IN THE COURT OF APPEALS OF IOWA

No. 3-378/ 12-1704
Filed June 12, 2013

IN RE THE MARRIAGE OF KAREN ANN PELLETIER AND PAUL JEFFRY PELLETIER

Upon the Petition of
KAREN ANN PELLETIER,
Petitioner-Appellee/Cross-Appellant,

And Concerning
PAUL JEFFRY PELLETIER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

Paul Pelletier appeals, and Karen Pelletier cross-appeals, from their decree of dissolution of marriage. **AFFIRMED.**

Mark D. Fisher of Nidey, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Steven E. Howes and Jase H. Jensen of Howes Law Firm, P.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Paul Pelletier appeals, and Karen Pelletier cross-appeals, from the district court's decree dissolving their marriage. The parties challenge the ruling as it relates to custody, visitation, support, alimony, property distribution, attorney fees, contempt, and a request for an injunction. Because we agree with the findings and analysis of the district court, we affirm.

I. Background Facts and Proceedings

Karen and Paul Pelletier were married on December 31, 1999, after a year of dating. After Paul accepted new employment, the couple relocated to the Washington, D.C., area. Paul worked from 2000 until 2005, generally as an independent contractor, earning in excess of $100,000 per year. During this time Karen worked as an independent grant writer.

Unable to have children, Paul and Karen adopted N.P., in 2005.

The parties are well-educated. Karen has a degree from Baylor University, and Paul has a master's degree and an advanced graduate certificate. Following the events of 9/11, Paul joined the Naval Reserve. He was commissioned as a public affairs officer in 2003, and his unit was deployed in 2005. Though the marriage was difficult prior to his deployment, the deployment placed additional strain on the marriage.

Prior to the deployment, Karen expressed a desire to return to Iowa so she could be closer to family. The parties executed an agreement to allow her to sell their marital home before Paul deployed. Karen and N.P. then moved to

Iowa.[1] Paul was injured in 2008 and medically evacuated from Iraq. Paul claims to have sustained significant injuries, though he refused to provide Karen or the district court with his medical records.

Following Paul's return from Iraq, he remained stationed in Bethesda, Maryland, for two additional years. During this time he visited Karen and N.P. in Iowa on multiple occasions. Karen was the primary caregiver during and after Paul's deployment. Facing a court-martial, Paul accepted an "other than honorable discharge" from the Naval Reserve and moved to Iowa to be with his family. The parties disagree on the circumstances of Paul's discharge. He claims he left the military early at Karen's request. Karen claims Paul was discharged due to poor performance and misconduct.

Karen had, prior to Paul's discharge, purchased a home for the family in Cedar Rapids, Iowa. Paul moved in with his family and had difficulty finding employment. Paul worked for some time in a cigar store, earning ten dollars per hour. He also worked for a short time as the Executive Director of the Finley Hospital Foundation, earning $85,000 per year.[2] Paul also ran unsuccessfully for political office, which would have resulted in full-time employment. Karen continued to work as a grant writer and fundraiser, mostly from home. Financial

---

[1] Paul claims Karen improperly sold their home during his deployment and forged his signature to do so. The district court found that, based upon various emails and other documents, it is clear Paul knew of and consented to the sale of their home.

[2] The circumstances of Paul's separation from Finley Hospital are hotly contested. Paul argues he resigned after being pressured by Karen to spend more time with the family. Hospital personnel records, however, show that Paul was allowed to resign after unsatisfactory performance.

difficulties, resulting from Paul's prolonged unemployment placed a significant strain on the marriage.

Paul and Karen disagree on the allocation of household labor following his move to Iowa. Paul claims to have been N.P.'s primary caregiver and homemaker and argues Karen was career orientated and disengaged from the family. Karen testified that she did the majority of household chores and child care duties while Paul spent the majority of his time sleeping and watching television.

The marriage further deteriorated when Karen had a brief affair. Shortly thereafter she informed Paul of her intention to divorce. A petition to dissolve the marriage was filed on May 31, 2011. The parties' disagreements intensified from this point on. The couple continued to argue about finances and Karen claims Paul demanded to have sex with her. When she refused, she claims he physically grabbed and threatened her. Karen then requested a protective order.

While waiting for a hearing to determine the permanency of the protective order, the parties reached an agreement on visitation. However, the parties' relationship continued to deteriorate. Paul cancelled the utilities on the family home occupied by Karen and N.P., tried to cancel Karen's cell phone, removed her from a country club membership, fired their housekeeper, charged his attorney's fees to her credit card, and made various allegations to Karen's employers and others which negatively impacted her both professionally and personally.

The divorce has been contentious, and neither party has acted in an exemplary manner. Both parents have made allegations against the other in the presence of their child. Paul will not allow the marital home to be sold, desires reconciliation, and, in lieu of reconciliation, intends to make the legal proceedings long and costly, while Karen is responsible for at least one instance of dishonesty before the district court.

A three-day divorce trial was held. After receiving dozens of exhibits and hours of testimony, the district court filed its ruling on September 10, 2012. The well-reasoned ruling established custody and visitation, determined appropriate child support and alimony, provided for the sale of the marital home, divided property, and disposed of a number of ancillary matters. Nearly every subject addressed by the district court is appealed and/or cross-appealed by the parties.

II. Standard of Review

We review dissolution of marriage proceedings de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012). We give the findings of the district court weight, though we are not bound by them. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). Prior cases are of little precedential value. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We must decide this case according to its own particular circumstances. *Id.*

We review the finding of contempt for substantial evidence. *Ervin v. Iowa Dist. Ct*, 495 N.W.2d 742, 744 (Iowa 1993).

III. Discussion

A. Custody

Karen and Paul each appeal the district court's award of physical care to Karen and the grant of joint legal custody. Paul argues the district court should have ordered joint physical care, while Karen contends she should have been granted sole legal custody.

1. Sole Legal Custody

The parties were granted joint legal custody of N.P. In her cross-appeal, Karen argues this was in error and that she should be granted sole legal custody of N.P.

Legal custody is an award of legal custodial rights and responsibility for most major points of decision making in the raising of a child. Iowa Code § 598.1(5) (2011). This includes responsibility for decision making on education, extracurricular activities, religion, and medical care. *Id.* Our courts are statutorily required to consider an award of joint custody when the parties do not agree to such an arrangement on their own. *Id.* § 598.41(2)(a). The statute further provides a list of factors we are to consider when making such a determination. *See id*. § 598.41(3)(a)-(k). Our supreme court has delineated a nonexhaustive list of additional factors which should be considered in a given case.[3] *See In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The guiding concern is the best interests of the child, with the critical issue being a determination as to

[3] The factors and considerations are well settled and understood and need not be repeated at length here.

which parent will do the better job raising the child, without any consideration of gender. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa 1985).

In the present matter, the district court engaged in a lengthy discussion of the issue and decided that there should be an award of joint legal custody. Reviewing the entire record, we reach the same conclusion. Both parents love N.P. and are capable of caring for the child and supporting the child's development. Though Karen was the primary caregiver before the divorce, both parents have spent substantial time caring for N.P. before and since the separation. N.P. has expressed, though only at a late date and after an extended period of time with Paul, a desire to split time between the parents. We also find that N.P.'s safety is not an issue. Each of these findings supports a joint custodial arrangement.

The parents do have difficulty in communicating and in supporting one another. Of particular concern is evidence that Paul has discussed unfounded mental health allegations regarding Karen with N.P., and that Karen has refused to allow N.P. to contact Paul in a reasonable, consistent, and private manner.

Karen's allegation of domestic abuse against Paul requires additional review. One documented incident of domestic abuse is insufficient, however, to constitute a history under the statute. *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). Karen makes a single allegation of abuse, and though it is concerning, based upon a broader examination of Paul's behavior and parenting history, we do not believe it outweighs the positive impact a joint custody arrangement will have on N.P.

We prefer joint custody because it will often encourage the parties to improve their relationship and allow both to enjoy parenthood. *In re Marriage of Weidner*, 338 N.W.2d 351, 359 (Iowa 1983). Awarding legal custody to one parent alone must be accompanied by convincing evidence that joint custody is unreasonable and warrants the serious step of severing the parental relationship between the child and noncustodial parent. *See In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988).

Having reviewed Karen's arguments, we believe joint legal custody is in the best interests of N.P. as there is insufficient evidence to support Karen's request for sole legal custody.

2. Physical Care

Karen was granted physical care of N.P., awarding her the "right and responsibility to maintain a home for the minor child and provide for the routine care of the child." Iowa Code § 598.1(4). The most important consideration in determining physical care is the best interests of the child. *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007) (holding that the nonexclusive custody factors found in section 598.41 are relevant in physical care determinations). When determining whether joint physical care is preferential between two suitable parents, stability and continuity are the primary concerns, favoring the spouse providing primary care before the divorce.[4] *Id*. Other important concerns include the ability of the parents to communicate, the degree

[4] This is otherwise known as the "approximation" factor.

of conflict between the parents, and the continuity between the parents in terms of approach to daily matters. *Id.* at 698–99.

The district court examined these concerns and determined Karen was the primary caregiver before the divorce, and the difficult and conflict-filled relationship between the parents precluded joint physical care. We agree.

Karen was N.P.'s only caregiver for the earliest years of life. While we are hesitant to penalize a parent who has sacrificed family time in service to his country, we are satisfied that Karen has remained the primary caregiver following the reunification of the family in Iowa. Even under an equal caregiving relationship, the high degree of conflict and near-total breakdown in communication between these parties would make a joint care arrangement problematic. Both parties have placed N.P. in the middle by failing to shield the child from the ugliest aspects of this dissolution. Karen listened in on telephone calls between N.P. and Paul. Paul has spoken in a derogatory and inaccurate way about Karen in front of the child, and placed both mother and child in peril by disconnecting utilities and refusing to allow the home to be sold, which would be to the financial advantage of all. Karen and Paul remain unable to deal with one another in a respectful and reasonable manner, making joint physical care impossible. We believe Karen is in the best position to care for N.P. on a daily basis.

We affirm the district court's award of physical care to Karen.

2. Visitation

Both parties appeal the visitation schedule established by the district court. Two elements of the visitation schedule are challenged on appeal. First, the district court provided Paul with visitation every-other-weekend from Thursday after school until Sunday evening at 6:00 p.m. On alternate weekends, Paul is given visitation from Monday after school until school begins on Tuesday. Second, the parties are prohibited from removing N.P. from the country without the written consent of the other parent.

Courts are to award liberal visitation, where appropriate, if in the best interests of the child. Iowa Code § 598.41(1)(a). Visitation is mandatory unless it will somehow injure the child. *Fitch v. Fitch*, 224 N.W. 503, 504 (Iowa 1929). Granting visitation ordinarily serves the best interests of the child, as it provides for maximum continuing association with the parent. *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973).

Karen argues Paul should not be given visitation on school nights because N.P. has been tardy or absent an excessive number of times on similar occasions. We are not to allow or deny visitation as punishment for bad behavior. *Fitch*, 224 N.W. at 504. Though N.P. has been absent or tardy more frequently when in Paul's care than in Karen's care, we do not believe that N.P. will be injured by staying with Paul on school nights. The child will benefit from the presence of both parents while doing homework and preparing for school, albeit on differing days.

Paul also argues that the district court improperly reduced the visitation he enjoyed before the decree, and that he should be permitted to travel abroad with the child without Karen's consent.[5] We find the schedule established in the decree provides N.P. with the benefit of weekend and weeknight overnights with both parents while maximizing the stability sought by the award of physical care.

Turning to Paul's request for foreign trips, we can conceive of no logical reason why one parent should be able to take the serious step of temporarily removing a child from the country without the knowledge and consent of the other.

We affirm the district court's visitation schedule.

B. Financial Matters

1. Child Support

Paul and Karen each appeal from the child support obligation established by the district court. In the decree Paul was ordered to pay $345 per month, based in part upon imputed income equivalent to a ten-dollar-per-hour job. Paul essentially argues he should pay nominal child support due to his continuing unemployment. Karen argues that Paul is capable of obtaining high-income employment and should have his support obligation calculated according to his earning potential.

Iowa's child support guidelines exist to benefit the child by establishing the contribution of both parents in the child's financial support. *In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998). Though the guidelines are

[5] The decree reduced the visitation Paul held on an every-other-weekend basis from Thursday through Monday to Thursday through Sunday.

presumptively correct, adjustments are permitted to do justice between the parties and children. *Id.* We may use earning capacity, rather than actual earnings; provided a written determination is made that actual earnings would work a substantial injustice. Iowa Ct. R. 9.11(4). We will not permit a parent to "self-inflict" un- or under-employment to gain an advantage and artificially reduce their support obligation. *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993).

The district court examined Paul's current earnings, as well as the level of income Karen argued should be imputed to him, and found that neither of those alternatives was appropriate. We agree. Paul is well-educated with a history of well-paid employment. No compelling reason for his continued unemployment was presented. Considering his abilities and history, imputing no income to him would be unjust.[6] However, Karen's proposal is no more just. She argues his earning capacity should be set according to his past earning history. The parties agree that the market for Paul's skills is lower in Iowa than in more populous areas. His earning history in Iowa is sparse as compared to his history elsewhere. He has held one high-paying job in Iowa, which he maintained for only a short time. Karen's proposal is unreasonable.

The district court set Paul's income at ten dollars per hour. He has held a job in Iowa at this level, and jobs of this type should be freely available to him considering his work history and education. We find the amount set by the district court is reasonable and affirm the child support decision.

---

[6] Paul asks that his obligation be set at ten dollars per month, a level commensurate with almost no income.

2. Alimony

Paul argues the district court erred in refusing to grant him alimony. Though he does not explain which type of alimony he believes is proper, he argues; as Karen earns in excess of $67,000 a year while he earns nothing, and with the limited market for his skills in Iowa, an award of alimony is necessary. We disagree.

Alimony is a payment of money to a spouse in lieu of the legal obligation of support. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). We recognize multiple types of alimony. Rehabilitative alimony supports an economically dependent spouse for a period of retraining or rehabilitation. *Id.* at 63. Reimbursement alimony repays a spouse for economic sacrifices made which benefited the other spouse during the marriage. *Id.* Traditional alimony is payable for life when a spouse is incapable of supporting themselves. *Id.*

There is no question that Paul is capable of supporting himself. Traditional alimony is not a reasonable alternative, as reflected in his request for $1000 a month for sixty months. His request appears to be a combination of rehabilitative and reimbursement alimony. He seeks alimony to allow him to seek retraining so that his skills and education might enjoy a higher local demand. He asks to be reimbursed for the economic sacrifice he made by moving to Iowa. Neither point is entirely unreasonable. However, they must be balanced against the fact that Paul obtained two advanced degrees during the time of the marriage, each of which would justify an alimony request from Karen. *See id.* at 62. ("[T]he future earning capacity flowing from an advanced degree or

professional license is a factor to be considered in the division of property and the award of alimony."). Paul has significant earning capacity, however, the reason it has not been utilized is unclear. We agree with the district court that alimony is not appropriate.

3. Property Distribution

Karen and Paul each argue the district court's property distribution is inequitable. Karen's argument, however, is significantly more limited. She contends the court improperly categorized a single account held by Paul when he entered the marriage as separate property. Paul presents a more holistic attack on the property distribution, arguing the district court improperly distributed assets in five separate ways.

The district court is directed by statute to distribute the couple's property equitably, with the exception of inherited property and gifts. Iowa Code § 598.21(5). Property contributed to the marriage is part of the divisible estate; however the contribution is a factor in determining an equitable distribution of the property. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our courts engage in a two-part process when dividing property. First, we are to determine which property is subject to division. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). Next, the subject property is divided equitably according to the factors found in section 598.21. *Id.* Though the division need not be equal, our supreme court has recognized that "equality is often most equitable." *Id.*

We agree and approve the analysis utilized by the district court. Paul argues that certain pieces of jewelry and furs should have been considered marital property. The district court determined that these were gifts which are to be excluded. We agree. Though Paul testified the items were purchased as an investment, we find his testimony unpersuasive. The more reasonable conclusion is that the items were gifts; especially considering the fact the couple had other investment accounts.

Paul also complains the court improperly awarded certain investment accounts previously held by Karen to her. Though we agree that based upon the rule announced in *Fennelly*, these accounts are part of the divisible property, the district court awarded Karen her investment accounts and correspondingly awarded Paul his pre-marital cash. This is an equitable decision taken in light of each party's contributions during the marriage. We also agree with the manner in which the district court addressed the liquidated retirement accounts. The accounts were liquidated to continue supporting the family during Paul's period of unemployment, and were necessary to keep the home mortgage current while Paul refused to allow the home to be sold. We also agree with the decision employed by the district court to continue this process. The accounts will continue to be used to pay for the home until it is sold, and then any remaining proceeds will be distributed equally.

We do find that the district court used an incorrect amount for the TIAA-CREF account into Paul's portion of the distribution. The amount is incorrect by six dollars and fifty-six cents. Considering the deviation in terms of the overall

value of the account, and the fact that as an investment account, the value will vary over time, we find that the district court's valuation is within the permissible range of evidence. Paul also complains that the district court assigned a value to the Cadillac that was too low. The value was based upon an asset/debt distribution chart provided by Karen and a Kelly Blue Book valuation. Paul's valuation was entirely speculative. We find ample support for the district court's valuation of the Cadillac and reach the same conclusion.

C. Injunction

Paul requested an injunction barring Jeff Wright from having any contact with N.P. The request is based upon an incident where Paul accuses Jeff Wright of chasing him on a motorcycle and brandishing a knife.

An injunction is only to be entered when there has been: "(1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." *Community State Bank, Nat. Ass'n v. Community State Bank*, 758 N.W.2d 520, 528 (Iowa 2008). Paul fails to establish these elements. It is unclear which right he believes has been or will be invaded, and based upon the testimony provided concerning the incident with Wright, we do not believe Paul has established there is a substantial injury or damage which will result without the injunction.

D. Attorney Fees

Both parties argue they should have been awarded attorney fees by the district court, and that they should be awarded appellate attorney fees.

Attorney fees are generally not recoverable absent a statute to that effect. *Kent v. Employment Appeal Bd.*, 498 N.W.2d 687, 689 (Iowa 1993). In dissolution proceedings, fees are available but only within the discretion of the court. *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977). The award is dependent upon the parties' ability to pay. *Id.* The denial of trial court fees is fair and reasonable in this case. Paul has almost no present capacity to pay, and we agree with the district court that Paul's conduct in charging attorney fees to Karen's credit card is ample reason to deny his request. We reach the same conclusion on appellate attorney fees.

D. Contempt

Karen appeals the district court's contempt finding against her.

To be punished for contempt, it must be shown, beyond a reasonable doubt, that the person has done a contumacious act. *Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 709 (Iowa 1986). When confronted with a contempt proceeding, the question is whether the individual willfully disobeyed the court order. *Bevers v. Kilburg, In and For Linn County, Sixth Judicial Dist.*, 326 N.W.2d 902, 904 (Iowa 1982). The evidence must show the actions have been "intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not." *Id.* It is the contemnee's burden to prove the willful violation, though the contemnor has a shifting duty to show they did not willfully violate the order. *Skinner v. Ruigh*, 351 N.W.2d 182, 185 (Iowa 1984).

In the present matter, the district court found that Karen had knowingly and willfully violated an order regarding telephone calls between N.P. and Paul. Karen's arguments on appeal are that she was justified in limiting N.P.'s telephone contact and that Paul lacks credibility. We give substantial weight to the credibility determinations of the district court, which clearly found some telephone calls were missed. Karen admitted during her testimony that the required calls have not occurred as ordered, and at the suggestion of a therapist, she did not require N.P. to make the telephone calls as ordered. This is the very definition of willful behavior. We affirm the decision of the district court.

AFFIRMED.