temporary strike or layoff should not be used to modify a child support decree, we find here that the strike should not be considered in allocating medical bill debts incurred during the marriage. *See In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa Ct. App. 1994); *see also In re Marriage of Shepherd*, 429 N.W.2d 145, 147 (Iowa 1988).

IV. TRIAL ATTORNEY FEES. Brent contends the district court should not have awarded Gloria $2000 in trial attorney fees, especially when she had already received some $1000 in temporary attorney fees. He recognizes that at the time of separation he was earning nearly $60,000 a year and Gloria had limited earnings. However, he points out that during the pendency of the case he lost his job,[8] he is currently living on unemployment, and his resources are not substantially greater than Gloria's.

Gloria contends her income and resources are limited and Brent has a greater ability to pay attorney fees. The trial court should consider the respective abilities of the parties to pay the fees in determining whether attorney fees should be awarded. *In re Marriage of Appleby*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). To overturn an award of attorney fees Brent must show the district court

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[8] He contends it was lost through no fault of his own. While Brent does not control the union, he obviously had a right to vote to strike or not to strike. However, the issue is controlled by a number of union members, and it would be unfair to Brent to consider that he intentionally lost his job.

abused its discretion. *See In re Marriage of Guyer*, 522 N.W.2d 818, 821 (Iowa 1994).

In determining whether to award attorney fees, the district court considered the income of the parties and assets available to them in the future. Brent's annual income had been over $60,000, and he testified he intends to return to his prior job when and if the strike settles. The trial court also noted that, even though being locked out from work, Brent's annual income exceeds Gloria's by about $5000. The court found Brent has a greater ability to pay attorney fees. We find the district court did not abuse its discretion in awarding Gloria trial attorney fees.

V. APPELLATE ATTORNEY FEES. Gloria asks this court to award her appellate attorney fees. She contends she was obligated to defend the decision of the trial court. *See In re Marriage of Kurt*, 561 N.W 2d 385, 390 (Iowa Ct. App. 1997). She contends she is a single mother of two and she has a limited ability to pay an attorney. We find Gloria is entitled to $500 in appellate attorney fees.

AFFIRMED.