IN THE COURT OF APPEALS OF IOWA

No. 3-405 / 12-1033
Filed June 12, 2013

IN RE THE MARRIAGE OF TAMMY MARLENE WASSON AND JAMES HENRY WASSON

Upon the Petition of
TAMMY MARLENE WASSON,
Petitioner-Appellee,

And Concerning
JAMES HENRY WASSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Greene County, Joel E. Swanson, Judge.

A father challenges the provisions of the parties' dissolution decree awarding joint physical care, spousal support, and partial attorney fees. **AFFIRMED.**

Mark J. Rasmussen, Jefferson, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Copeland & Williams, P.C., Jefferson, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

James Wasson appeals from the decree dissolving his marriage to Tammy Wasson. He contends the district court erred in granting joint physical care of the parties' two minor children, in requiring him to pay spousal support, and in ordering him to pay $1500 of Tammy's trial attorney fees. In response, Tammy requests we affirm the district court's decree and seeks an award of appellate attorney fees. Upon review, we affirm the decree of the district court and award Tammy appellate attorney fees.

I. Background Facts.

James and Tammy married in April 1987. At that time James was in the United States Navy and Tammy was unemployed. James continued his employment with the military during a significant portion of their marriage. Until his retirement from the military in 2005, he spent approximately half of each year away from the family serving at various military posts. After his retirement the family moved to Jefferson, Iowa. James took a position as a conductor with the railroad. Except for a two-year period when she was an uncertified nurse's aide, Tammy was a stay-at-home-mom to the couple's four children until 2008.

Tammy filed for divorce in February 2011. When she filed the parties' two remaining minor children lived with Tammy; James was living elsewhere in Jefferson with his girlfriend. In her petition Tammy sought physical care of the children, child and spousal support, and an award of trial attorney fees, although at trial she requested joint physical care. James' answer denied Tammy's

entitlement to any monetary support and requested sole physical care of their children.

In March 2011, the district court awarded temporary physical care of the children to Tammy and ordered James to pay temporary child support, temporary spousal support, and $400 in temporary attorney fees.

In November 2011, James filed a motion seeking review of the March 2011 order. In support he filed affidavits from both minor daughters in which they stated their desire to reside with him. The court modified the temporary order: the parties were to share physical care, with the children residing with James from Sunday at 7:30 p.m. to Friday at 5:00 p.m., and with Tammy the rest of the time, and neither party was required to pay child or spousal support.

At the time of trial Tammy was employed part-time by the Jefferson-Scranton school district and part-time by the Greene County Medical Center, earning $12,516 annually. James had an annual income of $33,280 from his job at Boone Cable Works, as well as an annual military pension in the sum of $18,077, and $1524 in annual disability payments. Each daughter expressed a desire to live with James at the trial.[1]

After the trial, on May 10, 2012, the district court issued a dissolution decree awarding joint physical care of the parties' two minor children; requiring James to pay Tammy child support in the amount of $355.78 per month; and awarding "traditional" spousal support in the amount of $250 per month. James was ordered to pay $1500 of Tammy's trial attorney fees.

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[1] At the time of trial the children in question were thirteen and sixteen years old.

James now appeals the award of joint physical care, spousal support, and attorney fees.

II. Standard of Review.

We review dissolution of marriage cases do novo. *In re Marriage of Olson*, 705 N.W.2d 312, 313 (Iowa 2005). We give weight to the district court's findings, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Discussion.

A. Joint Physical Care.

The district court ordered Tammy and James to share physical care of their two minor children. The children alternate weeks between the two homes. On appeal, James contends the district court erred because both children testified they prefer to live with him.

"Our first and foremost consideration in determining custody is the best interest of the child[ren] involved." *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *see* Iowa Code § 598.41(3) (2011) (listing factors relevant to determining what custody arrangement is in the child's best interests). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and

to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 685 (Iowa 2007). Although the children's wishes are a factor to be considered by the court, it is only one of many factors. *See id*. at 696 ("Although Iowa Code section 598.41(3) does not directly apply to *physical care* decisions, we have held that the factors listed here as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child.").

Here, both parents are capable and suitable custodians. In deciding whether joint physical care is appropriate, we consider four nonexclusive factors: (1) the stability and continuity of care-giving for the children; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree in which parents are in general agreement about their approach to daily matters. *See id*. at 696-700. Upon our de novo review of the trial record, we conclude joint physical care will best "assure the child[ren] the opportunity for the maximum continuing physical and emotional contact with both parents" and will best "encourage [the] parents to share the rights and responsibilities of raising the child[ren]." Iowa Code § 598.41(1)(a).

"Stability and continuity factors tend to favor a spouse who, prior to divorce, was primarily responsible for physical care." *Hansen*, 733 N.W.2d at 696; *see* Iowa Code § 598.41(3)(d) ("Whether both parents have actively cared for the child before and since the separation."). In this case Tammy was the primary caregiver for the children during their early years; she was a stay-at-home-mom while James was in the military and gone much of the time. When

James retired from the military in 2005, his new job still required him to spend nights away from his family. However, he was home for twenty-four-hour periods, two to four times a week, and he shared the responsibility of caring for the children during those times. At the time of the trial James no longer worked for the railroad. His most recent position with Boone Cable Works typically requires him to work hours that allow him to return home each evening. Since 2008 Tammy has also been employed outside of the home on a part-time basis. Although Tammy was clearly the primary caregiver during the children's early years, James has assumed more responsibility in recent years. In the six months leading up to the trial, both daughters were living with James five days a week and with Tammy the other two.

We next consider the ability of the spouses to communicate and show mutual respect. *See Hansen*, 733 N.W.2d at 698. In this case, while Tammy and James may not enjoy communicating with each other, they do show an ability to communicate about important matters in their daughters' lives. James testified about times during their separation when Tammy called and asked him for help dealing with issues involving their daughters. Furthermore, he testified that he foresaw their ability to communicate would continue to improve with time. We recognize that divorce proceedings are often emotionally charged, but these parties have been able to remain civil towards each other and to share necessary information with each other. This factor supports an award of joint physical care.

Our consideration of the third factor noted in *Hansen*, the degree of conflict between parents, also supports joint physical care. *See id*. at 698–99

(expressing some doubt that joint physical care is the best option in cases where one party requests sole physical custody). In this case, there is evidence of mutual acceptance. Tammy requested joint physical custody and, although James requested sole physical care of the minor children, his only stated reason for doing so was because his daughters claimed they would rather live with him. He did not deny either his or Tammy's ability to co-parent and testified he would support and encourage the arrangement if the court ordered it.

Finally, the record does not indicate any issues regarding the parties' approach to daily matters. *See id*. at 699. It appears the parties have similar parenting styles; neither party complained about or raised issues regarding the other's parenting style, and both parties support their children's continued involvement in school activities.

We have also considered the wishes of the children. *See* Iowa Code § 598.41(3)(f). The children were old enough at the time of trial that their wishes deserve some weight in our determination. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). "Children's expressed preferences are entitled to consideration but are not controlling; deciding custody issues is more complicated than merely asking the children which parent they wish to live with." *Id*. In this case, there is some question if the daughters' desire to live with their father was motivated by economic concerns. We note that undisputed testimony shows James bought the younger daughter an iPod in the days leading up to trial and had paid the bill to have the older daughter's cell phone turned back on after a fight she had with Tammy. And although both daughters testified they would

prefer to live with their father on a day-to-day basis, they indicated their real concern was ensuring they were able to spend some time with him on the weekend because the temporary court order in place at the time of trial required them to spend every weekend with their mother. We conclude joint physical care is appropriate and affirm the district court's award of joint physical care to the parties.

B. Spousal Support.

The district court ordered James to pay Tammy "traditional alimony" in the amount of $250 a month until she dies, is remarried, or cohabitates with another male. James contends the district court erred because the two parties' income was "relatively comparable" at the time of the decree and because he "did not develop any special skills" while married to Tammy.

Spousal support is not an absolute right. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Whether spousal support is proper depends on the facts and circumstances of each case. *Id*. Iowa law recognizes three forms of alimony—traditional, rehabilitative, and reimbursement—and each has a different aim. *In re Marriage of Becker*, 759 N.W.2d 822, 826 (Iowa 2008). Rehabilitative spousal support is meant to support an economically-dependent spouse for a limited time in order to provide an opportunity for that spouse to become self-supporting through re-education or retraining. *Id*. Reimbursement spousal support provides the receiving spouse with a share of the other spouse's future earnings as repayment for the contributions made to the source of that income. *Id*. Finally, traditional spousal support is "payable for life or so long as a

spouse is incapable of self-support." *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989).

Iowa Code section 598.21A provides the relevant factors in considering whether spousal support is appropriate, which include (1) length of marriage, (2) age and emotional and physical health of the parties, (3) property distribution, (4) educational level of the parties at the time of marriage and when the dissolution action is commenced, (5) earning capacity of the party seeking alimony, including educational background, training, employment skills, work experience, and length of absence from the job market, and (6) feasibility of the alimony-seeking party to become self-supporting with a reasonably comparable standard of living to that enjoyed during the marriage. *See also Hansen*, 733 N.W.2d at 704.

In this case Tammy and James were married twenty-five years. Tammy spent much of that time away from the workforce, acting as the sole parent while James was serving in the military in various posts away from home. At the time of the decree Tammy was employed part-time at two minimum wage jobs. She had obtained a high school diploma but had few skills and only minimal work experience in various unskilled positions. As the district court noted, "No evidence [was] offered as to any future rehabilitative training to increase her earning capacity." Furthermore, no evidence was offered as to any possible full-time positions that were available and appropriate for Tammy's skill set. In regard to property distribution, the marital home was foreclosed upon before trial and both parties intended to file bankruptcy to discharge their remaining debts.

At the time of dissolution Tammy's hourly wage had been recently increased to $8.94 per hour, and she worked approximately fifty-six hours biweekly as a kitchen aid. James earned sixteen dollars per hour and worked at least forty hours per week with the possibility of overtime some weeks. James' contention that the parties' income was "relatively comparable" at the time of dissolution is unsupported. After her raise in pay, Tammy was still earning less than forty percent of the amount James earned.

James also maintains the district court erred in awarding Tammy spousal support because he "did not develop any special skills" while married to Tammy that contribute to his income source. But the court was not awarding Tammy reimbursement spousal support, see *Becker*, 759 N.W.2d at 826, the district court explicitly stated it was awarding traditional alimony. Traditional spousal support is meant to support a spouse who is incapable of self-support and is clearly appropriate in this case. *See Francis*, 442 N.W.2d at 64. We affirm the minimal alimony award fixed by the district court.

C. Attorney Fees.

James argues the district court erred in ordering him to pay Tammy's trial attorney fees. "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Guyer*, 552 N.W.2d 818, 822 (Iowa 1994). Although Tammy did not submit evidence concerning the number of hours or total amount of fees, the absence of such evidence does not preclude an award of attorney fees. *See In re Marriage of Winegard*, 257 N.W.2d 609, 618 (Iowa 1977). The district court did note James' responsibility

was to pay "Tammy partial attorney fees in the sum of $1,500.00." Because, at the time of trial, James was making more than double the amount that Tammy was, we cannot say the district court abused its discretion.

Tammy asks this court to award her appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Factors to be considered in determining whether to award attorney fees include: "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Because James' income is greater than Tammy's and she was obligated to defend the district court's decision, we award her $3000 in appellate attorney fees.

We affirm the district court's dissolution decree and award Tammy appellate attorney fees.

AFFIRMED.