IN THE COURT OF APPEALS OF IOWA

No. 2-809 / 12-0448
Filed November 29, 2012

IN RE THE MARRIAGE OF SUSAN LYNN SAWVEL AND ERIC JAMES SAWVEL

Upon the Petition of

SUSAN LYNN SAWVEL,
Petitioner-Appellee,

And Concerning

ERIC JAMES SAWVEL,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen B. Jackson Jr., Judge.

Eric Sawvel appeals a district court's decree dissolving his marriage. **AFFIRMED AS MODIFIED.**

David Burbidge of Johnston, Stannard, Klesner, Burbidge & Fitzgerald, P.L.C., Iowa City, for appellant.

Alison Werner Smith of Hayek, Brown, Moreland & Smith, L.L.P., Iowa City, for appellee.

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

TABOR, J.

Eric Sawvel appeals from the decree dissolving his marriage. He challenges the physical care order, the visitation schedule, the spousal support award, the calculation of child support, and the distribution of the marital home. After a de novo review of the record, we affirm the district court's thorough fact-finding and sound legal conclusions on all grounds except one. We modify the decree to require Susan Sawvel to refinance the loan on the martial home to remove Eric as the liable party, or alternatively to sell the property.

I. Background Facts and Proceedings

Susan and Eric Sawvel began their eighteen-year marriage in June 1993. They have three children: twin daughters born in 2004 and a son born in 2006. At the time of trial, both parties were forty years old.

The couple met in high school in Dubuque. Upon graduation, Eric enlisted in the Air Force and Susan attended the University of Northern Iowa before transferring to the University of Iowa. Once Susan graduated and Eric finished his four-year term with the Air Force, they moved to Arizona so Eric could attend college. The couple moved back to Iowa in 1995, and Eric earned bachelor's and master's degrees in engineering from the University of Iowa. Eric then re-enlisted in the Air Force, and the couple moved back to Arizona, where Susan found full-time work as a dental hygienist.

Eric and Susan bought a home in Arizona in 2002, and shortly thereafter, Eric received transfer orders to Japan. He relocated, and three months later, after selling their home and finalizing their affairs, Susan joined him. The twins

were born in Japan in May 2004. Nine days after their birth, Eric was deployed to Iraq for four months. Upon his return, the parties remained in Japan another year before moving to San Antonio, Texas in July 2005. Their son was born in December 2006. Susan was responsible for the children and the home while Eric worked, though Eric would care for the children when Susan worked one or two days a week as a dental hygienist.

In 2008, the family moved back to Iowa, settling in North Liberty. Eric worked to obtain his doctorate in industrial hygiene at the University of Iowa. Susan was employed part-time as a dental hygienist and served as the primary caretaker for the children.

Susan petitioned to dissolve the marriage on October 12, 2010. She requested physical care of the children, with both parties sharing legal custody. In Eric's answer, he requested the parties share physical custody.

Susan moved out of the family home in mid-November. She and Eric developed a temporary custody schedule with an equal division of child care. Before the district court issued a temporary order, Eric requested physical care, with Susan to retain visitation rights. During the pendency of the divorce, Eric received orders to report to Wright Patterson Air Force base near Dayton, Ohio between December 2011 and January 2012.

On January 4, 2011, the district court issued a temporary order establishing joint legal custody and shared physical care, and requiring the parents to divide child-care expenses. The court ordered Eric to pay $986 a

month in child support, maintain costs of the children's health insurance and uninsured medical expenses, and pay $2000 for Susan's attorney fees.

The district court held trial in September 2011. On November 23, 2011, the court issued a twenty-seven-page decree, thoroughly analyzing the factual and legal issues raised in the proceedings. The district court ordered joint legal custody and assigned physical care of the children to Susan, providing Eric with liberal visitation, including six weeks during the summer. The court ordered Eric pay $1000 in monthly spousal support for ten years and $1755 per month in child support. The court also awarded the marital residence to Susan and ordered her to pay the loan secured by the home. Eric appeals from several aspects of the decree. Susan requests appellate attorney fees.

II. Scope and Standard of Review

We review equitable proceedings de novo. Iowa R. App. P. 6.907; *In re Marriage of Vaughan*, 812 N.W.2d 688, 692 (Iowa 2012). We examine the evidence in its entirety and decide anew the factual and legal issues properly presented for our review. *In re Marriage of Wade*, 780 N.W.2d 653, 565–66 (Iowa Ct. App. 2010). We give weight to the district court's factual findings, especially as to witness credibility, but are not bound by them. *Id.* This is because the district court has a firsthand opportunity to view the witnesses and hear the evidence. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Previous cases carry little precedential value; we instead base our decision on the particular circumstances before us. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996).

III. Analysis

A. Did the District Court Properly Award Physical Care of the Children to Susan?

Eric asserts Susan is not supportive of his relationship with their children and cites the alleged lack of support as the most important factor in determining physical care. He also claims to be the more even-tempered parent and contends he can provide the children a more stable environment even though placing physical care with him would require the children to move to Ohio.

Susan contends both she and Eric are capable parents, but argues the children would be better off remaining with her in Iowa where they have spent the majority of their lives and have established connections with friends and relatives of both parents. She reasons that moving to Ohio would force the children to adjust to yet another temporary environment that they would likely leave after Eric's three-year assignment.

In determining physical care of the children, we are guided by the factors enumerated in Iowa Code section 598.41(3) (2009), as well as other nonexclusive factors enumerated in *In re Marriage of Winter,* 223 N.W.2d 165, 166–67 (Iowa 1974). *McKee v. Dicus*, 785 N.W.2d 733, 737 (Iowa Ct. App. 2010). Our concern is not perceived fairness to the parents, but what is in the best interest of the children, seeking an environment most likely to foster a long-term healthy environment, both physically and mentally. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

In this case, both parents have shown themselves to be suitable care givers. We reject disparaging references in the parties' briefs that would suggest the other parent is not worthy to watch over the children. The district court acknowledged unbecoming behavior by both parties, but opined the conflict is "likely the result of the pendency of these divorce proceedings." The court noted many of the incidents cited by both parties occurred close to the filing of the petition and could be attributed to the emotion of divorce rather than reflecting the parties' true personalities. We defer to the district court's judgment on this point. We are also persuaded by the district court's observation:

> Based upon the position by both parties that if the parties reside in the same geographic area after the dissolution, they would agree that the parties would share physical care, the Court will take this as an admission by both parties that the other parent is a suitable and appropriate caretaker for their children.

Satisfied that both parents are fit custodians, we turn to the difficult question of which parent should be assigned physical care. Stability and continuity of care giving are two primary factors in this analysis. *Id.* at 696. These factors tend to favor a spouse who was the primary caretaker before divorce. *Id.*; *but see Kunkel*, 555 N.W.2d at 253 (modifying award when district court based its decision "upon that factor and that factor alone"). While a change in geographic location does not provide a sole justification for placing custody with a particular parent, it is a factor courts should consider in determining which environment will provide the children with the most stability and security. *In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa Ct. App. 1990).

Susan has been the children's primary care giver during the marriage, though Eric has been an involved father. Susan testified to her intent to remain in the North Liberty area—near extended family. The district court found Susan credible in her promise to encourage the children's contact with members of Eric's family. The district court had less information about the children's living arrangement if placed in Eric's physical care. Eric was unsure whether he would be living on or off the Air Force base and had not investigated the schools that the children could attend. "Accordingly, the Court was presented with little, if any, evidence about the environment and circumstances the children would be moving to if they reside with Eric in his primary care." Moreover, Eric's three-year assignment at the base could subject the children to yet another move that would disrupt their emotional development and overall stability.

But it is not just the children's physical location that motivated the district court's physical care decision. *See In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998) (stressing greater importance on stability of relationship with primary caretaker than physical environment). The court expressed concern that Eric's clandestine tape recording of family conversations inappropriately placed the children at the center of the parties' disputes.

We agree with the district court's conclusion that Susan will provide more opportunity for the children to continue their close relationship with Eric than he would reciprocate for her if the children moved to Ohio. Placing physical care with Susan promotes the children's strong relationship with both parents, and their long-term best interests.

On the issue of visitation, Eric requests we modify the schedule to increase his summer stint with the children from six to eight weeks. He points out that his nearly five-hundred mile move will prevent him from having day-to-day contact with the children. Susan resists increasing the summer visitation, arguing to do so would deprive her of any time with the children during their recess from school.

Our governing consideration in establishing visitation rights is the best interest of the children, and liberal visitation with the non-custodial parent is generally considered to be in children's best interest. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992); *see* Iowa Code § 598.41.

While the distance between the parents' homes will impede Eric's regular interaction with the children, the district court fashioned "a visitation schedule that will attempt to maintain as much as possible Eric's relationship with the children." We believe the court succeeded in doing so. For instance, the decree ordered Susan to maintain video conferencing capabilities for the children to have contact with Eric on Tuesday and Thursday evenings. The six-week summer visitation with allow Eric to spend sustained time with his son and daughters, while preserving some of their break to relax at home with their mother.

B. Did the District Court Properly Award Spousal Support?

Eric next argues we should eliminate the requirement in the decree that he pay $1000 per month for ten years in rehabilitative spousal support. Alternatively he asks that we reduce the amount or duration of the payments.

Alimony is a stipend to a party in lieu of the other party's legal obligation for support. *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). Alimony is not an absolute right; the facts of each case determine whether such payments are justified. *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). The form, duration, and amount of support payments awarded falls within the discretion of the district court. *In re Marriage of Crotty*, 584 N.W.2d 714, 718 (Iowa Ct. App. 1998). The district court enjoys considerable latitude when determining a proper award, and we will disturb its conclusion only if it fails to promote equity between the parties. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). We balance the ability of one party to pay against the needs of the other. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa Ct. App. 1995).

We consider the following factors in determining a proper award:

> a. The length of the marriage.
> b. The age and physical and emotional health of the parties.
> c. The distribution of property made pursuant to section 598.21.
> d. The educational level of each party at the time of marriage and at the time the action is commenced.
> e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> f. The feasibility of the party seeking maintenance becoming 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.
> g. The tax consequences to each party.
> h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.

> i. The provisions of an antenuptial agreement.
> j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A.

Spousal support payments may serve any of three purposes: traditional, rehabilitative, and reimbursement. *See In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). Rehabilitative payments provide support to the economically dependent spouse through a period of retraining or re-education following divorce, thereby creating opportunity and incentive for that party to become self-supporting. *Olson*, 705 N.W.2d at 316. Based on the needs of the dependent party, the award may be limited or extended. *Becker*, 756 N.W.2d at 826.

Because Eric and Susan were married for eighteen years and Eric has been the primary breadwinner, it is equitable to order Eric to pay spousal support. *See In re Marriage of Schenkelberg*, ___ N.W.2d ___, ___ 2012 WL 5285412, at *5 (Iowa 2012) (finding sixteen-year marriage merited support payments). Both parties are in relatively good physical and emotional health.[1] The marriage revolved around Eric's career; by mutual agreement, Susan tended to the children and domestic responsibilities. *See In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993). When Susan did work part-time as a dental hygienist, Eric would care for the children.

The property settlement did not award Susan with significantly more assets than were provided to Eric. Eric and Susan owned four parcels of

[1] Eric has had surgery on his back and his knees, but does not argue this will affect his ability to continue employment.

property: their former residence in Texas; an investment property in Arizona; a lot in Bellevue, Iowa; and their marital home in North Liberty. The parties had little to no equity in the Texas house[2] or the Arizona property. Eric and Susan tried to sell their family home in North Liberty, but had no offers. They anticipated a sale price of between $225,000 and $230,000, but after paying the mortgage balance and the realtor's fees, expected to incur a $13,000 to $15,000 loss. The parties also purchased a lot in Bellevue from Susan's father, the only parcel of land holding substantial equity. The district court awarded Susan the Bellevue and North Liberty properties, and awarded Eric the Texas and Arizona properties.

During the pendency of the proceedings, the parties sold a Honda Odyssey minivan and liquidated an investment account. Because Eric and Susan applied the proceeds to joint marital expenses and dissolution expenses, the court did not apportion those amounts. It held each party responsible for their personal credit card debt and ordered them to pay their own attorney fees. Similarly, Eric is responsible for the payments of his Chevrolet Silverado, and Susan is responsible for the Chevrolet Traverse payments. Each retained their own individual retirement accounts and bank accounts, and Eric's military pension is divided in half as per the *Benson* formula.[3]

Eric has attained more education than Susan. He completed his bachelor's and master's degrees during the marriage and is closing in on his

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[2] The parties incur $1200 per month in expenses without renters. They rented the home out until recently, which decreased the monthly expenses to $400.
[3] *See In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996).

doctorate. Susan had just completed her bachelor's degree when the couple married.

Eric's challenge focuses on subsections (e) and (f) of section 598.21A. He contends because Susan has maintained her skills and license as a dental hygienist, she does not need to retrain and is therefore not entitled to alimony. He argues she is unemployed because of her "malfeasance" in quitting jobs, not applying to positions, and turning down offers. Eric chafes at subsidizing what he considers her choice to remain unemployed.

Susan argues the oversaturated market in the dental hygiene field is preventing her from finding employment. Susan's former employer corroborated the claim that dental hygienists were in oversupply. Because of the scarcity of job openings, Susan has considered returning to school for nursing. The record supports Susan's assertion that her difficulty in finding suitable work is due to circumstances beyond her control. Accordingly, rehabilitative alimony is appropriate. *See In re Marriage of Trickey*, 589 N.W.2d 753, 759 (Iowa Ct. App. 1998).

An award of rehabilitative support would facilitate Susan's return to school for nursing. Moreover, even if she did not require retraining or reeducation, because Susan devoted the past seven years to raising the parties' children rather than pursuing her own career, rehabilitative alimony is still proper. *See In re Marriage of Francis*, 442 N.W.2d 59, 66–67 (Iowa 1989) (finding payee spouse with master's degree who sacrificed time caring for children rather than furthering her career was entitled to rehabilitative alimony).

Eric's earning potential has been increasing every year, and will likely continue to grow once he obtains his doctorate degree. During their marriage, Susan sacrificed her own pursuits to advance Eric's military career. For these reasons, we affirm the district court's spousal support award.

C. Did the District Court Properly Calculate Child Support?

Eric contests the district court's income calculations and argues he should not be required to pay $1755 per month in child support. In its decree, the court did not list Eric's actual income amount. Eric presumes the court used his basic allowance for subsistence (BAS) and basic allowance for housing (BAH) payments he was collecting while in Iowa. He argues because those are pre-tax figures and are more than he would be paid when he moves to Ohio, the court overstated his income. Eric also contends the court should have deducted alimony payments from his income and increased Susan's income by the same amount.

There exists a rebuttable presumption the child support guidelines create the correct child support payments, and a court shall not deviate therefrom without a written finding that the guidelines would be unjust or unfair given the special circumstances of the case. *In re Marriage of Thede*, 568 N.W.2d 59, 61 (Iowa Ct. App. 1997). Before applying the guidelines, a court must determine each parent's net monthly income. *In re Marriage of McKamey*, 522 N.W.2d 95, 98 (Iowa Ct. App. 1994). The court determines each parent's income based on the most reliable evidence on record. *Wade*, 780 N.W.2d at 566.

Salary packages can be enhanced by non-salary benefits and in some cases, nontaxable employer payments. *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995). A court may look to these factors in arriving at a child support award. *Id.* (affirming district court's increase of noncustodial parent's income based on employer's providing use of company vehicle where he would have to purchase, maintain and insure his own absent employment).

The district court considered Eric's BAH and BAS allocation when determining his child support, explaining the military awards those payments to compensate for housing and other living expenses incurred by soldiers living off base, and if Eric resides on the Ohio base, he will no longer receive those payments. The court did not expressly value these non-salary benefits in its decree, nor was it required to do so. "[T]he definition of net monthly income does not encompass adding employment benefits to other income prior to applying the guidelines percentages." *Id.* Instead, the court considers the value of these benefits in making a discretionary call to increase the support beyond the amount provided in the guidelines. *Id.* At the time of its ruling, Eric did not know whether he would live on or off the military base. By recognizing Eric's income would be supplemented by BAS and BAH in the form of amenities or stipend, the court made the appropriate written findings to increase Eric's payments.

The court also provided its reasoning for not deducting state tax from Eric's income:

> [T]he Court used income for the Respondent in the amount of $111,179.04, which is the amount of income the Respondent urged should be used to calculate child support . . . . Further, the Respondent argues the Court may have incorrectly calculated the

> tax impact of these benefits on the Respondent's income. Based upon the testimony of the parties that the Respondent does not pay state income tax due to the fact that he files his tax returns as a resident of Texas, the Court did not deduct from the Respondent's income any state income tax obligation. This is the exact same method the Respondent used to calculate his state income tax obligation on his child support guidelines . . . . [T]he Court's calculation mirrors that urged by the Respondent in his testimony, evidence[,] and documents presented at trial.

We agree with the court's decision not to deduct tax from Eric's income, as he requested at trial.[4]

When setting child support, the district court also has discretion to adjust payments to reflect present alimony payments as it feels necessary to provide for the needs of the children and do justice between the parties, depending on the circumstances of the case. *See In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991) (quoting child support guidelines); *see also In re Marriage of Russell*, 511 N.W.2d 890, 891–92 (Iowa Ct. App. 1993) (revising district court's income calculation to deduct five-year term $1000 per month alimony payments from husband's net monthly income); *In re Marriage of Allen*, 493 N.W.2d 273, 275 (Iowa Ct. App. 1992) (adjusting net monthly income payments by deducting $750 per month in six-year alimony from husband's income and adding the same to wife's income). In the case of long-term alimony, it is proper to deduct spousal support payments from the payor's income and add it to the payee's to determine child support. *In re Marriage of Benson*, 495 N.W.2d 777, 781–82 (Iowa Ct. App. 1992) (deducting $300 per month in traditional, "long-term alimony"); *cf.*

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[4] The district court relied on Susan's child support guideline worksheet to determine her income.

McKamey, 522 N.W.2d at 99 (declining to deduct thirty dollars per week alimony for four years in husband's net monthly income).

The court awarded Susan "rehabilitative alimony for a limited period of time"—$1000 per month for ten years. In its post-trial ruling, it defended its decision not to deduct the amount from Eric's income, reasoning a $1000 deduction from his net monthly income would not accurately reflect his out-of-pocket expense since Eric can deduct the cost from his overall tax liability: "The out-of-pocket cost to the Respondent is actually approximately $580 to pay $1,000 in spousal support." The court opined that Eric was capable of paying the amount of spousal support and child support ordered in the decree.

We conclude the district court achieved equity in declining to deduct the alimony payments in determining Eric's child support obligation.

D. Did the District Court Err in Awarding the North Liberty House to Susan But Leaving Eric as the Sole Obligor on the Loan?

Eric asserts he is the sole obligor on the loan securing the marital home and based on both parties' financial affidavits, Susan is unable to hold Eric harmless from the loan. He argues we should either require Susan to refinance the home to remove him as a liable party or require the house be sold. Because Susan and the children were living in a condominium during pendency of the divorce, Eric does not believe selling the home would force a hardship on Susan and the children.

Susan asserts nothing on record suggests Eric need be held harmless at this time, and embraces the district court's rationale for awarding the marital

residence to Susan. The court explained, because Susan is unable to refinance the home at this time, and selling the house would result in an overall loss, the better alternative would be to award the house to Susan, who would hold Eric harmless on all associated debt and expenses.

The court's order that Susan pay the mortgage does not relieve Eric of his legal obligation on the home loan. Our court faced a similar issue in *In re Marriage of Lovetinsky*, where the parties were jointly obligated on the marital residence's mortgage and note. 418 N.W.2d 88, 89 (Iowa Ct. App. 1987). Even though the proceeds from selling the home would not satisfy the debt, the district court ordered the sale if the wife was unable to remove the husband from the debt instruments. *See Lovetinsky*, 418 N.W.2d at 89. Our court affirmed the district court order, reasoning:

> To give [the wife] the home would continue to obligate [the husband] on a piece of real estate over which he exercised no control. The absence of equity gives him no protection in the event [the wife] fails to make the payments and there is a foreclosure.

Id. at 89–90 (noting wife's financial situation would not allow her to indemnify and hold husband harmless).

The *Lovetinsky* reasoning is even more persuasive here because Eric is the sole obligor on the secured debt. In addition, the parties previously tried to sell the home, the children and Susan lived in a condominium during the pendency of the divorce, and Susan testified she is willing to move from the home if a new job so required. Therefore, the traditional preference that the custodial parent retain the marital home is not as strong in this case. *See* Iowa Code § 598.21(5)(g) (recognizing preference that marital home be awarded to

custodial parent); *cf. In re Marriage of Burkle*, 525 N.W.2d 439, 442 (Iowa Ct. App. 1994) (awarding marital home to custodial parent rather than selling residence because children would "benefit by remaining in familiar surroundings").

The district court's order leaves Eric with a dormant obligation on the debt, but only so long as Susan continues to make the home loan payments as they come due. We believe it is inequitable that Eric continues to be liable for obligations over which he has no control. For these reasons, we modify the decree to order that Susan—within six months of the procedendo ending this appeal—either refinance the loan so that Eric is removed as the liable party or sell the home. While she is responsible for any loss or expense from the sale, she may realize any profit as well.

E. Is Susan Entitled to Appellate Attorney Fees?

Susan argues she is financially unable to pay her appellate attorney fees in this matter where she is defending the district court's position. She asserts Eric's finances would not be strained by contributing to her legal expenses and notes she was not awarded attorney fees at trial. Susan does not specify the amount she seeks, but rather asks us to award "100% of the court costs and 100% of her appellate attorney fees."

Eric urges us to hold each party responsible for his or her own attorney fees for this appeal.

We have discretion whether to award appellate attorney fees. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the

requesting party's needs, the other party's ability to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *Id.*

This appeal involves multiple challenges by Eric, each of which required Susan to defend the decree, and all but one of which was unsuccessful. Eric is in a superior position to pay attorney fees. But we do not believe it is appropriate to award Susan all fees when that amount is not disclosed to us. We instead award Susan $2000 in attorney fees and direct Eric to pay all court costs.

AFFIRMED.