IN THE COURT OF APPEALS OF IOWA

No. 3-868 / 13-0070
Filed November 6, 2013

IN RE THE MARRIAGE OF ERIC SCHULTZ
AND AUBREY SCHULTZ

Upon the Petition of
ERIC SCHULTZ,
Petitioner-Appellant,

And Concerning
AUBREY SCHULTZ,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, John D. Telleen, Judge.

Eric Schultz appeals the dissolution decree, contesting the grant of joint physical care, the determination of the parties' incomes, the award of spousal support, and the valuation and distribution of assets. **AFFIRMED.**

Jennifer Olsen of Olsen Law Firm, Davenport, and Richard Farwell, Clinton, for appellant.

J. David Zimmerman of J. David Zimmerman P.C., Clinton, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Eric Schultz challenges both the physical care and economic aspects of the decree dissolving his marriage to Aubrey Schultz. First, he claims he should have received physical care of their three children because Aubrey does not offer sufficient stability to be a primary caregiver. Next he disputes the court's determination of each party's income. He also contests the valuation and distribution of martial assets and debts. Finally, he challenges the award of spousal support. Because we agree with the district court's reasoning on all of the issues, we affirm.

I. Background Facts and Proceedings

Eric and Aubrey were married in 1999. They have three children together, ages fourteen, twelve, and five at the time of trial. Eric, who is thirty-six years old, is employed at Archer Daniels Midland (ADM) Company, where he is a machinery operator. Eric works twelve-hour swing shifts, often returning home after 7:00 p.m. if he works the day shift or 7:00 a.m. if he works the night shift. His schedule is two days on, then two days off. He typically works eighty-four hours in a two-week period. His 2010 tax return showed his income as $68,859. In 2011 his tax return indicated an income of $72,328.

Aubrey, who is thirty-three years old, has limited work experience and at the time of trial was attending classes at Clinton Community College to become an ultrasound technician. At the time of the divorce proceeding she was not employed. Aubrey has suffered from numerous medical issues during the marriage. She has undergone two bowel resections, gall bladder surgery, a

partial hysterectomy, and removal of her ovaries. She also had three cesarean sections. As a result of the many procedures, she developed an addiction to pain medication. She would go to various doctors and receive prescriptions for different narcotics. Aubrey successfully completed drug treatment and her family reports she is doing well in recovery. At the time of trial, she had mycobacterium avium complex, which is an infection of her lungs, liver, and spleen. She was taking non-narcotic medications under the care of a doctor for this condition.

The couple faced serious financial difficulties. Creditors often garnished Eric's paycheck to recoup overdue medical bills related to Aubrey's illnesses and numerous prescription pain drugs. The couple consulted a bankruptcy attorney but did not file a petition.

During the marriage Aubrey was not employed because she was the primary caretaker of the children. Aubrey also took charge of the household finances. Pressured by the family's increasing debt, she failed to make the monthly mortgage payments. Eric did not realize the extent of their delinquency until their house went into foreclosure and their utilities were turned off. He moved out of the marital home with the children, taking most of the furniture and appliances. According to the district court, "The only property that Aubrey was left with was a refrigerator, two chairs, and two beds."

On November 1, 2011, Eric filed for divorce. On December 19, 2011, he obtained temporary custody of the children. On April 24, 2012, the district court issued a ruling on temporary spousal support and specific visitation. It also ruled on Aubrey's motion to amend and application for citation for contempt. That

ruling denied respondent's request for overnight visitation because she had yet to find suitable living arrangements for the children and due to her ongoing battle with addiction to narcotic pain medication.

The court held trial on September 12, 2012. On October 17, 2012, the district court issued its findings of fact, conclusions of law and decree of dissolution of marriage. The court granted the parties joint legal custody as well as shared physical care. It awarded Aubrey $854.33 a month in child support with that amount decreasing as each child reached the age of eighteen. The district court initially granted Aubrey $300 per month in spousal support. The court also divided the marital assets and debts. Eric filed a motion for new trial and a motion under Iowa Rule of Civil Procedure 1.904. Upon reconsidering the amount of debt allocated to Eric, the district court lowered his spousal support obligation to $150 per month. Eric now appeals.

II. Standard of Review

We review marital dissolutions de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012). Nevertheless, we recognize the district court had the advantage of listening to and observing the parties and witnesses first hand. *See In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("A trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.' In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is

presented." (internal citations omitted)). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Analysis

Eric challenges the district court's award of joint physical care, as well as its determination of the parties' incomes, distribution of assets and debts, and spousal support. Both parties seek appellate attorney fees. We will address each claim in turn.

A. Did The District Court Err In Awarding Joint Physical Care?

Iowa courts do not resolve physical care issues based upon perceived fairness to the spouses, but upon what is best for the children. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The objective of a physical care determination is to place the children in the environment most likely to assure their physical and mental health, and to bring them to social maturity. *Id.*

The legislature set out factors for courts to consider when determining the optimal care arrangement. *See* Iowa Code § 598.41(3) (2011). We also look to the non-exclusive considerations articulated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974) (including the needs of the children, the characteristics of the parents, the relationship between each child and each parent, and the stability and wholesomeness of the proposed environment). In *Hansen,* our supreme court outlined specific factors to consider in deciding whether to grant shared care. *Hansen*, 733 N.W.2d at 696–99. First, we must

consider the stability and continuity of care giving and try to allocate custodial responsibility in a way that approximates the proportion of time each parent spent taking care of the children before the couple's separation. *Id.* at 696–97. Then we consider the ability of the parents to communicate and show mutual respect. *Id.* at 698. The degree of conflict between the parents is an important factor in making a joint-physical-care determination. *Id.* Finally, we consider the degree to which the parties agree on daily childrearing matters. *Id.* at 699. This list of factors is not exclusive, and our determination must reflect the particular circumstances at hand. *See id.* at 699–700.

Both Eric and Aubrey sought physical care of the children. Aubrey also testified she would be willing to share care with Eric. *See* Iowa Code § 598.41(5)(a) ("If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent."). The district court granted them joint physical care. The court also asked the parties to submit a proposed schedule for how their time with the children would be divided. *See In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007) (describing joint physical care as "roughly equal residential time" with each parent). The court adopted the shared care schedule developed by the parties in its ruling on Eric's motion for expanded findings under Iowa Rule of Civil Procedure 1.904(2).

On appeal, Eric argues he should be the sole caretaker for the children. He contends Aubrey lives in substandard conditions and is still addicted to pain

medication. He contends the district court "overlooked" the fact he was the children's primary caretaker under the temporary order.

Far from overlooking that fact, in ruling on Eric's 1.904(2) motion, the court explained in detail its rationale for moving away from the physical care arrangement in the temporary order. The court found the evidence at trial demonstrated the negative impact of Eric's work schedule. The court found when Eric is on second shift, the couple's oldest child, at age fourteen, must assume a parental role. The court also found Eric had limited Aubrey's access to the children, even he when was unavailable and they needed her. The court found his actions were not in the best interests of the children.

In addition, the court detected little evidence Aubrey's prescription drug use diminished her present ability to care for the children. Aubrey is now on non-narcotic medication. Also, several witnesses testified at trial about Aubrey's positive parenting skills.

After performing a de novo review of the record, we reach the same conclusion as the district court—finding joint physical care to be in the best interests of the children. Both parents are suitable custodians. The record shows Aubrey was the principal caregiver during most of the marriage. As the district court discussed, the temporary arrangement where Eric acted as the primary parent created hardships for the children. The children called their mother daily for advice and help. The children also started having behavioral problems. The oldest child began failing two classes at school. Another child became depressed.

While Eric may have believed he was acting in the best interests of the children when he initially moved them out of the marital home based on their mother's addiction to pain medication and the looming foreclosure, we agree with the district court that he has gone too far in denying Aubrey contact with the children. *See In re Marriage of Gensley*, 777 N.W.2d 705, 716 (Iowa Ct. App. 2009) (reiterating that one parent's denial of contact between the children and the other parent is a significant factor in a physical care decision). The court found "Eric has demonstrated a troubling lack of concern for the wellbeing of the children and his recent behavior seems more calculated to punish Aubrey." And while it is true that at the time of the trial Eric could offer the children a more stable living situation, his work schedule was not conducive to having physical care of the three children, who are left alone for significant periods of time. The court acknowledged the case presented a "difficult dilemma." The district court's solution, after assessing the credibility of all the witnesses, was to order shared care. We defer to the court's fact findings and opt not to disturb the custodial order.

Admittedly, the parties have not consistently demonstrated an ability to show mutual respect. But Eric and Aubrey were able to work out a visitation and holiday schedule, which the court adopted. We are optimistic their cooperation in formulating a plan allowing maximum contact for the children with each parent will be a harbinger of positive communication about the children's needs in the future. We are also encouraged by the fact that both parents have extended family nearby who can provide them support with the children. Given the

circumstances at the time of the trial, we agree that shared physical care was in the children's best interests.

B. Did The District Court Properly Calculate Each Party's Income?

Eric contends the district court did not accurately determine the parties' incomes. The court imputed to Aubrey an income of $15,080, which is minimum wage. Eric claims she is actually capable of earning ten dollars per hour (which would translate to an annual income of $20,800 for full-time work). He argues Aubrey's lack of earning capacity is a self-inflicted wound, related to her addiction to pain killers. Eric also asserts the court incorrectly determined his annual income to be $72,000 by relying on 2011 figures when he worked additional overtime hours to "make ends meet" given the family's financial downfall. He argues the court should use new income figures to recalculate his child support and redistribute the debts and assets.

"When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines." *In re Marriage of Malloy*, 687 N.W.2d 110, 115 (Iowa Ct. App. 2004). We agree with the district court's decision to impute a minimum-wage income to Aubrey. While she may be able to secure a higher salary after completing her degree program, the record does not show that she is capable of earning that amount now. She has not been in the job market since 2008 and her 2007 earnings were only $2900.

As for Eric's income, we again find the district court's calculation to be supported by the record. The court looked at Eric's annual income for 2011 and his earnings to date for 2012. The court also found Eric's financial affidavit to be "inaccurate" and accordingly calculated his net monthly payments based on the allowable deductions from his gross income and disallowed the double deduction of Eric's monthly expenses. We find no error in the district court's income calculations.

C. Did The Court Properly Distribute The Martial Assets And Debts?

Eric next challenges the district court's valuation of the marital property and its distribution of the debts and assets as inequitable. "What is equitable in a divorce is an endless source of debate." *In re Marriage of Breckenfelder*, 737 N.W.2d 97, 99 (Iowa 2007). The equitable division of property is guided by the factors in Iowa Code section 598.21(5).

To equitably distribute assets, the court must first determine what assets are available. To do this, the court must identify and value the assets held by the spouses both jointly and separately. *In re Marriage of Driscoll*, 563 N.W.2d 640, 641–42 (Iowa Ct. App. 1997). Property division also entails assignment of responsibility for marital debts. *In re Marriage of Siglin,* 555 N.W.2d 846, 849 (Iowa Ct. App. 1996). When it comes to allocating the marital assets and debts, Iowa courts abide by the maxim that equitable does not always mean equal. *Driscoll*, 563 N.W.2d at 642. Marriage does not come with a ledger. *See In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa Ct. App.1996).

In this case, the district court calculated the couple's assets at $31,000—including four vehicles, a boat, and several motors. The court allocated assets valued at $25,000 (including a 2006 Chevy Silverado, a 1979 Camaro, a 1956 Chevy Bel Aire, the boat, and several motors) to Eric and awarded a Chevy Trailblazer, worth $6000, to Aubrey. On the liability side, the court determined that Eric and Aubrey owed medical and hospital bills in an amount of $25,147 and owed additional debts in the amount of $33,213.[1] The court allocated the entire $58,360 in debt to Eric. The court stated that it was equalizing the difference in liabilities by allocating only a portion of Eric's 401(k) account to Aubrey. The court divided the 401(k) account by awarding $71,487 to Eric and $32,126 to Aubrey.[2]

Eric disputes the district court's valuation of the medical bills, as well as the 1979 Camaro and two motors. He also objects to the court's allocation of the entire family debt load to him. Eric argues the court should have "looked to who created the medical debts and who should be deemed responsible for those debts, [Aubrey]." In addition, Eric questions the court's decision to award Aubrey the Trailblazer, but to saddle him with the car payments and provide no order for Aubrey to have the vehicle insured[3]. He asserts awarding him a greater percentage of the 401(k) account does not equalize the difference in liabilities

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[1] The court noted $18,774 of that debt related to car loans and the boat and motor loans. Liabilities of $9359 to Allied Business accounts, and $1030 to RRCA collections related to Aubrey's medical debts, according to Eric's testimony. The remainder of the debt was a $4050 loan from the ADM 401(k) account.

[2] The court also used the formula from *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996) to divide Eric's ADM pension benefits.

[3] Aubrey as owner of the Trailblazer is required to insure the vehicle.

allocated between the parties because he is not able to access that money without significant penalties and tax implications. He urges us to allocate all of the medical related debts to Aubrey and to require her to pay half the $18,774 car loan debt. In the alternative, he asks us to award him the 401(k) account in its entirety.

For her part, Aubrey is critical of Eric's "unwillingness to pursue bankruptcy relief." On appeal, she argues we should affirm the district court's valuations and distribution, reasoning "the Court's division of assets and debts provided each party with a reasonable opportunity to survive the financial disaster of their dissolution of marriage."

We first address the valuation issues raised by Eric. Eric estimated the outstanding medical and hospital bills totaled $34,000, which was significantly greater than the $25,147 medical debt valuation accepted by the district court. The district court rejected Eric's estimate because "he provided no itemization and simply testified that he arrived at those values by calling around to various medical providers." By contrast, Aubrey submitted exhibits with a detailed breakdown of the medical bills and the amount outstanding. Ordinarily, we will not disturb the district court's valuation if it falls within the range of permissible evidence. *Hansen,* 733 N.W.2d at 703. Here, we find the district court acted properly in going with the more detailed exhibit and itemization concerning the medical debt.

The parties did not provide much specific information to guide the court in choosing between the competing values they placed on their assets. Eric

maintains the district court overvalued the 1979 Camaro and two motors; he contends their value is $2500 rather than the $10,000 assigned by the court. Aubrey's affidavit of financial status listed the market value of the Camaro as $15,000. As the fact finder, the district court is at liberty to reject or accept evidence relating to value. *In re Marriage of Richards,* 439 N.W.2d 876, 881 (Iowa Ct. App. 1989). We find the court's valuation of the Camaro and motors to be within the range of permissible evidence.

Turning to the allocation of the debts, we appreciate the district court faced few good options given the couple's long list of liabilities. The court reasoned that because Eric was gainfully employed and Aubrey was not, the only "viable option" was to allocate the entirety of the debt load to Eric.[4] The court's allocation of the debts fairly reflects the parties' financial wherewithal to assume them. *See In re Marriage of Geil*, 590 N.W.2d 738, 741 (Iowa 1993).

While Aubrey's hospital and medical bills represent a significant portion of the family's liabilities, Eric has not established the cost of her procedures and prescriptions should be treated differently from other marital debt. *See In re Marriage of Knight*, 507 N.W.2d 728, 732 (Iowa Ct. App. 1993) (finding division of marital debts was reasonable even though wife was required to pay one-half of debt for counseling husband participated in regarding his relationship with his son). Given the circumstances in this marriage, especially Aubrey's health issues and her limited employment opportunities due to the division of labor

[4] When considering the award of the Trailblazer to Aubrey but the payments to Eric, we note generally we expect a debt to follow the asset. But we are not sure Eric would be able to have the vehicle released from the loan and Aubrey has no ability to contribute to the loan payments at this time.

during the couple's thirteen-year marriage, we find no inequity in the allocation of the assets and liabilities.

D. Did The District Court Err When It Ordered Spousal Support?

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa Ct. App. 1996).

When determining the appropriateness of alimony, the court must consider the earning capacity of the parties and their present standards of living and ability to pay balanced against their relative needs. *In re Marriage of Volding*, 544 N.W.2d 457, 460 (Iowa Ct. App. 1995). "[P]rior cases are of little value in determining the appropriate alimony award." *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008). The amount of spousal support is calculated based on several factors, including: (1) the length of the marriage, (2) the age, physical, and emotional health of the parties, (3) the property division, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking support, and (6) the feasibility of the party seeking support becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *See* Iowa Code § 598.21A(1).

Iowa law recognizes three forms of alimony—traditional, rehabilitative, and reimbursement—and each has a different aim. *Becker*, 756 N.W.2d at 826. Rehabilitative spousal support is meant to support an economically dependent

spouse for a limited time and to provide an opportunity for that spouse to become self-supporting through education or retraining. *Id*.

The district court originally ordered Eric to pay Aubrey alimony in the amount of $300 per month for three years. In its 1.904(2) ruling, the court reduced that amount to $150 per month for three years based on a reassessment of the debt load assigned to Eric. Eric argues on appeal he should be relieved of any spousal support obligation.

While the district court did not place a specific label on its award of spousal support, it seems to fit the purpose of rehabilitating Aubrey, who did not pursue a career during the marriage. The parties were married for thirteen years. Eric is in good health; Aubrey is not. Eric was the primary earner in the household while Aubrey cared for the children. Aubrey is currently attending community college and unable to support herself at this time. Eric is fully employed at ADM. As discussed above, the decree placed the marital debt on Eric's shoulders. Given all of these circumstances, we find spousal support in the amount of $150 per month for three years that Aubrey can apply toward her college costs is an equitable award.

E. Should Either Party Be Awarded Appellate Attorney Fees?

Both parties request attorney fees on appeal. We have broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We base such an award on the needs of the party seeking fees, the ability of the other party to pay, and the relative merits of the appeal. *Id*.

Considering the relative financial positions of these parties, we deny both requests for appellate attorney fees. Costs are assessed one-half to each party.

AFFIRMED.