IN THE COURT OF APPEALS OF IOWA

No. 2-1099 / 12-1122
Filed February 13, 2013

IN RE THE MARRIAGE OF RENE LEIGH KRIENER
AND ARNOLD CONRAD KRIENER

Upon the Petition of
RENE LEIGH KRIENER,
Petitioner-Appellant,

And Concerning
ARNOLD CONRAD KRIENER,
Respondent-Appellee.

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge.

Rene Kriener appeals a district court's dissolution order placing the parties' daughters in their father's physical care. **AFFIRMED.**

Andrew Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Daniel Bray of Bray & Klockau, P.L.C., Iowa City, and Thais A. Folta of Elwood, O'Donohoe, Braun & White, Cresco, for appellee.

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

TABOR, J.

In this dissolution of marriage appeal, Rene Kriener challenges the district court's decision to place their two school-aged daughters in the physical care of their father Arnie Kriener. She also asks us to modify the property division and the spousal support ordered in the decree.

After examining the entire record and giving due deference to the district court's first-hand observation of the parties, we find support for the district court's conclusion that Rene has interfered with the children's relationship with their father and their interest in having a strong connection to both parents is best served by entrusting their physical care to Arnie. We also find the division of property and spousal support to be equitable. Accordingly, we affirm.

I. Background Facts and Proceedings

Rene was nineteen years old and Arnie was twenty-one when they married in October 1990. The couple separated in September 2010. They have four daughters—who at the time of the dissolution were ages twenty-one, eighteen, eleven, and nine. The physical care issue involves only the two youngest girls, M.K. and A.K.

Both spouses have had successful employment histories. Arnie left college after two and one-half years to support his family, at first farming and then working for a construction company. Arnie started selling insurance for Farm Bureau in 2002. In 2006, Arnie set up a subchapter S corporation, KJAM, Inc., which employs him to sell Farm Bureau insurance products. The district court determined his annual income averages $185,453.

Rene is a nurse practitioner employed by Gunderson Lutheran Clinic in Ossian, Iowa. She completed six degree programs during the marriage and in her testimony alluded to possibly pursuing additional educational opportunities. She maintains an excellent reputation for professionalism among her colleagues. Her gross annual salary for 2011 was $69,700.

Both parties enjoy overall good health. The record shows Rene sometimes suffers from migraine headaches and Arnie has occasional back pain, but neither malady affects their ability to work or care for the children.

Rene filed a petition for dissolution of marriage on August 30, 2010. During this same time period, Rene filed a petition for relief from domestic abuse under Iowa Code chapter 236 (2009). In her petition and supplemental statement, Rene stated she feared for her personal safety and the children's safety based on Arnie's past and recent verbal abuse and physical aggressiveness. She alleged that on August 29, 2010, Arnie "jammed" the side of her head with his finger causing her pain.

On October 21, 2010, Judge John Bauercamper found Arnie committed a domestic abuse assault against Rene and issued a protective order. The court noted: "Their marriage has been marred by long standing marital strife and a history of verbal abuse which has recently escalated." The court found Rene had been the children's primary caregiver, but that Arnie had been involved in their upbringing. The order granted Rene temporary physical care of the couple's three youngest daughters with visitation for Arnie.

In April 2011, the district court vacated Judge Bauercamper's order of protection and accepted a stipulation by the parties to an amended order directing Arnie to "stay away" from Rene for one year.

During the pendency of the dissolution petition, the parties retained Dr. Seth Brown, a licensed psychologist, to perform a custody evaluation. He interviewed Rene and Arnie, their four daughters, and several members of the extended family and friends of the parties. All four of the daughters called their father "Arnie." The two youngest girls expressed a strong preference for living with their mother. The third oldest daughter, J.K., a junior in high school at the time, had voluntarily moved from her mother's house to her father's residence. J.K. told the evaluator that her parents' relationship was "rough." She believed her younger sisters had "adopted a role of helping to protect their mother and discrediting their father and herself." The oldest daughter K.K., who was away at college, explained that her sister J.K. moved in with their father because he provided less supervision of J.K.'s relationship with an older boyfriend. K.K. told the evaluator she had a good relationship with both her mother and father until their separation. But K.K. felt betrayed by her father when he obtained a transcript of her text messages with her mother and forwarded it to his divorce attorney.

Dr. Brown provided his report to the court on April 18, 2011. He wrote that each parent "offered an array of advantages and disadvantages for assuming [the primary caretaking role]." The psychologist ultimately expressed his opinion that it was in the best interests of the children to reside primarily with their father

because he appeared more capable of placing them in a more "structured and calm environment with minimal involvement in the divorce process." Dr. Brown also recommended regular visitations with their mother, given their strong attachment to their mother and her positive attributes.

On May 13, 2011, Arnie filed an application to modify temporary custody. The court held a hearing on July 26, 2011, and issued its order on August 16, 2011. The order repeated findings from the psychologist's report—specifically that Rene was involving the children in the emotional process of the divorce. The court determined the findings were supported by the record and transferred the temporary physical care of the children to Arnie, with visitation for Rene.

The district court heard six days of testimony in the dissolution case during January and February 2012. On April 18, 2012, the court issued the decree—ordering joint legal custody, placing physical care of the children with Arnie, and granting liberal visitation for Rene. After dividing the marital estate, the court ordered Arnie to make an equalization payment to Rene in the amount of $68,000. The decree also ordered Arnie to pay spousal support to Rene in the amount of $2000 per month for three years.

Rene filed a motion to amend and enlarge under Iowa Rule of Civil Procedure 1.904, asking—among other things—for the physical care order to be reconsidered, the property division amended, and the spousal support duration be increased to ten years. The court issued an order on May 25, 2012, denying the substance of the motion. Rene now appeals.

II. Scope and Standards of Review

We review dissolution cases de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). Our de novo review entails examining the whole trial record and deciding anew the issues raised on appeal, but we perform these tasks realizing the district court had the advantage of seeing and listening to the parties and witnesses. *See In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Based on that realization, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). In custody matters, our overriding concern is the best interests of the children. Iowa R. App. P. 6.904(3)(o). Because we base our decision on the unique facts of each case, precedent is of little value. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

We afford the district court considerable latitude in its determination of spousal support under the statutorily enumerated factors, and will disturb its finding only when the award is inequitable. *In re Marriage of Spiegel,* 553 N.W.2d 309, 319 (Iowa 1996).

III. Discussion

Rene asks us to modify the dissolution decree in three ways: by changing the grant of physical care; by increasing Arnie's equalization payment; and by awarding greater spousal support. For the following reasons, we decline to order the requested modifications.

A. Physical Care

The goal for custody arrangements is to assure the children "the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage." Iowa Code § 598.41(1)(a) (2011). In considering what custody arrangement is in the best interests of the children, courts are to consider a number of factors, including whether each parent would be a suitable custodian, the parents' ability to communicate regarding the children's needs, the continuity of caregiving both before and after the parents' separation, each parents' ability to support the other's relationship with the children, the children's wishes in the context of their age and maturity, the safety of the children, and whether there is a history of domestic abuse. Iowa Code § 598.41(3).

The district court appropriately weighed these factors before granting joint legal custody and physical care to Arnie. The court recognized Rene had been the primary caretaker of the children through the marriage and acknowledged that A.K. and M.K. expressed a strong desire to live with their mother. On the other side of the fulcrum, the court found Rene demonstrated by her words and actions that she could not support Arnie's relationship with the children, and in fact, fostered an attitude of disrespect toward him. The court credited Arnie's testimony that the girls are growing more comfortable in his care. The court also found it significant, as do we, that the girls' attendance at school improved markedly while they have been living primarily with their father.

Because the district court serves as our eyes and ears on the ground, we choose to defer to its detailed factual findings reached after six days of observing the parties at trial. In doing so, we address three particular concerns raised by Rene on appeal.

1. Custody Evaluation

Rene offers a strong critique of the district court's reliance on the report of the custody evaluator. She contends the report was "flawed" and the evaluator developed "a bias in favor of Arnie during the evaluation process." She relies on *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa Ct. App. 1998) and *In re Marriage of Pothast*, 539 N.W.2d 199, 202 (Iowa Ct. App. 1995) for the proposition that the evaluation should have had little sway over the court's deliberations.

Our court has recognized the value of having an independent psychologist make a recommendation regarding the physical care of the children. *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993). While a custody evaluator's view is not controlling, it can be given "considerable weight" when the expert has met with both parents and gathered information concerning their caretaking abilities. *Id*. The district court's consideration of Dr. Brown's evaluation differs from the situation in *Rebouche* and *Pothast*. The record does not support Rene's assertions that Dr. Brown lacked neutrality in reaching his opinions regarding custody. Dr. Brown followed a protocol designed to eliminate the threat of bias, including undertaking in-depth interviews with both parents, all four daughters, and other individuals recommended by the parties' attorneys.

The report was thorough and balanced. Rene's dissatisfaction with the recommendation does not prove the method of evaluation was flawed. Moreover, the district court did not cede its decision to the evaluator; it considered the report as one factor in its determination of physical care.

2. Domestic Abuse

Rene contends Dr. Brown failed to consider she had been the victim of domestic violence when he relied on her MMPI (Minnesota Multiphasic Personality Inventory) to conclude that she exhibited "maladaptive personality patterns." Her contention is belied by the record. Dr. Brown testified he did consider the reported episodes of physical aggression during the marriage, but did not find strong evidence to support Rene's characterization of Arnie as a domestic abuser. Moreover, while the district court mentioned the evaluation's personality assessment of Rene, those findings were not central to the court's ultimate physical care decision.

Rene also asserts placing physical care with Arnie is not in the children's best interests because of his domestic violence toward her. Rene does not argue that Arnie's conduct amounts to a "history of domestic abuse" as that term is used in Iowa Code section 598.41, but nevertheless contends his abusive behavior "disqualifies him as a parent who can best act in his children's long term best interests."

We are troubled by Arnie's reference in his appellate brief to his act of domestic violence toward Rene as a "technical assault." Such a reference minimizes the seriousness of his conduct and runs counter to Judge

Bauercamper's determination in issuing the October 2010 protective order that Arnie represented "a credible threat to the physical safety" of Rene. Our court has noted that "spousal abuse discloses a serious character flaw in the batterer, and an equally serious flaw in parenting." *In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997).

The district court stated in the decree: "each party physically assaulted the other during the course of the marriage." It is true the evidence showed Rene "jammed" a pen into the back of Arnie's neck in 1997. But we are hesitant to equate that isolated event fourteen years earlier with the more recent aggression perpetrated by Arnie against Rene, as described in her September 2010 statement in support of the petition for relief from domestic abuse.

The question is whether Arnie's abusive conduct in 2010 "disqualified" him as the children's primary caregiver. Judge Bauercamper concluded in the October 2010 temporary custody order that the evidence did not justify depriving either parent of joint legal custody, noting the marriage was "marred by long standing . . . strife" and "a history of verbal abuse" that had recently escalated. We believe that was an apt description of the situation. Arnie's heated reaction in the throes of the divorce proceedings, while concerning and disappointing, does not rule him out as a proper parent in the long run. We find Arnie's domestic abuse assault against Rene in 2010 to be one of among the many factors to consider when determining the physical care arrangement.

3. Children's Preference

The preferences of minor children regarding which parent should be the primary caregiver are relevant, but not controlling. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985). When deciding how much weight to give children's wishes, a court must consider the strength of the children's preference in light of their age and level of maturity. Iowa Code § 598.41(3)(f). At the time of the custody evaluation, M.K. was nearly eight years old and A.K. was ten. Both girls were articulate, but used terminology considered by the evaluator to be overly "sophisticated" for children their age.

A.K. and M.K. both told the evaluator they wished to live with their mother and have less time with their father. Both girls communicated harsh pronouncements about "Arnie"—saying he "has never been a dad," "doesn't have the right to be a dad," and that he "never took care of us." As detailed in the decree, the girls also told the evaluator their father was "frequently verbally and physically aggressive towards their mother," but the evaluator noted their accounts were "delivered in a pressured manner, containing particularly sophisticated terminology for their age and with an absence of details for these reportedly common events."

Rene offered into evidence journals the girls kept concerning their feelings about the divorce. The entries started in October 2010 and continued until December 2011. Rene testified that she did not "coach" or "coerce" the girls to write in the journals, but would suggest they could do so if they came home after having a "bad day." Although Rene testified the journals were not created for use

in the custody case, the district court found: "It is apparent the journals are directed to the Court." The court found it telling that both girls made a point of stating that their mother was "not telling them what to write" in the journals. The journals show the girls harbored a great distrust toward their father and a strong attachment to their mother.

Rene argues on appeal that the district court gave too little weight to the girls' preferences. Arnie counters that the evidence revealed "the children had been pressured to align themselves with Rene" and that away from their mother, they have forged a good relationship with him.

We agree with the district court's inclination to give little weight to the preferences expressed by the eight- and ten-year-old girls in their interviews with the custody evaluator and in their journals. Their mother's open hostility toward their father washed over these girls and undoubtedly influenced their expressed opposition to spending time with their father. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 674 (Iowa 1980) (giving little deference to preferences of children, ages eleven and ten, due to the parental influences on their views).

In our de novo review, we agree with the district court's decision to place physical care of A.K. and M.K. with their father. The district court wisely ordered Arnie to continue to secure counseling services for himself and the girls until they have adjusted to the change in custody. We also highlight the district court's order that the parties designate an hour of the day when the children can engage in telephone communication with the non-custodial parent. We likewise believe liberal visitation for Rene is important for the well-being of the children. As the

evaluator opined, both parents love their children and are "supportive and involved in their children's development."

Before addressing the economic provisions of the decree, and given the parties' history of placing these children in the middle of their marital strife, we echo this important directive from the district court:

> Both parties shall encourage at all times in the children an attitude of love and respect for the other parent and should never make any negative comments about the other parent in the presence of the children.

B. Property Division

Rene asks for a greater equalization payment based on what she perceives as two mistakes in the district court's distribution of assets. First, she claims the court erred in crediting her with $73,225.67 held in a Luana Savings Bank money market account. She claims on appeal that the couple agreed before the divorce to spend that money to repay her student loans. Second, she faults the court for failing to set aside $30,000 she received from a personal injury settlement. She argues that to correct these errors, the court should increase Arnie's equalization payment by $51,924.39.

Arnie claims Rene's appellate argument regarding repayment of her student loans is at odds with her trial testimony that she removed the money from the Luana Savings Bank money market account and placed it in a savings account at the Security State Bank in Ossian so she could use it for living expenses. He relies on *Fennelly,* 737 N.W.2d at 104, for the proposition that a court dividing property may consider whether a party's expenditures amount to dissipation.

In *Fennelly*, the court set out four questions to ask when determining whether an expenditure amounts to dissipation: (1) did the expenditure occur close in time to the parties' separation? (2) was it typical of expenditures during the marriage? (3) did it benefit one spouse to the exclusion of the other? and finally (4) how much was the expenditure and did the party need to make it? *See Fennelly,* 737 N.W.2d 104–05. According to Rene's own testimony, she transferred the money at the time of the separation and "a majority of it has gone toward the divorce proceedings." Because those expenditures were atypical of spending during the marriage and benefitted her to the exclusion of Arnie, the district court acted reasonably in attributing those funds to Rene.

Arnie also contends the district court was correct in "reciting Rene's testimony at trial that the personal injury settlement was part of the monies held in the Luana Savings Bank money market." The proceeds of a personal injury settlement may be considered marital assets and should be divided according to the circumstances of the particular dissolution case. *In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987) (adopting the so-called "mechanistic approach" which allows trial courts flexibility in dividing personal injury awards). In this case, Rene did not present any specifics to the district court regarding what damages the personal injury settlement addressed or how the assets should be divided. Accordingly, her objection to the court's treatment of the settlement as marital property is without merit.

We find the district court's overall property distribution was equitable and opt not to disturb it on appeal.

C. Spousal Support

Next, Rene claims her spousal support award should be increased in its duration. The district court ordered Arnie to pay $2000 per month for a period of thirty-six months, reasoning:

> This will allow Rene to secure additional education, if she elects to do so. As previously noted in this Decree, Rene testified that, due to difficult divorce proceedings, she did not intend to pursue "my degree." If desired by Rene, additional education would be expected to increase her earning capacity. The evidence indicates Rene has generally improved her earning capacity with each degree program she undertook and completed.

On appeal Rene asserts that after more than twenty years of marriage, she depends on Arnie's earnings and does not have the ability to become self-sufficient, "at least not in the short-term." She urges us to modify the decree to extend Arnie's obligation to pay spousal support to ten years. Arnie resists this suggestion, pointing out that Rene is relatively young at forty-one years of age, is healthy, received a substantial equalization payment, and does not have physical care responsibilities for the children under the decree. He also emphasizes that she completed six advanced degree programs during the marriage and the couple paid off her student loans with marital funds.

The statutory criteria for determining spousal support include, but are not limited to: the length of the marriage; the parties' ages and physical and emotional health; the property distribution; the parties' educational levels at the time of the marriage and the divorce; the earning capacity of the party seeking maintenance, including education, employment skills, work experience, responsibilities for children, and the time and expense necessary to acquire

sufficient education to enable the party to find appropriate employment; and the feasibility of the party seeking maintenance to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal. Iowa Code § 598.21A(1).

In applying these factors, our supreme court has discussed three types of support: traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). Generally, traditional alimony is "payable for life or so long as a spouse is incapable of self-support." *Id*. Rehabilitative support offers a bridge for an economically dependent spouse needing a limited period of re-education following divorce. *Id*. Reimbursement support allows the economically dependent spouse to share in the other spouse's future earnings in recognition of the receiving spouse's contributions to the income source. *Id*. An award may properly reflect the statutory criteria even if it cannot be characterized as purely one of the three support types. *Id*. at 827.

Here, the spousal support ordered may serve the aims of both traditional and rehabilitative alimony. The marriage was of long duration and Arnie enjoyed a higher earning capacity, despite less formal education. But Rene is far from being incapable of self support. She has earned nursing degrees during the marriage and achieved advancements in her profession. The district court's rationale that Rene could continue to increase her earning potential given thirty-six months of $2000 in spousal support is backed by the record. We find the three-year duration to be equitable.

D. Appellate Attorney Fees

Finally, Rene urges us to grant her attorney fees in connection with this appeal. Arnie counters that given the merits of the parties' positions on appeal and their relative ability to pay, he and Rene should shoulder the costs of their own legal representation.

Any award of attorney fees on appeal is discretionary. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the requesting party, the other party's comparative financial wherewithal, and whether the party seeking the award was required to defend the district court's decision on appeal. *Id*. Considering these factors, we decline to award Rene attorney fees. She has a solid earning capacity and, under the decree, received a significant equalization payment, as well as spousal support. The parties shall divide the costs of the appeal equally.

AFFIRMED.