IN THE COURT OF APPEALS OF IOWA

No. 7-223 / 06-0189
Filed May 23, 2007

IN RE THE MARRIAGE OF FAWN MARIE BROOKS
AND MICHAEL LEE BROOKS

Upon the Petition of
FAWN MARIE BROOKS,
Petitioner-Appellee,

And Concerning
MICHAEL LEE BROOKS,
Respondent-Appellant.

Appeal from the Iowa District Court for Marion County, Gary G. Kimes, Judge.

A father appeals the physical care, child support, and attorney fee provisions of a decree of dissolution of marriage. **AFFIRMED.**

Kenneth Weiland of Andrew & Weiland, P.C., Knoxville, for appellant.

Steven Guiter of Johnston, Hicks, Guiter & Griffith, Knoxville, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Michael Brooks appeals the physical care, child support, and attorney fee provisions of his decree of dissolution of marriage. We affirm on all issues and award Fawn Brooks attorney fees on appeal.

I. Background and Facts

Fawn and Michael were married in October 2002. Their marriage was dissolved by decree in December 2005. They are the parents of two minor children affected by this decree: J.B., born in July 2002, and C.B., born in October 2004.[1] Fawn and Michael had a tumultuous relationship. In May 2004, Fawn stabbed Michael in the leg and injured his finger when he tried to grab the knife from her. In March 2005, they were again involved in an altercation.[2] In April 2005, the Iowa Department of Human Services (DHS) issued a founded report against Fawn and Michael for denial of critical care. In June 2005, the children were adjudicated to be children in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(b) and (c) (2005). They were returned to Fawn's care following a six-day removal and have remained with her since. Both Fawn and Michael were ordered to complete a psychological evaluation. Fawn completed the evaluation. Michael did not. At the time of dissolution, Fawn was a full-time student and Michael worked part-time and earned ten dollars per hour. Fawn had completed Children in the Middle. Michael had not.

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[1] There is a third minor child who is the child of Fawn but not Michael and therefore is not at issue in this matter.

[2] There is a dispute regarding who was the aggressor in the assault. It is clear, however, that Michael pushed Fawn into the washer/dryer and punched her in the face. Fawn reported the assault to the police, and Michael was charged with domestic abuse assault. Pursuant to a deferred prosecution agreement, the charges were dismissed, and Michael was restrained from any contact with, or threats or abuse toward, Fawn.

The decree provided for joint legal custody of the children pursuant to a stipulation by the parties. Fawn was awarded physical care, subject to Michael's reasonable visitation. The trial court gave considerable weight to the testimony of the in-home worker, April Verweers, and the children's guardian ad litem, Natalie Hazen. Both recommended Fawn be awarded physical care of the children. Michael was ordered to pay $482 per month in child support and $950 for payment of Fawn's attorney fees. Michael appeals the physical care, child support, and attorney fee provisions of the decree.

II. Merits

Our review in equity cases is de novo. Iowa R. App. P. 6.4. We are not bound by the trial court's findings of facts, but we give them deference because the trial court had a firsthand opportunity to view the demeanor of the parties and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); *see also* Iowa R. App. P. 6.14(6)(*g*). When we determine physical care, our primary consideration is the best interests of the children. *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999).

A. Physical Care

Michael argues the district court improperly granted Fawn physical care[3] because it failed to give appropriate weight to the domestic abuse allegations. There are numerous factors used to determine which parent is best suited to serve as primary caregiver. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). We have previously recognized domestic abuse as a factor in

[3] In his answer to the petition of dissolution of marriage, Michael agreed to joint custody. Therefore, although Michael argues the district court improperly granted Fawn "custody," we assume he is disputing the award of physical care of the children to Fawn.

determining which parent should be awarded physical care. *Id.* "[T]he weight ultimately assigned to each factor depends on the particular facts of each case." *Id.* In this case, the domestic abuse allegations were given sufficient weight and did not preclude awarding physical care to Fawn.

Michael further contends the district court gave too much weight to the testimony of the guardian ad litem and the in-home worker because they were unqualified to provide a conclusion regarding physical care. Hazen and Verweers' testimony established they had extensive knowledge of the family. Their opinions were sufficiently neutral and informed to effectively aid the court in making its determination. The court did not rely excessively on their testimony.

Michael contends the district court failed to consider that the children were temporarily removed from Fawn's care and that her psychological assessment was not considered. The children were returned to Fawn's care within six days of the removal. Fawn complied with the requirements of the juvenile court, including completing the psychological assessment, while Michael had not.

He asserts the court did not consider that he has been consistently employed, and therefore in a better position to provide for the children. The longest Michael had worked for any one employer was eight to nine months, and his assertion that he is in a better position to provide for the children is inconsistent with the fact that he failed to provide child support from March through December 2005.

Michael also contends that the district court improperly granted Fawn physical care because he produced more credible witnesses. The number of witnesses is not controlling. *Brown v. Blanchard*, 240 Iowa 123, 140, 35 N.W.2d

858, 867 (1949) ("In determining the probative force and the value of evidence, courts weigh it rather than count the witnesses."). The findings of the district court are supported by the evidence in the record. In custody cases, "we give weight to the findings of the trial court, which had an opportunity to view the demeanor of the witnesses when testifying." *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

Upon our careful de novo review of the record, we conclude that the district court properly granted Fawn physical care of the children. Fawn had been the primary caregiver, and she was the only parent who complied with the juvenile court's requirements, established a safe and secure residence for her children, and took steps to improve herself by attending college. Michael, on the other hand, did not comply with the juvenile court's requirements, did not work full-time, and did not support his children. We affirm the district court's granting of physical care of C.B. and J.B. to Fawn.

B. Attorney Fees

Michael contends the district court improperly awarded attorney fees to Fawn. "An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion." *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). The controlling factor in awards of attorney fees is the ability to pay. *Id.* The district court correctly assessed the parties' respective abilities to pay. We therefore affirm the award of attorney fees to Fawn.

C. Child Support

Michael contends the district court improperly calculated his child support obligation when it based his obligation on a forty-hour work week instead of the thirty-two hours he typically works. When a parent voluntarily works less than full-time, the court may consider earning capacity rather than actual earnings in applying the guidelines. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). "We examine the employment history, present earnings, and reasons for failing to work a regular work week when assessing whether to use the earning capacity of a parent." *Id.* Michael does not work a forty-hour week, and we find no valid reason why he cannot work a regular work week. A refusal to consider his earning capacity would result in substantial injustice to the children. We therefore agree with the district court's use of his earning capacity to determine his child support obligation.

D. Appellate Attorney Fees

Fawn requests this court order Michael to pay the attorney fees incurred for this appeal. "An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions." *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). "In considering such a request, we look to the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Romanelli*, 570 N.W.2d at 765. We determine Fawn is entitled to an award of $500 to apply towards her appellate attorney fees. Costs on appeal are taxed against Michael.

III. Conclusion

We conclude that the district court properly granted Fawn physical care of the children, correctly awarded attorney fees to Fawn, and properly calculated Michael's child support obligation based on earning capacity. Appellate attorney fees of $500 are awarded to Fawn.

AFFIRMED.