IN THE COURT OF APPEALS OF IOWA

No. 7-653 / 07-0004
Filed October 24, 2007

IN RE THE MARRIAGE OF VIKKI E. MACKOVICH AND MICHAEL J. MACKOVICH

Upon the Petition of
VIKKI E. MACKOVICH,
Petitioner-Appellee,

And Concerning
MICHAEL J. MACKOVICH,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Michael Mackovich appeals the physical care, child support, and alimony provisions of the district court's dissolution decree. **AFFIRMED AS MODIFIED.**

Jennie L. Clausen of Cartee & Clausen Law Firm, P.C., Davenport, for appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper & Preacher, Bettendorf, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

Michael Mackovich appeals the physical care, child support, and alimony provisions of the district court's dissolution decree. We affirm as modified.

I. Background Facts and Proceedings

Michael and Vikki Mackovich were married in 1989. The parties have two children—Dylan, born in 1993, and Makenzie, born in 1996.

Vikki was forty years old at the time this case was tried. She obtained a bachelor's degree in communications in 1989. Thereafter, she worked full-time with two different marketing firms. When Dylan was born, the parties agreed that Vikki would be a full-time mother and homemaker. In addition to her communications degree, Vikki took classes over a two-year period in golf management/merchandising and graphic design at local community colleges. Vikki worked part-time at the Spring Green Country Club, the Davenport Country Club, Prism Retail Services, Jackson Hewitt Tax Service, and the City of Bettendorf's Recreation Department. Currently, Vikki works twenty-five hours per week as a food service worker at the Pleasant Valley School District in Bettendorf making $8.43 per hour. Vikki's stated intentions are to continue working and attend Iowa State University part-time to obtain a teaching degree.

Michael was forty years old at the time this case was tried. He obtained a registered nursing degree in 1990. Thereafter, he worked full-time as a registered nurse with different hospitals in Wisconsin and Iowa. In 2000 or 2001, he obtained a registered nursing job in Chicago with Centegra Health System and commuted between the parties' home in Bettendorf and Chicago. In 2005 his gross income from employment was $114,000. In April 2006 Michael

resigned from his job in Chicago. His stated reason was to spend more time with the children. As of the trial date, he was employed as a part-time registered nurse and instructor with Intelistaf Health Service in Davenport making between twenty-seven and thirty-two dollars per hour for twenty-four hours a week. He intends to continue working and go back to college part-time so he can become a family nurse practitioner.

On January 30, 2006, Vikki filed a petition for dissolution of marriage. Michael filed an answer, requesting joint physical care. On March 22, 2006, the district court awarded Vikki $700 per month in temporary child support. Michael's motion to modify temporary support, based on his employment change, was denied.

The district court's October 3, 2006 dissolution decree declined Michael's request for joint physical care and awarded Vikki physical care of the children. Michael was granted liberal visitation. In making this determination, the district court cited the parties' lack of communication, Michael's lack of respect for Vikki, and Vikki's dominant role as the primary care provider. The district court also concluded Vikki is more likely than Michael to foster the other's relationship with the children. The district court awarded child support pursuant to the child support guidelines, calculating Vikki's income at the rate of a $7.45 per hour for twenty-five hours a week and Michael's income at $114,000 per year. The district court declined to calculate Michael's income based on his current earnings because "his stated motivation for changing employment and reducing his income is simply not believable"; rather, it "was the result of this action and his attempt to limit his income and, therefore, limit any award of child

support . . . ." The district court also awarded Vikki $600 per month in alimony for two years due to "the long-term nature of this marriage, the dependency of the petitioner, and her need to supplement her education in order to be self-supporting. . . ."

On October 11, 2006, the district court issued its supplemental order, awarding Vikki $1590.29 per month in child support. On November 30, 2006, the district court increased Vikki's child support award to $1609.07 per month.

On appeal, Michael claims that the district court erred in (1) denying his request for joint physical care of the children, (2) in the alternative, failing to award him primary physical care of the children, (3) using earning capacity in calculating his income and refusing to use earning capacity in calculating Vikki's income, and (4) awarding Vikki alimony.

II. Standard of Review

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate the parties' rights anew. *In re Marriage of Rebouche*, 587 N.W.2d 795, 797 (Iowa Ct. App. 1998). We give weight to the district court's findings of fact, especially its credibility determinations, because of its opportunity to view the demeanor of the witnesses while testifying; however, we are not bound by them. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). Prior cases have little precedential value; therefore, we must base our decision on the particular facts of this case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). Finally, we give the district court considerable latitude in awarding

alimony and will disturb this award only if there has been a failure to do equity. *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

III. Physical Care

Michael argues that the district court erred in denying his request for joint physical care of the children or, in the alternative, in failing to award him primary physical care of the children. "Joint physical care" means

> an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child, including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to the other parent.

Iowa Code § 598.1(4) (2005). Iowa Code section 598.41(5)(a) (Supp. 2005) provides:

> If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

In determining whether a joint physical care arrangement is in the best interests of the children, our supreme court recently devised a nonexclusive list of factors to be considered whereby no one factor is determinative. *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 1997). The factors are whether one parent was the primary caregiver, "the ability of the spouses to communicate and show mutual respect," the degree of conflict between the parents, and "the degree to which the parents are in general agreement about their approach to daily matters." *Id.* at 696-99.

If joint physical care is not in the best interests of the children, then the court must choose one parent to be the primary caretaker and award the other parent liberal visitation rights. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). In awarding primary physical care, "[t]he parent who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives is chosen as [the] primary physical care giver." *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998). The gender of the parents is irrelevant. *In re Marriage of Barry*, 588 N.W.2d 711, 712-13 (Iowa Ct. App. 1998). The court must consider the factors set forth in Iowa Code section 598.41(3) and in *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *In re Marriage of Williams*, 589 N.W.2d 579, 761 (Iowa Ct. App. 1998). Our supreme court has recently stated that "the factors of continuity, stability, and approximation are entitled to considerable weight." *Hansen*, 733 N.W.2d at 700.

Based on our de novo review of the record, we find the foregoing factors weigh in favor of awarding Vikki primary care of the children. Most notably, Vikki has been the children's dominant primary care provider during the marriage. Her successful history of caregiving cannot be seriously disputed and is a reliable indication of the quality of primary care the children will receive in the future. We also note that the district court's findings concerning the parties' abilities to communicate and mutual respect for each other are amply supported by the evidence, and we adopt them as are own. We also defer to the district court's impressions of the parties gleaned from observing their testimony at trial. We, for

the same reasons cited by the district court, deny Michael's request for joint physical care and affirm the district court's award of physical care to Vikki.

Michael also argues that he should have been awarded increased visitation. We will not consider this argument because it was made for the first time in a reply brief. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996).

IV. Child Support

Michael argues that the district court erred by using his earning capacity rather than his actual earnings to calculate his child support obligation. He also argues the district court should have used Vikki's earning capacity rather than her actual earnings. We disagree.

To determine a parent's child support obligation, we must use the child support guidelines. Iowa Code § 598.21B(2)(c); Iowa Ct. R. 9.4. One of the factors we consider in determining if we will use a parent's earning capacity, rather than a parent's actual earnings is whether the parent's inability to earn a greater income is self-inflicted or voluntary. *See In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003) (stating "[u]nder our case law, 'a party may not claim inability to pay child support when that inability is self-inflicted or voluntary'") (quoting *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993)). "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." *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). We must also determine that "the use of actual earnings would create a substantial injustice or adjustments are necessary to provide for the needs of the children

and to do justice between the parties." *In re Marriage of Raue*, 552 N.W.2d 904, 906 (Iowa Ct. App. 1996).

The record indicates Michael's dramatic income reduction was self-inflicted. He voluntarily terminated his five-year employment at Centegra Health System in favor of part-time employment. Although Michael's stated reason for changing jobs was to spend more time with the children, the record contains evidence indicating he did not. There is also evidence Michael was actively seeking employment in the Chicago area. Under these circumstances, it would be substantially unjust to Vikki and the children to calculate Michael's child support based on his actual earnings.

We also reject Michael's claim that equity requires use of Vikki's earning capacity rather than her actual earnings in calculating his child support. Contrary to Michael's claim, the record contains no evidence on which a reliable determination of Vikki's earning capacity can be made. In any event, when Vikki obtains full-time employment, Michael has the option of requesting modification of the decree to accommodate that change in circumstances. We therefore affirm on this issue.

V. Alimony

Michael argues that the district court erred in awarding Vikki alimony. Alimony is "a stipend to a spouse in lieu of the other spouse's legal obligation for support." *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa Ct. App. 1996). A spouse is not entitled to alimony; an alimony award depends on the facts of each case. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). The discretionary award of alimony is made after considering the factors

listed in Iowa Code section 598.21A(1). *In re Marriage of Peterson*, 491 N.W.2d 535, 537 (Iowa Ct. App. 1992).

It appears the district court awarded rehabilitative alimony. Rehabilitative alimony

> was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating an incentive and opportunity for that spouse to become self-supporting.
>
> Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses.

In re Marriage of Anliker, 694 N.W.2d 535, 540-41 (Iowa 2005) (quoting *In re Marriage of Francis*, 442 N.W.2d 59, 63-64 (Iowa 1989) (citations omitted)).

Vikki's stated need for rehabilitative alimony is based on her desire to obtain a teaching degree. Because Vikki already has a college degree, additional vocational training, as well as a significant employment history, we conclude she does not need rehabilitative alimony to become self-sufficient. We accordingly modify the district court's decree by vacating the alimony award.

VI. Appellate Attorney Fees

Both Michael and Vikki request attorney fees on appeal. The award of attorney fees is discretionary and is not a matter of right. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). We must consider "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." *Id*. We find the parties should be responsible for their own

attorney fees on appeal, and court costs are assessed half to Michael and half to Vikki.

AFFIRMED AS MODIFIED.