IN THE COURT OF APPEALS OF IOWA

No. 3-864 / 12-1936
Filed November 6, 2013

IN RE THE MARRIAGE OF JOSHUA DAVID BAKK AND ELIZABETH ANN BAKK

Upon the Petition of
JOSHUA DAVID BAKK,
Petitioner-Appellant/Cross-Appellee,

And Concerning
ELIZABETH ANN BAKK, n/k/a
ELIZABETH ANN JOHNSON,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

Joshua Bakk appeals and Elizabeth Bakk cross-appeals from the decree dissolving their marriage. **AFFIRMED.**

Amy L. Reasner of Lynch Dallas, P.C., Cedar Rapids, for appellant.

Richard F. Mitvalsky of Gray, Stefani & Mitvalsky, P.L.C., Cedar Rapids, for appellee.

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

BOWER, J.

Joshua Bakk (Josh) appeals and Elizabeth Bakk (Liz) cross-appeals from the decree dissolving their marriage. Josh contends the district court erred in failing to require Liz to submit to random alcohol testing, not including language which would require their child remain in daycare during summer mornings, and in dividing the parties' assets. Liz contends the district court valued the parties' real estate holdings improperly. We affirm.

I. Background Facts and Proceedings

Josh and Liz Bakk were married on August 2, 2002 and have one child who is now four years old. The parties originally resided in Elk Grove Village, Illinois, and moved to Marion, Iowa, in 2007. During the marriage they jointly owned a residence in Iowa and two pieces of investment real estate in Illinois. They also owned several retirement/investment accounts and two vehicles.

At the time of trial Josh was residing in the marital home with the child. He was given temporary physical care of the child in April 2011 while Liz was seeking treatment for alcohol abuse. The district court found the parties have worked together regarding issues of custody and visitation, and the child spends significant time with each parent.

Trial was held on May 15, 16, and 31, 2012. The district court entered a decree dividing the parties' property and addressing issues of support and custody. The marital home was awarded to Josh, according to the parties' wishes, and assigned a value of $320,573. Subtracting the amount still owed on the mortgage, the equity in the home was found to be $76,606.36. When valuing

the home, the district court rejected Josh's request to subtract fees associated with the sale of the home from the home's value. The district court also decided the two condominiums owned by the parties in Illinois each had an identical value of $35,000.[1] The investment/retirement accounts were valued and divided with no allowance for contributions made before the marriage. The parties were awarded joint legal custody and joint physical care of the child. Josh's request to require Liz to submit to random alcohol testing was rejected. Josh was ordered to pay $308 per month in child support and $500 per month in alimony for a period of thirty-six months. Finally, the court ordered a one-time equalization payment from Josh to Liz. Other divisions of property and findings by the district court were not appealed.

II. Standard of Review

As an equitable proceeding, we review the decree of dissolution de novo. Iowa R. App. P. 6.907. Though we are not bound by the findings of the district court, we will give them weight. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988). We give substantial weight to credibility evaluations made by the district court. *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa 2007).

III. Discussion

A. Alcohol Testing

In response to Liz's issues with alcohol abuse, Josh requested Liz submit to random alcohol testing at his discretion. It was Josh's hope this would allow him to monitor Liz's sobriety while Liz was caring for the child. He claimed this

[1] Each unit is valued at less than the amount owed on the respective mortgage.

was necessary because Liz no longer lives with him and therefore he is unable to monitor her sobriety.[2]

The district court rejected Josh's request and found the request was more about a desire to control Liz than about the child's safety. Though we are not bound by this credibility determination, we find it persuasive. Liz presented evidence of significant progress in her recovery and she has cared for the child frequently, for extended periods of time, without incident since she began addressing her alcoholism. We find Josh's request to be unwarranted.

B. Daycare

The child is currently four years old and attends regular daycare. Liz is a teacher who does not teach during the summer. She intends to remove the child from daycare at certain times during the summer so they may spend time together. Josh argues educational activities occur in the morning at daycare and the child should not be removed from daycare during the mornings unless good cause is shown.

Our supreme court has previously held the courts must step in as arbiter when joint custodians disagree on issues with the care of a child. *See Harder v Anderson*, 764 N.W.2d 534, 538 (Iowa 2009). We find educational decisions fall within this category. Accordingly, we seek a solution which best serves the interest of the child. We find the request by Josh is not in the best interests of the child. Liz is an educator who is well suited to tend to the educational development of the child during the mornings when absent from daycare. Josh

[2] Josh made a number of allegations regarding Liz being intoxicated while caring for the child and placing the child in danger.

also admitted the child has already been signed up for swimming lessons which may occur during summer mornings. Mindful of the requirement we provide for maximum physical and emotional contact with both parents, we reject Josh's request.[3] *See* Iowa Code § 598.41(1)(a) (2011).

C. Property Division

Property is distributed according to the factors set out in Iowa Code section 598.21. We are to distribute assets equitably, which does not always require an equal division. *In re Marriage of McDermott*, 827 N.W.2d 671, 682 (Iowa 2013). Our decisions are based upon the particular facts of the case and precedent is of little value. *Id.*

1. Real Property

By agreement Josh was awarded the marital home. While it is clear Liz would be unable to afford the home on her own, Josh's ability to do the same is in doubt. Josh stated his desire to remain in the home; however he claimed he may not be able to afford to do so, particularly in light of the equalization payment the district court ordered. He interprets the decree as preventing him from selling the home should he be unable to afford the mortgage payments.

We find the decree does not prevent Josh from selling the marital home. He is free to sell the home and keep the proceeds of any sale once encumbrances have been satisfied. What Josh really requests is the power to

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[3] Josh relies upon *Schmidt v. Des Moines Public Schools*, 655 F.3d 811, 819 (8th Cir. 2011) to claim a parent does not have a fundamental liberty interest in contacting their children while in school. *Schmidt* does not require that a child must remain in school in all circumstances, or that a parent never has a right to remove a child from school. *See* 655 F.3d at 819. We find it important that the child in this case is not in school, but rather daycare, thereby further distinguishing *Schmidt.*

control Liz's equalization payment. He asks for a period of time during which he can choose, with no input from Liz, whether to sell the house or remain in it. If he sells it, he would then split with Liz whatever proceeds remain after satisfaction of the mortgage and costs associated with the sale are paid. If he chooses to remain in the home, he would make the equalization payment already ordered. The result would be an extended period of uncertainty for Liz and would effectively provide Josh significant control over the amount of the equalization payment.

The home was valued by the district court according to its present market value and is reflected in the equalization payment. This is not the type of case where it is necessary to order the sale of the home, and we find it inequitable to give Josh control over the amount of Liz's equalization payment.

2. Refinancing the Condominiums

Josh and Liz purchased a pair of condominiums located in Illinois as an investment. The investments have done poorly, and each unit is now worth significantly less than the balance on the mortgage. The district court awarded one unit to each party but did not require the units be refinanced into the individual owner's name. The practical result of this decision is each party remains responsible should the other party default on their individual condominium. Josh requests each party should be required to refinance their unit into their individual name.

Josh's argument is persuasive, however he requests the impossible. The parties admit they are presently unable to refinance their units because of their

current financial circumstances. Ordering either party to refinance at this time is not equitable as it would require the parties to take steps which would be impossible or further unsettle their financial position.

3. Retirement/Investment Accounts

Josh contends the district court erred in dividing the parties' retirement accounts without taking into account premarital contributions. He argues fifty-three percent of a Northwestern Mutual Retirement Account was a result of premarital earnings, and forty percent of Liz's Illinois teacher's pension was premarital. Josh contends these premarital contributions should be accounted for in dividing the assets.

Pensions are divisible as martial property. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). They are divided just as any other property, though calculating value presents special problems. *See In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993). The principles of property distribution are set out in Iowa Code section 598.21. Only inherited and gifted property is excluded from an equitable distribution of property. Iowa Code § 598.21(6). Though the length of marriage and property brought to the marriage by the parties is a necessary consideration, premarital property is not automatically separated for distribution purposes. *See* Iowa Code § 598.21(5).

Our supreme court set forth a formula by which a former spouse's share of pension benefits may be calculated. *See Sullins*, 715 N.W.2d at 250. We do not read *Sullins* to require distribution only in this method, however. The court must first accomplish equity, and where equity demands dividing all, or none, of a

particular pension, it remains free to do so. Josh argues fifty-three percent of his Northwestern Mutual account was acquired with premarital earnings. He provided evidence to the district court which displayed the present value of the account; however he did not provide proof of premarital contributions. Josh testified he calculated the fifty-three percent figure based upon the number of months he contributed to the account before and during the marriage. He did not, however, provide us or the district court with facts and numbers by which we could review the calculation. The same is true regarding his calculations of Liz's Illinois teacher's pension. An equalization payment was required to level the distribution assigned to each party. Josh's argument, if accepted, would further increase the inequity between the parties. We find the distribution of the accounts by the district court to be equitable.

4. Asset Distribution

Josh argues the district court's overall calculation regarding property distribution was inequitable. Josh reaches this conclusion by claiming the district court provided no explanation for the equalization payment ordered. Though the district court did not set out its calculations in table form, we can review the court's math. Under the district court's calculations, with an equalization payment of $33,706.92, Josh was awarded $65,176.90 and Liz was awarded $64,822.90.

Josh advances two alternative calculations. The first is contingent upon sale of the home and a division of any sale proceeds. We have previously rejected this argument. The second argument assumes Josh is awarded the full

equity in the marital home, but does not include Liz's college loans, or a debt owed to the Area Alcohol Substance Council (ASAC).[4] Josh argues his equalization payment should be reduced by an amount slightly less than the value of these two debts. We find it would be inequitable to require Liz to pay both debts on her own. The ASAC debt was incurred while Liz participated in an outpatient program after the petition for dissolution was filed but before the parties were divorced. The student loan debt was incurred before the marriage, but provided Liz with an education which benefited both parties during the marriage. In light of Liz's lesser earning capacity and the financial standing of the parties, we find it is equitable to consider both when calculating the equalization payment. Because the district court did the same, the equalization payment shall be paid as previously ordered.

D. Alimony

Liz was awarded a $500 monthly alimony payment for a period of thirty-six months. Josh argues the award is not proper as either rehabilitative or reimbursement alimony.

Alimony is awarded in place of the support which the marriage would have provided. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Rehabilitative alimony was established to support a dependent spouse while they attempted to gain the skills necessary to be self-supporting. *Id.* Reimbursement alimony is meant to compensate a spouse for sacrifices made during the marriage. *Id.* These sacrifices are not limited to financial considerations.

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[4] We also note Josh's calculations assign him his vehicle, however the value of the car is excluded from the calculations he urges us to adopt.

The district court did not clearly state which type of alimony it was awarding; however we find the amount proper as a form of reimbursement alimony. Though Josh was the primary earner throughout the marriage, he was able to obtain a master's degree in business administration while married to Liz. While he did so Liz maintained the family home and took on the larger share of child-care duties. Josh will enjoy the fruits of his advanced degree throughout the remainder of his working years; however Liz will not, despite having made significant personal sacrifices. The alimony award is equitable.

D. Cross Appeal

1. Value of Marital Home

Liz argues the district court undervalued the marital home. A number of possible values were provided during trial. A local realtor conducted two comparative market analyses. The first conducted in January 2011 established a value of $319,400. A second, conducted in October, 2011 established a value of $335,700. The parties each argued for amounts in between those two values. Liz argues a value of $327,550, the average of the two comparative market analyses, is the bottom end of the reasonable range.

Ordinarily, we will not disturb the district court's valuation of a marital home so long as the valuation was "within the range of permissible evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). The district court assigned the marital home a value of $320,573. This is the value Josh proposed in the joint pretrial statement. It is within the range established by the two comparative market analyses and therefore it will not be disturbed.

2. Value of Condominiums

Liz argues the district court undervalued her condominium, unit 310. The district court assigned both condominiums identical values of $35,000. Liz argues unit 310, as an upper unit with a balcony, is more desirable and therefore is worth more than $35,000. The parties agreed during trial the other unit they owned during the marriage, unit 109, is worth $35,000. Liz testified she believed unit 310 was worth $40,000, while Josh testified it was worth $39,000.

A comparative market analysis was performed on both units and concluded they would sell for between $35,000 and $40,000.[5] Though there are compelling reasons why unit 310 could sell for a higher price, the value chosen by the district court is within the permissible range established by the comparative market analysis. We will not disturb the district court's valuation of unit 310.

3. Appellate Attorney Fees

Awards of appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). We consider the needs of the party asking for fees as well as the other party's ability to pay when determining whether fees should be awarded. *Id.* Liz asks for $4000 in appellate attorney fees. Josh was successful on only one of his claims on appeal, and possesses a significantly higher income compared to Liz. He has been, however, ordered to pay a

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[5] Liz contends the upper condominium, unit 310, is worth more on the open market because it has a balcony and because, as an upper floor unit, it is less likely to be the target of crime. If unit 310 is worth $40,000 instead of $35,000, it will have less negative equity, leaving Josh with less debt and resulting in a higher equalization payment for Liz.

significant equalization payment which will impact his finances. In light of these factors, we order Josh to pay $2000 in appellate attorney fees.

Costs are assessed one-half to each party.

AFFIRMED.