IN THE COURT OF APPEALS OF IOWA

No. 3-779 / 13-0155
Filed November 6, 2013

IN RE THE MARRIAGE OF TROY SCOTT JOHNSON AND KRISTY LYNN JOHNSON

Upon the Petition of
TROY SCOTT JOHNSON,
Petitioner-Appellant,

And Concerning
KRISTY LYNN JOHNSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

Troy Johnson appeals from the child custody and economic provisions of the decree dissolving his marriage to Kristy Johnson. **AFFIRMED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Todd E. Babich and Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, for appellee.

Considered by Potterfield, P.J., Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.

Troy Johnson appeals from the child custody and economic provisions of the decree dissolving his marriage to Kristy Johnson. He contends a joint physical care arrangement is in the child's best interests. He also contends he should be awarded spousal support and a lump-sum social security dependent payment. Finally, he contends the trial court abused its discretion in declining to award him his trial attorney fees.

We find granting Kristy physical care is in the child's best interests. We further find a spousal support award is not supported under the facts before us. We decline to divide the lump-sum dependent disability payment between the parties. Finding no abuse of discretion, we affirm the district court's denial of an attorney fee award to Troy, and we decline to award either party appellate attorney fees.

I. Background Facts and Proceedings.

Troy and Kristy were married in September 2004 and have one child, born in 2008. Troy petitioned to dissolve the marriage in May 2011, and the case was tried in October 2012.

Troy was thirty-one years old at the time of trial. He has a bachelor's degree in marketing and worked as a regional account manager, earning approximately $45,000 per year. But in December 2009, Troy herniated two discs in his back and could no longer work. He underwent surgery in March 2010 but still reports experiencing pain. Troy receives monthly social security disability benefits after an October 3, 2011 decision of the Social Security Administration's Office of Disability Adjudication and Review found he is limited

"to sitting one hour, standing one hour, and walking one hour in an eight-hour workday" and "is limited to lifting less than ten pounds and could never bend or stoop." The Social Security Administration also paid Troy a $16,044 lump-sum payment for benefits owed from June 2010 through September 2011. It made a $12,756 lump-sum payment to the child, which the court ordered be placed in a trust account until the dissolution was finalized.

At the time of trial, Troy was studying digital forensics at Des Moines Area Community College. He was attending one class, two days per week. He expects to receive his certification in two years. With this education, Troy hopes he will no longer need to collect social security disability benefits.

Kristy was thirty-four years old at the time of trial. She has a master's degree in mental health counseling. Kristy is a licensed mental health counselor, nationally certified counselor, and certified drug and alcohol counselor. She works as a school-based mental health therapist and earned $47,039.98 per year at the time of trial.

After the parties separated, they began alternating physical care of their child. At first, the parties alternated care of the child every few days. In August 2011, a temporary custody order set forth a schedule in which Kristy had the child in her care four days and Troy had the child three days during one week, with the schedule reversed the following week. The parties experienced difficulties during the custody exchanges due to animosity between them. As a result, a child custody evaluation determined "[a]n equally shared parenting plan is not recommended," noting the child "has not thrived thus far under such a plan

and the parents are a long ways from being able to effectively communicate with one another." The evaluation recommended granting Kristy physical care.

On November 14, 2012, the district court entered its decree dissolving the marriage. It granted Kristy physical care of the child with Troy receiving weekly overnight visitation on Thursdays and visitation from Thursday night through Monday morning in alternating weeks. The court ordered Troy to pay $320 per month in child support, which is offset by the monthly social security dependent payment the child receives. The court declined to award Troy spousal support and ordered the lump-sum social security dependent payment to be placed in a 529 plan account for the child's benefit. Finally, the court ordered each party to pay his or her own trial attorney fees.

II. Scope and Standard of Review.

We review dissolution actions de novo. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). We examine the entire record before the court and adjudicate rights anew. *Id.* While we give weight to the district court's fact findings, particularly those involving witness credibility, we are not bound by them. *Id.* We will disturb the court's ruling only "when there has been a failure to do equity." *Id.*

III. Physical Care.

We first address Troy's argument regarding physical care of the child. Iowa Code section 598.41(3) (2011) outlines the factors the court must consider in determining which custody arrangement will be in the best interests of the child. The controlling consideration is the child's best interests. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). "The objective of a physical care

determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

Troy contends a joint-physical-care arrangement is in the child's best interests. The court may award joint physical care if requested by either parent. Iowa Code § 598.41(5)(a). In deciding whether to grant such a request, we must consider the following: the parents' historical role in caregiving; the ability of the parents to communicate and show mutual respect; the degree of conflict between the parents; and the degree to which the parties are in agreement on daily childrearing matters. *Hansen*, 733 N.W.2d at 696-99. However, this list is not exclusive; our determination must reflect the particular circumstances at hand. *See id*. at 699–700.

After considering the foregoing factors, we find a joint-physical-care arrangement is not in the child's best interests. The evidence shows the parents have a good deal of animosity toward each other, which was noted in the child custody evaluation. The child is aware of this animosity, telling the child custody evaluator, "[M]y mom doesn't like [my dad]" and "Dad doesn't like Mom either." As the custody evaluation concludes, the child did not thrive under a joint-physical-care arrangement during the parties' separation, showing signs of stress and decreased self-confidence. While Troy might enjoy the extra time with the child that would come from a joint-physical-care arrangement, there is no indication a joint-physical-care arrangement would be beneficial to the child. Rather, the evidence shows the joint-physical-care arrangement has been harmful to the child.

If joint physical care is not appropriate, "the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights." *Fennelly*, 727 N.W.2d at 101. The district court found Kristy was better equipped to minister to the child's best interests. Based upon our review of the record, we agree. Kristy was the child's primary caretaker during the first two years of her life, when Troy's job frequently required him to travel from home during the week and he worked as a hog buyer during the weekend. After Troy's injury, Kristy continued to provide the majority of the childcare functions in addition to being the family's sole financial provider and attending to Troy. Though Troy was an equal parent in the year leading up to the trial, Kristy has historically been the child's caretaker, and as a result, the child is more closely bonded to Kristy.

IV. Spousal Support.

Troy next seeks an award of spousal support. He argues such an award is appropriate until he finishes his education and can obtain employment. He seeks an award of $500 per month until he "is no longer receiving social security disability benefits due to his own earned income." He claims he should be awarded $372 per month "at a minimum" because of Kristy's "windfall" from his social security dependent benefit.[1]

The court may grant an order requiring spousal support after considering the factors set forth in Iowa Code section 598.21A(1). Such an award is not an

[1] The social security dependent benefit is not a "windfall" to Kristy. Although she receives the payments as the child's physical caretaker, they are for the child. *See Potts v. Potts*, 240 N.W.2d 680, 682 (Iowa 1976) (noting the primary purpose of social security dependent benefits is to meet the current needs of the dependents). Troy is not entitled to receive any of the benefit above the amount he is ordered to pay for child support. *See Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990) ("The receipt of excess government benefits over the monthly child support obligation is equitably deemed a gratuity to the children.").

absolute right, but depends on the circumstances of each particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). We give the district court considerable latitude in determining whether a spousal support award is warranted and will only disturb that determination when there has been a failure to do equity. *Id.*

There are three types of alimony available as a spousal support award: traditional, rehabilitative, and reimbursement. *Id.* Rehabilitative alimony is intended to support an economically dependent spouse during a limited period of further education and training to allow that spouse to become self-supporting. *Id.* Given Troy's back injury and his current endeavor to further educate himself, we deem Troy's request for spousal support to be a request for rehabilitative alimony.

After considering the factors set forth in section 598.21A, we decline to award Troy spousal support. This was a marriage of short duration between two parties who are still in their early thirties. At the time of trial, Troy was receiving $1285 per month in social security disability benefits. He is not currently required to pay Kristy child support because the social security dependent benefits the child receives offset his child support obligation.

There is some conflict in Troy's claims about his injury. Troy receives disability benefits and testified he is unable to "fully run and bend and stoop and climb various things." Initially, his injury left him unable to work. However, Troy also testified he has been making improvements with regard to his injury "since day one." At trial, Troy claimed his injury "doesn't impede [his] ability to work" and stated his belief that he is currently employable and could work in a desk job.

He further testified he can handle the physical demands of caring for a four-year-old child.

Troy is currently attending school to pursue certification in digital forensics. There is no evidence as to Troy's employment outlook or earning ability upon completion of the program. Troy testified it would take him two years to finish his education, taking one class at a time. At the time of trial, he was attending class only on Mondays and Wednesdays.

In spite of Troy's claim he is physically capable of working and in spite of his limited class schedule, Troy was not employed in any capacity at the time of trial. With a bachelor's degree in marketing, Troy has the type of education that would allow him to obtain sedentary work, which he claims he can perform. Because Troy—by his own admission—is capable of working, an award of rehabilitative alimony is not appropriate. We find no other category of spousal support is appropriate.

V. Lump-Sum Dependent Payment.

Troy next challenges the portion of the decree relating to the lump-sum social security dependent payment. The child receives a monthly social security dependent benefit as a result of Troy's disability. Under the temporary custody arrangement, Troy received the benefit beginning in February 2012. Because Kristy is the child's physical caretaker, she now receives the monthly benefit.

While the dissolution action was pending, the Social Security Administration paid the child $12,756 lump-sum social security dependent benefit, which covers the time period from June 2010 through January 2012

when the child was eligible for the benefit but not receiving it. The court ordered these funds be placed in a 529 plan account for the child.

On appeal, Troy argues the lump-sum payment is marital property that should be divided. He asks to be awarded one-half the amount that would have been dispersed prior to separation and the total amount that would have been dispersed under the joint-physical-care arrangement. The total award he seeks is $8950.

The aim of the Social Security Act was not to create a program "generally benefitting needy persons," but to "provide . . . dependent members of [a wager earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings." *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2032 (2012). Our supreme court has held a child support award may be offset by social security benefits during the period the benefits are received, and—in an "exceptional case"—a lump-sum payment of social security benefits may be applied toward an outstanding child support obligation. *In re Marriage of O'Brien*, 565 N.W.2d 619, 622 (Iowa 1997); *Potts*, 240 N.W.2d at 682.

The supreme court found one such exceptional situation in *Marriage of O'Brien*. 565 N.W.2d at 623. In that case, social security dependent benefits were applied for when the mother had custody of the child. *Id.* at 620. After custody was transferred to the father, the benefits were approved and the child—through the father—began receiving monthly payments. *Id.* The court found in addition to offsetting the mother's monthly child support obligation by the amount of dependent benefits received, the mother should also be entitled to credit the lump-sum payment of dependent benefits to her child support arrearage. *Id.* at

623. The court noted the case presented an exceptional situation where the lump-sum payment was being awarded for the time period in which the mother had been the custodial parent. *Id.* at 623.

> [I]t was Tracy, not Bret, who was responsible for Brooke's current needs during this time. Had it not been for the fact SSA approved payment of benefits after the court's April modification order, Tracy would have received the lump-sum payment as the custodial parent of Brooke. We think fairness requires, therefore, that these benefits be credited against Tracy's subsequent child support obligation.

Id.

Although Troy is not in arrears on his child support payments, he essentially seeks to be "credited" for his past caretaking expenditures by being refunded that amount from the lump-sum social security dependent payment. While the child was in his care during the time period for which benefits were paid, the facts of this case are distinguishable from *O'Brien*, and we find a credit is inappropriate under the circumstances before us. During the time period for which the benefits were received, Troy and Kristy were still married. From June 2010 through May 2011, they lived together, and Kristy was the sole provider for the family. From June 2011 through January 2012, the parties were separated but not yet divorced. They jointly shared care of the child. Troy received child support payments from Kristy[2] in addition to one hundred percent of the child's social security dependent benefits from February 2012 until the decree was entered in November 2012.

Unlike in *Marriage of O'Brien*, Kristy did not receive any of the lump-sum dependent payment. Therefore, there is no unique set of circumstances that

[2] Kristy paid Troy $380 per month in child support, which was reduced to $305 in December 2011.

necessitates reimbursing Troy for payments that would have otherwise gone to him. Any money expended for the child's care prior to the separation came from Kristy's efforts, and Kristy paid Troy child support following the separation, even though they cared for the child equally. Under these circumstances, it would be inequitable to award Troy any of the child's lump-sum dependent payment. Considering the purpose of social security dependent benefits, we find the portion of the decree ordering the lump-sum payment to be placed in a 529 plan account is equitable.

VI. Attorney Fees.

Troy requested an award of his trial attorney fees, which amounted to $39,956. The district court ordered both parties to be responsible for their own attorney fees. On appeal, Troy asks that he be awarded $10,000 in attorney fees.

An award of trial attorney fees depends on the parties' respective abilities to pay. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We review the court's denial of an attorney fee award for abuse of discretion. *Id.* This means we only reverse if the court's ruling rests on grounds that are clearly unreasonable or untenable. *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 73 (Iowa 2011). While Kristy has a greater ability to pay, she is not in a position to pay $10,000 toward Troy's attorney fees in addition to the $42,029 in attorney fees she has accrued herself. Accordingly, we find no abuse of discretion.

Both parties request an award of appellate attorney fees. Such an award is not a matter of right, but rests within our sound discretion. *In re Marriage of*

Okland, 699 N.W.2d 260, 270 (Iowa 2005). "We consider the needs of the party making the request, the ability of the other party to pay," and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Considering the foregoing, we decline to award either party appellate attorney fees.

AFFIRMED.