IN THE COURT OF APPEALS OF IOWA

No. 7-772 / 06-1478
Filed March 14, 2008

IN RE THE MARRIAGE OF MICHELLE LYNN BARTUSEK AND TODD ANDREW BARTUSEK

Upon the Petition of
MICHELLE LYNN BARTUSEK,
Petitioner-Appellee/Cross-Appellant,

And Concerning
TODD ANDREW BARTUSEK,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Leo Oxberger, Judge.

Todd and Michelle Bartusek appeal and cross-appeal from several provisions of a dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Silvia J. Hansell and Patricia A. Shoff of Belin, Lamson, McCormick, Zumbach & Flynn, P.C., Des Moines, for appellant.

Alexander R. Rhoads and Leslie Babich and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

VAITHESWARAN, J.

Todd and Michelle Bartusek appeal and cross-appeal from several provisions of a dissolution decree. We affirm as modified and remand.

I. Background Facts and Proceedings

Todd and Michelle married in 1994. They had five children. Michelle petitioned for a dissolution of the marriage in 2005. The district court granted the petition, awarded Michelle physical care of the children, prescribed a visitation schedule for Todd, awarded Michelle spousal support, distributed the property, and ordered Todd to pay a portion of Michelle's trial attorney fees. Todd appealed and Michelle cross-appealed.

After the notice of appeal was filed but before final briefs were due, the State filed a juvenile court petition to have the five children declared children in need of assistance. The existence of this action and its effect on pending issues was not discussed in the parties' final briefs. However, the appellate record discloses that, in mid-March 2007, the juvenile court ordered custody of the children placed with Todd. Todd's child support obligation was suspended as of June 12, 2007.

Todd's final brief raised the following substantive issues: (1) whether the visitation provisions of the decree were "inequitable and contrary to the children's best interest," (2) whether "excessive support obligations were imposed on Todd because of the district court's erroneous determination of the parties' income," (3) whether "the district court's property division is punitive, unworkable and based on wholly erroneous valuations," and (4) whether "the district court's award of attorney fees should be stricken or at least substantially reduced."

Michelle's final brief raised the following substantive issues: (1) whether the district court erred "in awarding Todd visitation from Friday after school until Monday at 6 p.m.," (2) whether the district court erred "in setting Todd's child support and alimony obligations," (3) whether the district court's property decision was "fair and equitable to the parties," (4) whether the district court erred "in ordering Todd to pay $12,000 of Michelle's attorney fees," (5) whether the district court "improperly set Todd's alimony and child support obligation too low," (6) whether the district court "failed to equitably divide the parties' assets and liabilities, and (7) whether the district court erred "in failing to order Todd to pay $25,000 toward Michelle's attorney's fees." These arguments cover the following topics: visitation, child support, spousal support, property, and attorney fees.

II. Scope and Standard of Review

Our review is de novo. Iowa R. App. P. 6.4. As a preliminary matter, Todd argues "the district court's findings of fact, conclusions of law and decree are not entitled to their customary deference." Todd bases his argument on the fact that the district court, in large part, adopted the proposed decree proffered by Michelle. Todd suggests this fact affects the weight we afford a district court's fact findings. *See Rubes v. Mega Life & Health Ins. Co.*, 642 N.W.2d 263, 266 (Iowa 2002) ("[O]ur ability to apply the usual deferential standard is undermined by the court's verbatim adoption of Rubes' proposed factual findings and legal conclusions on this point."). Michelle counters that the court made several modifications to the proposed decree before signing it.

We agree with Michelle that the proposed decree evinces an exercise of independent judgment. Therefore, we will abide by the general rule that, on our

de novo review, we give weight to a district court's fact findings and credibility determinations but are not bound by them. *Id.*

III. Visitation

As noted, Todd asserts that the decree's visitation provisions are inequitable. Specifically, he asks this court "to modify the visitation provision to allow [him] the recommended weekly individual time with his children as well as visitation from Thursday after school until Monday at 8 p.m. every other weekend."

On our de novo review, we conclude the issue is moot because the juvenile court granted Todd custody of the children. *See In re Marriage of Neff*, 675 N.W.2d 573, 578 (Iowa 2004) (stating a question is moot when the issue it presents is merely academic and any judgment rendered can have no practical legal effect). In reaching this conclusion, we have considered facts outside the dissolution record as permitted by case law. *See In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992).[1]

IV. Imputation of Income

Both parents contend the district court underestimated the other's income. In their view, the court's determination of income affected the child support and alimony determinations.

[1] At oral arguments, the court asked Michelle's attorney about the decree's visitation provisions. He responded that this was no longer an issue we needed to address, as the juvenile court granted custody of the children to Todd.

A. **Michelle's Income.** The district court found that Michelle's annual income was $7800. Todd asserts her prior earnings and her earning capacity were significantly more.

When parents voluntarily reduce their income or decide not to work, courts may consider earning capacity rather than actual earnings in applying the child support guidelines. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). Before using earning capacity rather than actual earnings, a court must make a determination that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the children or to do justice to the parties. *Id.*

We believe Michelle's earning capacity should have been considered. We recognize that, in some cases, the only equitable way to determine income for child support purposes is to average income over time. *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). Michelle's earnings in the five years preceding 2004 were significantly higher than $7800. Michelle admitted her income was $29,639 in 1999, $31,429 in 2000, $23,182 in 2001, $32,122 in 2002, and $43,611 in 2003. Taking the average income during this period, we conclude she had an earning capacity of $32,000 annually.

In reaching this conclusion, we find it significant that Michelle was able to earn substantially more than $7800 in part-time wages while serving as primary caretaker of the children. *See id.* ("As a mother of four, it was eminently reasonable for her to choose to spend half of her working hours parenting the children."). Although she claimed this was possible because Todd was available to assist with child care in the evenings, her assertion was inconsistent with

earlier testimony that "most nights he would work until 10 or 11:00 at night." The assertion was also inconsistent with her testimony that Todd "would not have been able to work in the evening if" she "wasn't there to take care of the children." After reviewing Michelle's testimony, we are convinced a substantial injustice would be served if income were not imputed to her. *See id.*

B. **Todd's Income.** Todd contends the district inappropriately attributed more than $39,000 in income to him. Conversely, Michelle asserts the court understated Todd's earnings by nearly $25,000.

Todd's expert witness testified that he earned approximately $88,000 per year. Michelle's expert testified that Todd's income from his business was $126,115 and, in addition, he received $18,827 in rental income, for a total of $144,492. The district court found Todd's earning capacity was $120,000 annually. As this finding was supported by the testimony of Todd's expert, we find no reason to alter it.

V. Issues Affected by Imputation of Income Analysis

A. **Child Support.** Having determined Michelle's earning capacity was $32,000, Todd's child support obligation must be recalculated. We modify the decree's child support provision and remand for a redetermination of Todd's child support obligation. [2]

Todd also contends the court improperly ordered him to maintain life insurance on the balance of his child support obligation. As a preliminary matter,

[2] This issue is not moot because, although Todd's child support obligation ended in June 2007, there was a period of time between the entry of the decree and the June order during which the obligation would have been affected. We do not decide the issue of child support from June 12, 2007 forward.

we note that Todd's present challenge is inconsistent with his trial testimony. There, he testified he had a $1 million term life insurance policy for which he paid an annual premium of $1130. When asked what he wished the court to do with respect to this policy, he answered,

> if the Court so wishes, they can allow this policy to stand or, actually, I would like to ask the court, if I choose to increase the amount of this policy, that I may, at any time, and I wish that they leave the beneficiaries as stated in the policy on its face.

When asked whether the policy was "in trust for your children," he answered "[t]hat is correct." Based on this testimony, Todd cannot now argue that the order requiring him to maintain life insurance was inappropriate. *See Clark v. Estate of Rice ex. rel. Rice*, 653 N.W.2d 166, 172 (Iowa 2002) (stating appellant was foreclosed from changing theory on appeal).

In any event, this type of provision is enforceable. *Stackhouse v. Russell*, 447 N.W.2d 124, 125 (Iowa 1989). This type of provision also has been deemed equitable under specific circumstances. *In re Marriage of Weidner*, 338 N.W.2d 351, 360 (Iowa 1983) ("The provision requiring maintenance of life insurance makes sense here; the amount is within a reasonable range in view of the parties' financial condition and the children's potential needs."). Were we to reach the merits, we would conclude the district court acted equitably in ordering Todd to retain his policy.

B. **Uninsured Medical Expenses.** Based on the income figures the district court adopted, the court ordered Todd to pay ninety-five percent of the children's uninsured medical expenses. Todd takes issue with this portion of the decree. Under our rules,

> [T]he custodial parent is responsible for the first $250 of the uncovered medical expenses each year for each child up to a maximum of $500 for all children. Iowa Ct. R. 9.12. Any uncovered medical expenses in excess of these amounts are paid by the parents in proportion to their respective net incomes.

In re Marriage of Okland, 699 N.W.2d 260, 267 (Iowa 2005). As we have modified Michelle's income, this portion of the decree also must be modified. We remand for such a modification.

C. **Alimony.** Todd contends the district court acted inequitably in awarding Michelle alimony of $2000 per month for seven years. Michelle counters that his spousal support obligation should be increased. Both arguments are premised on the parents' assertions that the district court underestimated the other's income.

We conclude the district court's award of spousal support was equitable. Even with our modification of Michelle's income, there was a substantial disparity in earnings and earning capacity. This factor alone warranted an award of spousal support. *See In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (citation omitted).

In addition, there was evidence that Michelle would need time to transition into full-time employment. There was also evidence that, despite her young age, health difficulties would render the transition period longer.

Todd also asserts that the court should consider what Michelle could have earned on her property settlement. However, Todd introduced scant evidence of an expected return. For this reason, we are not persuaded that the district court was obligated to reduce the spousal support award based on interest Michelle would earn on her property settlement.

VI. Property Division

In examining a property distribution scheme, we consider the factors set forth in Iowa Code section 598.21(1) (2005), including the existence of a prenuptial agreement.

A. **Gateway Building.** Todd owned a commercial building known as the Gateway building. The district court included the building in the property subject to division. Todd argues the building should have been set aside to him pursuant to the prenuptial agreement.

Section two of the agreement, which is the only provision on which Todd relies, allows him to place his personal assets into his corporation, CJT, subject to the approval of Michelle, and retain the property rights in the corporation as expanded or appreciated. The provision states**:**

> [I]t is agreed that Todd A. Bartusek may place business and/or personal assets of any nature into CJT Corporation, Hawkeye Yamaha, and/or their successors in interest, subject to obtaining written approval for the placement of Todd A. Bartusek's personal assets from Michelle Lynn Glaug at the time of the transaction, and that all property rights to both CJT Corp. and/or Hawkeye Yamaha as expanded by him or as appreciated subsequent to 6/11/94 without expansion by him shall be maintained for the benefit of him and his heirs, legal representatives, and assigns, respectively, as though no relation or cohabitation or marriage ever existed between them.

This provision does not apply to the Gateway building, as Todd owned the building but never placed it into his corporation. While Todd argues the prenuptial agreement "contains absolutely no requirement that the property be titled to CJT in order to be deemed an expansion of CJT," we note that the second clause of that paragraph is connected to the first with an "and." In our view, this means the two clauses must be read together. The first clause clearly

requires Todd to place his property in the corporation to avail himself of the benefits of that paragraph. For this reason, we conclude the district court acted equitably in declining to segregate the property pursuant to the prenuptial agreement.

B. **Gift.** Before Todd married Michelle, his parents gave him $32,000. Todd's mother testified the money was inherited by Todd's father in 1988 and was evenly distributed among their three children. Todd used the money to buy a lot in Urbandale and to begin building a home. The district court found that

> [w]hatever monies could now be traced to Todd's premarital interest in the Urbandale home . . . [is] no longer Todd's separate property and under the terms of the prenuptial agreement are to be considered by this Court in making an equitable division of the parties' assets and liabilities.

Todd does not dispute this aspect of the court's ruling. Indeed, he concedes, "[t]he proceeds from the sale of [his] premarital home were successively rolled into the parties' jointly owned homes, including the parties' homestead."[3] He argues that the funds should nonetheless have been set aside to him because "Michelle's contributions to the properties were not so extensive and the marriage was not so long as to justify an exception to the general rule that Todd is entitled to the $32,000."

We agree with Todd that

> [p]roperty inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section

[3] Michelle appears to challenge this language, even though her attorney drafted it. To the extent there is any question about the effect of the prenuptial agreement, we agree with the district court that the agreement does not apply to property held in joint tenancy.

> except upon a finding that refusal to divide the property is inequitable to the other party or the children of the marriage.

Iowa Code § 598.21(6). Here, the exception trumps the rule. The parties were married for twelve years. The $32,000 was rolled over into homes that both parties and their five children used and enjoyed. Under these circumstances, the district court acted equitably in declining to set aside the money to Todd.

C. **Credit Card Debt.** Todd next claims we should modify that portion of the decree holding him responsible for the payment of $25,258 in debt on four credit cards, in addition to other debt. He maintains that, although these cards were in his name, the debt was originally accumulated by Michelle on joint credit cards and the balances were subsequently transferred to card numbers solely in Todd's name, to prevent her from amassing more debt.

This is essentially an argument that Michelle dissipated assets. *In re Marriage of Fennelly*, 737 N.W.2d 97, 104 (Iowa 2007) (noting accumulation of debt has same result as depletion of assets). "Dissipation of assets is a proper consideration when dividing property." *Id.*

Todd does not dispute that the $25,258 in contested credit card debt was for family expenses. Although there was some evidence that Michelle shopped too much and did not pay their bills on time, she explained that this was because "at no point would [Todd] be a part of the family finances." On this record, we are not persuaded that Michelle dissipated assets. Considering the credit card debt in conjunction with the district court's entire property distribution scheme, we conclude the court acted equitably in allocating the $25,258 to Todd. *See In re Marriage of Sullins*, 715 N.W.2d 242, 251 (Iowa 2006) ("Even though a debt may

have been incurred by a party for family expenses, it is not inequitable to order that party to be responsible for the entire amount of the debt as long as the overall property distribution is equitable.").

D. **RTL Contingent Liability.** Todd asserts the district court should have held the parties jointly liable for an unresolved $15,000 damage claim and should have set aside home sale proceeds to cover this claim. Michelle argues evidence concerning the debt was "too speculative."

The district court could have addressed this contingent liability if it wished. *See Doolittle v. Doolittle*, 166 Iowa 625, 147 N.W. 893, 895-96 (1914) (upholding provision in dissolution decree that allowed ex-wife to recover from ex-husband sum of any judgment rendered against her in pending litigation). However, the court was not obligated to do so. At the time of trial, Todd had only received a letter from an insurance company. There was no indication that a lawsuit had been filed or was imminent. Under these circumstances, the court acted equitably in declining to set aside $15,000 from the home sale proceeds to cover this contingent liability.

E. **Property Equalization.** Michelle contends she is entitled to an equal share of property. She maintains an additional $10,500 would equalize the distribution plan ordered by the district court.

Property settlements need not be equal but should be equitable. *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa Ct. App. 1998). In this case, the difference between Michelle's proposed property distribution plan and the district court's actual property division was $21,110. This sum represented the value ascribed by Michelle to a 2004 vehicle. At trial, Michelle conceded the

vehicle was titled in the name of Todd's corporation. She also stated that payments on the vehicle were, to the best of her knowledge, made "from the business." Nonetheless, she maintained she should receive the vehicle debt free because she had exclusive use of it.

As the district court found, the vehicle was a corporate asset and the debt on the vehicle was a corporate liability. The corporation went to Todd pursuant to the prenuptial agreement. In light of the prenuptial agreement, we find no basis for separating the vehicle from the remaining corporate assets, stripping it of corporate debt, and awarding the vehicle to Michelle. Accordingly, we decline to modify the decree to provide for an equalizing payment.

VII. Attorney Fees

***A.* Trial Attorney Fees.** The district court ordered Todd to pay $12,000 of Michelle's trial attorney fees. Todd asserts the award should be stricken or reduced. Michelle counters the award should be increased to $25,000.

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 Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We discern no abuse of discretion in the court's award. Michelle's earnings at the time of trial were significantly less than Todd's. Although she left the marriage with a substantial property award, that fact was accounted for in the district court's award of less than half the fees she requested. For these reasons, we affirm the district court's attorney fee award.

***B.* Appellate Attorney Fees.** Michelle contends she is entitled to an award of appellate attorney fees. Again, an award of attorney fees on appeal is

not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We decline Michelle's request, as she did not prevail on appeal.

VIII. Disposition

Todd's challenge to the visitation provisions of the dissolution decree is moot. His challenge to the insurance requirement is inconsistent with the position he took at trial. We affirm the alimony and property provisions of the dissolution decree. On our de novo review, we conclude Michelle had an earning capacity of $32,000 annually and, accordingly, we remand for a modification of Todd's child support obligation and his obligation to pay ninety-five percent of the children's uninsured medical expenses. We affirm the award of trial attorney fees and decline to award Michelle appellate attorney fees. Costs are taxed equally to Todd and Michelle.

AFFIRMED AS MODIFIED AND REMANDED.