IN THE COURT OF APPEALS OF IOWA

No. 8-758 / 07-1148
Filed February 4, 2009

IN THE MARRIAGE OF ELISABETH WEST NORWOOD AND JOHN MERRILL NORWOOD

Upon the Petition of
ELISABETH WEST NORWOOD,
n/k/a ELISABETH B. WEST,
Petitioner-Appellee/Cross-Appellant,

And Concerning
JOHN MERRILL NORWOOD,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

The parties appeal the economic provisions of their dissolution decree. **AFFIRMED AS MODIFIED, AND REMANDED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

James M. Meade, West Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ROBINSON, S.J.

I. Background Facts & Proceedings

Elisabeth (Lisa) and John Norwood were married in 1997. They have two children, Brook, born in 1999, and Sarah, born in 2003. The parties lived together for several years before they married.

At the time of the marriage, the parties were living in California. Lisa was engaged in graduate studies at Stanford University. She received a full scholarship, plus a stipend of $15,000 per year. John was employed at Autodesk, where he was a product marketing manager, and earning $68,000 per year. In November 1998 John left that job to become a special assistant to the California Secretary of Natural Resources for two months. John then worked as a volunteer for a conservation fund from January to September 1999. In October 1999, he became employed by the South Livermore Land Trust, earning $50,000 per year.

In 2002, Lisa was awarded a Ph.D. and she obtained a position as an English professor at Drake University, where she earns about $47,000 per year. John left his job with the South Livermore Land Trust to move to Iowa with Lisa. He became self-employed as an environmental conservation consultant. John had net business income of $43,535 in 2004, and $89,861 in 2005. He is also attempting to market a laser golf device he patented.

At the time of the marriage, Lisa had about $441,000 in inherited and gifted funds. Throughout the marriage Lisa's mother, Nancy West, gave large cash gifts to Lisa, John, and the children. The parties used these funds to better

their lifestyle. After moving to Iowa they purchased a home worth about $330,000 in West Des Moines. Lisa used $69,853 of her gifted and inherited funds for the down payment on the house. The parties also borrowed $52,500 from Lisa's parents for repairs to the house. John supervised the repairs, and performed some work on the house himself.

Lisa filed a petition for dissolution of marriage on September 2, 2005. The parties agreed to joint legal and physical custody of the children, under a plan where Lisa had the children for a majority of the time to begin with, and then transitioning so they had equal time with the children. They implemented a cost sharing plan while the dissolution was pending. Nancy purchased a home for Lisa, for $190,000, near the marital residence to facilitate the transfer of the children.

The district court issued a dissolution decree on March 9, 2007. The court found Lisa's annual income was $57,751, and John's income was $89,861. The court ordered John to pay child support of $1013.41 per month from September 1, 2006, until June 1, 2007, when he would begin to pay $680.67 per month. Beginning April 1, 2008, John's child support obligation was reduced to $378.64 per month.

The court determined John should be given the option to purchase the marital residence, or the parties could sell the residence. In either event, Lisa was to be reimbursed $69,853 for the down payment she provided from the gifted funds. Additionally, the amount of $52,500, representing the loan by Lisa's parents, was to be deducted from the proceeds. Each party was awarded their

own vehicle, life insurance, securities, and investments. John was awarded his interest in his businesses. The court divided the marital assets to give Lisa $63,890 and John $66,381.

John filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court refused to modify the division of property. The court also refused to modify the amount of John's child support obligation. The court, however, modified the effective date of John's child support obligation to June 1, 2007. John appealed and Lisa cross-appealed.

II. Standard of Review

Our review in this equitable action is de novo. Iowa R. App. P. 6.4. In an equitable action, especially when considering the credibility of witnesses, we give weight to the factual findings of the district court, but are not bound by these findings. Iowa R. App. P. 6.14(6)(*g*).

III. Dissolution Decree

John contends the district court improperly adopted Lisa's proposed dissolution decree nearly verbatim. Our review shows the district court's dissolution decree follows nearly word for word the proposed decree submitted by Lisa. The only major change was that the district court did not award Lisa any interest in John's businesses.

The verbatim adoption of a decision written by counsel has been sharply criticized. *See Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 435 (Iowa 1984). "All courts agree that the finding of facts is an important part of the judicial function and that the judge cannot surrender this function to counsel." *Id.*

(citation omitted). In some instances "the customary deference accorded trial courts cannot fairly be applied when the decision on review reflects the findings of the prevailing litigant rather than the court's own scrutiny of the evidence and articulation of controlling legal principles." *Rubes v. Mega Life & Health Ins. Co., Inc.*, 642 N.W.2d 263, 266 (Iowa 2002). In other instances, "we do not apply a separate standard of review on appeal from a decree prepared by counsel." *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996).

While we acknowledge the benefit of requesting proposed decrees, especially with high volume family law dockets, we reiterate the importance of having a judge's own words and analysis, not only for review, but for the appearance of fairness.

In equity cases, where our review is de novo, "we review the evidence anew, disconnected, ultimately, from the trial court findings." *Id.* Furthermore, the district court judge stated at a post-trial hearing that although the decree was based on Lisa's proposed decree, the court had carefully considered the factual findings and conclusions of law incorporated into the decree. We conclude that it is not necessary for us to employ a less deferential standard of review in this case.

IV. Property Division

John asserts the distribution of property in the dissolution decree was inequitable. He contends the district court should have divided these assets that were set aside to Lisa as inherited or gifted property: (1) $69,853 of the value of

the marital home; (2) a trust account of $478,912; and (3) two IRAs valued at $11,809. He also claims the overall property distribution was inequitable.

Generally, property should be equitably divided between the parties in a dissolution decree. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). There is an exception, however, for inherited property and gifts received by one party. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 682 (Iowa 2005). "This property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process." *Schriner*, 695 N.W.2d at 496.

Iowa Code section 598.21(6) (Supp. 2005) provides:

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

Inherited or gifted property may be divided when it would be inequitable to award the property to one spouse. *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). In determining whether inherited or gifted property should be equitably divided, we consider "the length of the marriage; contributions made by either party toward the property's care, preservation, or improvement; and the impact of the property on the parties' standard of living." *In re Marriage of Geil*, 509 N.W.2d 738, 741 (Iowa 1993).

John asserts that under the facts of this case it would be inequitable to set aside to Lisa her inherited or gifted funds. He claims that because Lisa did not work during much of the marriage, his income was used to pay taxes on her

inherited and gifted funds. He also claims that Lisa used her inherited and gifted funds as her contribution to the finances of the marriage because she did not have any income while she was going to school. John asserts Lisa intended for these funds to be used for the benefit of the family.

We conclude John has not shown that the district court's refusal to divide Lisa's inherited and gifted funds is inequitable to him. While the parties relied on Lisa's funds to supplement their lifestyle, the evidence shows John was able to pay off his student loans and increase his retirement accounts because he was not using his wages to pay for his daily needs. Thus, in an indirect way, John is benefitting from Lisa's inherited and gifted funds, even though those funds were not directly divided in the dissolution decree. Under section 598.21(6), the district court properly set aside to Lisa the amount of the down payment on the house, her two IRAs, and her trust account.

John also asserts that the property division, as a whole, was inequitable to him. He states that if Lisa's inherited and gifted funds are not divided, then he should receive a greater share of the marital assets. He claims that because of her inherited and gifted funds Lisa will have a more secure future than he will, and therefore he should receive more than one-half of the marital property.

John received as his separate property IRAs and securities, valued at $59,133, which he held before the marriage. In addition, he received slightly more than one-half of the marital property. Upon our de novo review of the record, we determine the division of property in the dissolution decree is equitable.

V. Child Support

John contends the district court improperly calculated his child support obligation. He asserts the court did not properly determine either his income, or that of Lisa. Under Iowa Court Rule 9.5, a parent's child support obligation is calculated by using the parent's net monthly income. "The court must determine the parent's current monthly income from the most reliable evidence presented. This often requires the court to carefully consider all of the circumstances relating to the parent's income." *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991).

A. The district court found Lisa's annual income was $57,751.24. John claims this amount is too low because it does not fully take into account the income she receives from her trust account. For the 2006-07 school year, Lisa's salary at Drake University was $47,060. The district court then attributed $10,691 in income to her from her investments. John points out that from 2003-05 Lisa had an average income from capital gains of $34,568, and an average income from dividends and interest of $15,445.

Lisa notes that from 2001-05, her average income from dividends and interest was $12,644. Adding this amount to her salary gives her annual income of $59,704. A review of Lisa's capital gains income shows this amount varies widely from year to year, and we conclude it is too uncertain and speculative to be included in a determination of her annual income. *See In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997) ("All income that is not anomalous,

uncertain, or speculative should be included when determining a party's child support obligations.").

John further asserts that the district court should have considered the gifts Lisa receives from her family in determining her annual income. Lisa's mother, Nancy West, testified that she could not sustain giving gifts to Lisa at the same level in the future. Generally, a person's child support obligation should be based on a person's income, rather than other sources of financial support. *See In re Marriage of Will*, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999); *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991). We conclude the district court properly did not consider possible gifts Lisa might receive in the future in determining her income.

After considering all of the evidence, we conclude Lisa's annual income is $59,704.

B. John claims the district court also improperly determined his income. He asserts the court should have used an average of his income as a self-employed person, instead of using his highest income since moving to Iowa. From 2004-06, John's average income was $74,419.

"When income is subject to fluctuation, an average income over a reasonable period of time should be used." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). A self-employed person often has fluctuating monthly income, and in these instances, "it is generally best to use an average of income from a period that accurately reflects the fluctuations of income." *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992).

When a person does not have a steady income "it is unreliable and unfair to fix child support obligations based solely on the most recent periodic income amounts." *In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994).

John has been self-employed as an environmental consultant from 2004. We determine his average income of $74,419, over the period of 2004-06 should be used in calculating his child support obligation.

John additionally claims the district court should have deducted his health insurance costs to determine his net monthly income. While the parties were married John was covered by Lisa's health insurance at Drake University. He states that because he will be required to obtain his own health insurance this amount should be deducted from his income.

Under Iowa Court Rule 9.5(6), health insurance premiums may be deducted in determining a parent's net monthly income "so long as the child is covered by the policy." Under the parties' dissolution decree Lisa is required to provide health insurance for the children. We conclude the district court properly denied John's request to deduct his health insurance premiums from his net monthly income.

We determine the amount of John's child support obligation should be modified to take into account our findings that Lisa's annual income is $59,704 and John's is $74,419. We remand to the district court for a calculation of the parties' child support obligations, which should then be offset to take into consideration the parties' joint physical care arrangement.

VI. Retroactive Child Support

Under an order on temporary matters, filed in December 2005, the parties were ordered to share the costs of maintaining the home and supporting the children. The parties were then still living in the same home, and no specific child support was ordered. On December 12, 2006, the parties entered into a stipulation regarding physical care of the children. The stipulation provided that until the end of the 2007 school year the children would be in Lisa's care most of the time. After the completion of the 2007 school year Brook would begin to divide his time equally between the parents. Sarah would still spend a majority of her time with Lisa until the completion of spring break in 2008, when she would begin to spend an equal amount of time with both parents.

In the parties' dissolution decree, issued on March 9, 2007, the court terminated the order on temporary matters as of August 31, 2006, because the parties then began living apart and had implemented the first phase of their parenting plan. Based on the three-step implementation of the parties' physical care arrangements, the dissolution decree provided John would pay child support of $1013.41 per month from September 1, 2006, until the end of May 2007; $680.67 per month from June 1, 2007, until the end of March 2008, and $378.64 per month from April 1, 2008 and thereafter. A supplemental decree was issued on March 13, 2007, which adopted the parties' stipulation regarding physical care.

John filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), pointing out that his child support obligation was made retroactive because the

decree, issued on March 9, 2007, ordered him to pay child support beginning September 1, 2006. He stated that under the decree he was $7093 in arrears in his child support obligation at the time the decree was issued. He stated that until the dissolution decree was filed the parties had continued to operate under the temporary order and had continued to share child-related costs. The district court granted John's request, and ordered that his child support obligation would commence June 1, 2007.

Lisa appeals the district court's decision that John's child support obligation would begin June 1, 2007. She states that under the dissolution decree the parties' obligations under the temporary order ended on August 31, 2006, and that John was then given a nine-month period of time when he was not required to support the children. She states that under the first part of the parties' parenting plan, she had the children in her care a majority of the time beginning September 1, 2006, and she asserts that John should be required to pay her child support as of that date.

Although the parties' dissolution decree terminated their responsibilities under the order on temporary matters as of August 31, 2006, the parties were unaware of this until the dissolution decree was filed on March 9, 2007. The parties continued to share costs of supporting the children under the temporary order until March 2007, as they were required to do. John supported the children under the temporary order, and we agree with the district court's conclusion that it would be unfair to require him to pay child support during the period of time he was also supporting the children under the order on temporary matters. We

conclude the district court properly required John's child support obligation to commence June 1, 2007.

VII. Attorney Fees

Lisa seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court, except that we determine the amount of child support should be modified. We remand to the district court for a calculation of the parties' child support obligations, which should then be offset. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED, AND REMANDED.