IN THE COURT OF APPEALS OF IOWA

No. 3-679 / 12-2045
Filed September 5, 2013

IN RE THE MARRIAGE OF MELISSA A. PENALUNA AND DANIEL T. PENALUNA

Upon the Petition of
MELISSA A. PENALUNA,
Petitioner-Appellant,

And Concerning
DANIEL T. PENALUNA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas Staskal, Judge.

Melissa Penaluna appeals from the child custody and support provisions of the decree dissolving her marriage to Daniel Penaluna. **AFFIRMED AS MODIFIED.**

Scott L. Bandstra and Karmen Anderson of Bandstra Law Firm, Des Moines, for appellant.

Michael J. Burdette of Burdette Law Firm, P.C., Clive, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

EISENHAUER, C.J.

Melissa Penaluna appeals from the child custody and support provisions of the decree dissolving her marriage to Daniel Penaluna. She contends she should be awarded physical care of their two children. In the alternative, she contends she should receive additional visitation. Melissa also contends the child support award should be calculated using Daniel's earning capacity rather than his actual earnings.

Finding only slight disagreement with the trial court's decree, we affirm as modified.

I. Background Facts and Proceedings.

Melissa was born in 1982. She has attended some college, but did not earn a degree. Melissa has completed a pharmacy technician course and has been employed as a medical support assistant at the VA hospital since 2006. She earns $36,254 per year.

Daniel was born in 1962. He has an MBA degree and is a certified public accountant. Daniel was hired as a controller for LWBJ Financial in August 2007 at a salary of $75,000 per year, but his position was terminated in November 2008. Daniel struggled to find employment and has begun an accounting business. He expected to earn $20,000 from this business in 2012.

Melissa and Daniel were married in Las Vegas in February 2002. Their first child, J.P., was born in 2005. C.P. was born in 2010.

The parties' relationship began to deteriorate in 2008. During an argument on July 9, 2009, Daniel grabbed Melissa's wrist and twisted it in an attempt to keep her from destroying a picture. Daniel then blocked Melissa from

leaving the house. Melissa called the police, and Daniel was arrested for domestic abuse assault. He pleaded guilty to disorderly conduct and a no-contact order remained in place until October 2008.

To call the parties' relationship between 2008 and 2011 tumultuous would be generous. Melissa called the police to the home on one other occasion and filed several actions for temporary protective orders under Iowa Code chapter 236 (2011). An Iowa Department of Human Services investigation resulted in a founded child abuse report "confirmed but not placed" for denial of critical care of J.P. with Melissa as the perpetrator. The parties split and reconciled a number of times. Eventually, both parties moved into their respective parents' homes.

Between June 2010 and July 2011, Melissa cared for J.P. during the week, and Daniel cared for J.P. each weekend. Daniel did not have a regular visitation schedule with C.P., who was an infant; he never had C.P. overnight.

Melissa filed a petition to dissolve the marriage in May 2011. In July 2011, the district court entered a temporary custody order granting Daniel physical care of the children. Melissa was granted overnight visitation every Wednesday and alternating weekends from 5:00 p.m. Friday until 8:00 a.m. Monday.

The temporary custody arrangement was not free of strife. Daniel enrolled J.P. in school in Ankeny, where he lived. He did so without consulting Melissa, who wanted J.P. to attend Sacred Heart in West Des Moines. Daniel also made the unilateral decision to change J.P.'s physician. There was an incident in which Melissa gave C.P. prune juice during her weekend visitation, causing several bowel movements the following day. C.P. developed a yeast diaper rash

as a result; Melissa sought modification of the temporary custody order based in part on C.P.'s diaper rash.

Trial was held, and on September 14, 2012, the district court entered a decree dissolving the marriage and granting Daniel physical care of the children. Melissa's visitation was ordered to continue in the same manner as it had under the temporary order with one change: the court ordered weekend visitation to end at 5:00 p.m. Sunday rather than 8:00 a.m. Monday. The court ordered Melissa to pay $574.61 per month in child support, calculating this amount under the child support guidelines by using Melissa's income of $36,254 per year and Daniel's projected 2012 income of $20,000.

Melissa appeals.[1]

II. Scope and Standard of Review.

Because dissolution actions are equitable proceedings, our review is de novo. *In re Marriage of Kimbro*, 826 N.W.2d 696, 698 (Iowa 2013). We examine the entire record and adjudicate anew the issues presented. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). We defer to the district court's fact findings although they are not binding upon us. *Kimbro*, 826 N.W.2d at 698.

[1] Iowa Rule of Appellate Procedure 6.905(4)(b) states: "If portions of a court reporter's transcript of testimony are included in the appendix, the table of contents shall state the name of each witness whose testimony is included and the appendix page at which each witness's testimony begins." Our rules of appellate procedure also require the name of each witness whose testimony is included in the appendix to be written on the top of each appendix page where the witness's testimony appears. Iowa R. App. P. 6.906(7)(c). The appendix provided to the court does not comply with either requirement. Compliance with these rules is important given the high volume of cases this court is tasked with deciding, *see* Iowa Ct. R. 21.30(1), and failure to comply can lead to summary disposition of an appeal. *In re Estate of DeTar*, 572 N.W.2d 178, 181 (Iowa Ct. App. 1997).

We only disturb the district court's ruling "when there has been a failure to do equity." *Id.*

III. Child Custody.

Melissa first contends the district court erred in granting Daniel physical care of the children. She cites Daniel's "history of physical and emotional abuse" and pattern of hostility toward her as reasons she should be granted physical care. She also argues Daniel has interfered with her contact with the children and made unilateral decisions regarding their care, which shows she would be a better caregiver.

Iowa Code section 598.41(3) outlines the factors the court must consider in determining which custody arrangement will be in the best interests of the children. The controlling consideration is the children's best interests. *In re Marriage of Rebouche*, 587 N.W.2d 795, 797 (Iowa Ct. App. 1998). The court places the children with the parent that can most effectively minister to the children's long-term best interests. *Id.* The objective is to place the children "in the environment most likely to bring them to a healthy physical, mental, and social maturity." *Id.*

One of the factors the court is to consider in making its custody determination is a history of domestic abuse. Iowa Code § 598.41(3)(j). This is because domestic abuse has "ravaging and long-term consequences" on children. *In re Marriage of Daniels*, 568 N.W.2d 51, 55-56 (Iowa Ct. App. 1997). However, a "history" is not established by one incident of domestic abuse. *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). Instead we weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom it is

directed. *Id.* We are mindful the district court had the benefit of hearing and observing the parties first-hand and therefore give considerable weight to its judgment. *Id.*

We find there is not a history of domestic abuse that would impact the custody determination. There was one incident in July 2009 where Daniel admits he twisted Melissa's wrist to keep her from destroying a photograph of J.P. and his two children from a prior marriage. He also blocked Melissa from leaving the home with their child out of fear of the child being harmed. The bulk of the allegations Melissa levels at Daniel involve what Melissa considers to be verbal or emotional abuse. She offered into evidence written correspondence sent by Daniel, which the district court found "did display a sort of arrogance and controlling attitude." Daniel's actions did not occur in vacuum, however. As the district court noted, "[O]ne can see some justification, or understand at least, under the circumstances, Daniel's sense of injustice in Melissa's behavior in obtaining multiple protective orders." Regardless, there is no evidence or allegation Daniel had ever engaged in any type of abuse toward the children. In spite of the tone of their written communication, the evidence shows the parties were civil to each other in front of the children.

In making custody determinations we also consider the parents' ability to communicate regarding the children's needs and to support each other's relationship with the children. Iowa Code § 598.41(3)(c), (e). One parent's denial of the other parent's opportunity for maximum continuing contact—without just cause—is "a significant factor in determining the proper custody arrangement." Iowa Code § 598.41(1)(a).

We find the evidence of the turmoil in the parties' relationship does not impact their ability to parent the children. While there were some issues between the parties concerning their communication in the year leading up to the dissolution, overall they were able to communicate with regard to the children. We defer to the following findings by the trial court based on its observations at trial:

> Although only time will tell, in observing the parties' demeanor and listening to their testimony, the court has a clear sense that they are well down the road to getting over their issues with each other as marital partners and are very capable of communication productively regarding their children and in being flexible and accommodating for the benefit of the children. Daniel readily acknowledged that he should have handled [J.P.]'s school change differently. Melissa is obviously sad and disappointed but appears nevertheless capable and willing to accept what is and move forward, maximizing her opportunities for time with the children.

The court found the custody arrangement set forth in the temporary custody order should be continued.

The child custody evaluator's testimony supports the district court's finding "the current custodial and parenting time arrangement is working very well for the children." Dr. Kari Kinnaird testified that while the parties had "slight differences" in their parenting styles, there were "no major concerns" about their parenting practices. She recommended the custody arrangement set forth in the temporary order be continued.

Given that both parties are equally capable of caring for the children, and taking into consideration the evidence showing the parents' ability to make the temporary custody arrangement work and the children's need for stability, we find

the children's best interests are served by affirming the child custody provisions of the dissolution decree.

IV. Visitation.

Having decided Daniel should receive physical care, we must determine whether the visitation granted Melissa is appropriate.

Melissa contends she should be granted additional visitation. She asks us to modify the visitation provisions of the decree to grant her two weekly overnight visits (on Tuesday and Thursday), rather than one (on Wednesday). She seeks to have the weekend visitation changed back to the schedule provided in the temporary custody order, with visitation ending at 8:00 a.m. Monday rather than 5:00 p.m. Sunday.

Visitation should be liberal "where appropriate" to assure the children "the opportunity for maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a). Generally, liberal visitation is in the children's best interests. *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993).

The district court determined the custody arrangement set forth in the temporary order should be continued, with one modification. The court stated: "[T]o accommodate Melissa's concerns about its effect on her work schedule, her every-other-weekend parenting time will extend through Sunday evening instead of through Monday morning." The court seems to have based this change on Dr. Kinnaird's testimony.

At trial, Dr. Kinnaird testified there were no perceived problems with the temporary custody and visitation arrangement, although "[t]here are ways it could

be adjusted for greater parental convenience if they can agree to such a change . . ., but to answer your question I did not see any problem with it. In fact, I believe I recommended that it continue." She then stated one of Melissa's concerns "was a difficulty with a conflict between her work schedule and the Monday morning transition." It appears that based on this testimony, the district court adjusted the time of the weekend custody exchange in order "to accommodate Melissa's concerns about its effect on her work schedule."

Melissa did not testify regarding any conflict between her work schedule and the visitation provided in the temporary custody order. She objects to the change. Because the temporary custody arrangement was working and absent a request from either party to change it, we find the weekend visits should end 8:00 a.m. Monday rather than 5:00 p.m. Sunday. We modify the visitation provisions of the decree accordingly.

We find no reason to deviate from the weekly overnight visitation set forth in the temporary custody order.

V. Child Support.

Finally, Melissa challenges the child support provisions of the dissolution decree. She contends Daniel's earning capacity, rather than his actual earnings, should be used in determining the amount of child support she must pay under the guidelines.

The court may consider a parent's earning capacity rather than actual earnings in determining child support where the parent voluntarily reduces income or decides not to work. *In re Marriage of Nielsen*, 759 N.W.2d 345, 348 (Iowa Ct. App. 2008). Before the court may use earning capacity or otherwise

impute income, however, it must make a written determination "that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child(ren) or to do justice between the parties." Iowa R. 9.11 (2013).[2] In making this determination, we examine the parent's employment history, present earnings, and reasons for the current employment. *Nielsen*, 759 N.W.2d at 348.

Daniel's employment was terminated in 2008. Despite his search for new employment, Daniel has not been able to secure a new job. He has recently opted to start his own accounting business and was projected to earn $20,000 in 2012—considerably lower than the $75,000 salary he earned in his last position. Melissa argues Daniel should be imputed a salary of $60,000 to reflect his earning capacity.

This is not a situation where a parent has voluntarily reduced his income or decided not to work. Daniel's employment ended involuntarily. *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (finding that an obligor's reduction in income due to termination of employment for insubordination was not voluntary or self-inflicted). His decision to start his own business was not some fanciful dream he was following at his children's expense but was born of necessity. *See id.* ("The self-infliction rule applies equitable principles to the determination of child support in order to prevent parents from gaining an advantage by reducing their earning capacity and ability to pay support through

[2] The child support guidelines set forth in chapter 9 of the Iowa Court Rules were amended effective July 1, 2013. We calculate the child support based on the new guidelines. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996) (finding the language stating new guidelines "shall apply to cases pending on the effective date" includes those on appeal).

improper intent or reckless conduct."). He was unemployed for almost two and one-half years before the dissolution proceedings were initiated in 2011. To reduce Melissa's child support payments based upon Daniel's inability to find new employment would penalize the children. We decline to do so. Accordingly, we affirm the child support provisions of the dissolution decree.

Costs are taxed equally between the parties.

AFFIRMED AS MODIFIED.