IN THE COURT OF APPEALS OF IOWA

No. 9-347 / 08-1695
Filed May 29, 2009

IN RE THE MARRIAGE OF RENEE L. PETERSON-BAYER AND ALBERT WILLIAM BAYER II

Upon the Petition of
RENEE L. PETERSON-BAYER,
Petitioner-Appellant/Cross-Appellee,

And Concerning
ALBERT WILLIAM BAYER, II,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Monroe County, Joel D. Yates, Judge.

Renee L. Peterson-Bayer appeals, and Albert William Bayer, II, cross-appeals, from the decree dissolving their marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Gregory G. Milani of Orsborn, Milani & Mitchell, L.L.P., Ottumwa, for appellant.

Bryan J. Goldsmith of Webber, Gaumer & Emanuel, P.C., Ottumwa, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Renee L. Peterson-Bayer appeals, and Albert William Bayer, II, cross-appeals, from the September 2008 decree dissolving their marriage. Renee contends that (1) the district court should not have provided for shared care of the parties' daughter; rather, the child should be in her primary physical care, (2) the child support was incorrectly computed, and (3) Albert should have been found in contempt of court. Albert contends that (1) the shared care arrangement should be affirmed, (2) the child support was correctly determined, (3) the district court correctly ruled on the contempt issue, (4) the district court did not equitably divide the parties' assets and debts, and (5) the fees of the child custody evaluator should have been assessed as court costs. We affirm as modified and remand to the district court.

I. SCOPE OF REVIEW. Our scope of review is de novo. Iowa R. App. P. 6.4 ; *In re Marriage of Olson*, 705 N.W.2d 312, 313 (Iowa 2005); *In re Marriage of Schriner*, 695 N.W.2d 493, 495-96 (Iowa 2005). Although weight is given to the fact findings of the district court, the reviewing court is not bound by them. Iowa R. App. P. 6.14(6)(*g*).

II. BACKGROUND AND PROCEEDINGS. Renee, born in 1974, and Albert, born in 1965, were married in April of 2003. Their daughter was born in April of 2004. Albert had a prior marriage, and at the time of the parties' marriage, his teenage son was in his care. In July of 2007, Renee filed a petition seeking dissolution of the marriage, asking for an equitable division of assets. She also requested that the parties' daughter be placed in the parties' joint legal

custody, that she be named the physical custodian, and Albert be ordered to pay child support. Albert responded asking for reconciliation to preserve the marriage, that the parties' daughter be placed in the parties' shared care, and the assets and debts be equitably divided.

In August of 2007, Renee sought an order preventing either party from selling, transferring, diminishing, spending, destroying, removing, damaging, or concealing any of the parties' property. The district court granted the application. In September of 2007, the district court entered an order providing that the daughter of the parties be placed in Renee's physical care and that Albert have reasonable visitation to be arranged by agreement, with Albert entitled to a minimum of ten overnight visits and ten other visits each month, each of an approximate three hours duration.[1] Albert was ordered to pay Renee $678.82 a month in child support. An application was made by Albert to appoint a child custody investigator. Dr. Keri Kinnaird was appointed pursuant to Iowa Code section 598.12(4) (2007) to investigate the parties, their home, and their parenting abilities, among other things. Albert was ordered to pay $3000 to the investigator which could be acquired through a draw on the parties' line of farm credit and would not be in violation of the order preserving personal property.

In June of 2008, Renee filed an application for rule to show cause why Albert was not in contempt in failing to preserve certain personal property, alleging that he (1) sold a horse trailer, (2) purchased a horse trailer, (3)

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[1] The provisions of the order were difficult to deal with and the parties agreed to a schedule that Albert would have the child in his care from Wednesday evening to Sunday evening at 6 p.m. every other weekend.

purchased a hay rake, (4) secured transportation and made plans to vacation at Disney World, (5) attempted to borrow on the parties' line of credit, (6) attempted to refinance a mortgage, (7) sold hay, (8) transferred ownership of a horse to his name, (9) purchased a mower conditioner, and (10) increased the parties' farm operating note by about $20,000. Albert was served with the rule to show cause.

The matter came to trial on August 12 and 13, 2008, at which time the district court considered both the dissolution and contempt actions. The parties had agreed on a number of issues. There were several property disputes remaining and the issue of their daughter's custody had not been resolved. On September 8, 2008, the district court filed a decree which on September 24, 2008, it amended and enlarged.

The court found that the parties should share their daughter's care, alternating weeks and holidays. The court found Renee would owe child support of $446.86 a month and Albert would owe $546.08. Offsetting the amounts the result was that Albert was ordered to pay Renee $100 a month in child support. Provision was made for medical support, and the dependency exemption for the child was alternated between the parties. The court divided the property and determined that Albert should pay Renee an equalization payment of $22,000 by December 31, 2008. Interest was to accrue on any unpaid balance commencing January 1, 2009, at the rate of five percent per annum.

III. CUSTODY. Renee contends the district court should not have ordered shared care. She contends she has spent more time with the child than has Albert, she and Albert do not have good communication, and the parties

have disagreements and do not agree on the day-to-day approach of raising children. She also contends that she was more credible than Albert and we should give more weight to her testimony than did the district court.

Iowa Code section 598.41(5) provides in relevant part:

> 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.

Joint physical care is most likely to be in the best interest of the child (1) where both parents have historically contributed to physical care in roughly the same proportion, (2) have the ability to communicate with each other and show mutual respect, and (3) there is no serious conflict between the parents. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697-98 (Iowa 2007).

The district court carefully addressed these factors finding that while Renee historically had been the child's primary caregiver, Albert maintained an active, ongoing commitment to the child which has increased as she has gotten older. It also noted the custody evaluator testified the parents were civil and mature and showed mutual respect to each other and there were no major conflicts between them. The court also considered the fact the parties lived only three miles from each other and both parents have strong ties to the Albia area where they live, and there was no evidence either intended to move. The court found Albert had a track record of parenting in that he has a grown son and neither the son, nor his mother, complained about Albert's ability to communicate. The court also found the parents had shared goals and concerns

about their daughter, who was on the right track developmentally or ahead of it, and the child had adjusted well to her parents' divorce. The court concluded shared care or joint physical care was in the child's best interest.

We find no reason to disagree with the district court's careful assessment of the issue. Both parents worked outside the home during the greater part of the child's life, and they both were involved with her care. The child's preschool teacher opined that both parties were good parents. She had seen Albert with his older son because her son is a friend of his son. She also had observed Renee with her daughter, and observed the couple after their separation and found they were cooperative with each other. She had the child in preschool during the 2007-2008 school year. She testified that the child did not seem to be stressed by her parents' separation, and she did not note any regression in the child's abilities or her attendance or attention span during the course of the year.

Dr. Kinnaird was contacted by both parties and did a child custody evaluation. She interviewed the parents and talked to the daycare provider and the preschool teacher. She testified she has done a number of such evaluations and that the parties stood out because they were more civil and mature than others she had seen, and she saw that as a strength that they both possessed. She was of the opinion that shared physical care was something that these parties could successfully accomplish.

On our de novo review, giving the required deference to the factual findings of the district court, we affirm on this issue.

IV. CHILD SUPPORT. Renee contends the child support was not properly calculated because it did not include Albert's bonus income. Renee relies on the record of Albert's social security tax earnings in making this argument.[2] She contends we should consider this average income of $48,685. The district court found his average annual earning to be $44,811.52.[3] We agree with Renee that bonuses can be considered in determining child support especially where, as here, there have been bonuses over a number of years. *See Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). Albert argues that he has no guaranteed bonus, his bonus was less in the current year than the prior year, and under the current state of the economy there is no guarantee that he shall receive a bonus.

Once evidence of extra income has been introduced, the burden is on the recipient of the income to establish that it should be excluded from gross income as uncertain and speculative. Albert is not guaranteed a bonus as it is not certain; it is based entirely on the profitability of his employer, Deere & Company, and the labor agreement between his employer and the United Auto Workers. He argues whether he will get a bonus in the future is affected by factors including, a recession in the national economy, a recession in the agricultural

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[2] Wages that are subject to FICA do not necessarily represent net income for child support purposes. In determining the correct amount of child support, the net monthly income of the parties must be computed. *State of Iowa ex rel. Nielsen v. Nielsen*, 521 N.W.2d 735, 737 (Iowa 1994). Net monthly income means the gross monthly income less deductions for certain identified items. Iowa Ct. R. 9.5. All income that is not anomalous, uncertain, or speculative should be included. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004).

[3] Albert and Renee's income figures do not include farm losses that they both showed on their previous year's state income tax return.

industry, an increase in the price of material and the decrease in sales or profits, and the expiration and re-negotiation of his union's contract with his employer. Given the current state of the national and state economy, we decline to determine that Albert has a bonus that is certain. Given that the bonus is not a certainty but recognizing that Albert has received one in prior years, we modify the opinion to provide that if Albert receives a bonus he shall retain thirty percent to compensate him for the taxes thereon, and then after considering the parties' respective incomes and the fact they share care of their daughter, we direct that he pay to Renee as additional child support ten percent of the remaining bonus.

V. CONTEMPT. Renee contends the district court erred in failing to find Albert in contempt of court. The district court found Albert did add to an operating loan without Renee's permission or knowledge. The court did not condone the activities, but concluded it was not a willful or wanton violation of the court's order, and that most, if not all, of the expenses associated with the operating loan were necessary to preserve either the parties' homestead or farm operations. While not holding Albert in contempt, the district court found him responsible for any increase in the debt after August 13, 2007.

Renee argues that the increase in the farm operating loans as well as the purchase of several items, and the paying for a trip to Disney World, demand that he be found in contempt of court. Albert argues that the asset purchases did not come from assets the parties had at the time of their separation, and that he agreed to be responsible for the loans. He contends that the trip to Disney World did not deplete assets the parties had at the time of their separation.

Contempt must be established by proof beyond a reasonable doubt. *Ary v. Iowa Dist. Court*, 735 N.W.2d 621, 624-25 (Iowa 2007). Substantial evidence sufficient to support a finding of contempt is evidence that could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt. *Id.*; *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). A finding of disobedience pursued "willfully" requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not. *Jacobo*, 526 N.W.2d at 866. A failure to follow a court order is not willful if a contemner shows the order was indefinite, or that the contemner was unable to comply with the order. *Ary*, 735 N.W.2d at 624. The order preserving personal property provides that the parties are "restrained from selling, transferring, spending, destroying, removing, damaging or concealing any property of the parties." We cannot say that the instances Renee complains of were prohibited by the language of the order. Because the order is indefinite as to Renee's complaints, we believe the district court was correct in not finding Albert in contempt. Even if that were not so, we note that both parties continued to earn wages and spend money during the separation period and we do not interpret the order as requiring that the parties are limited in how their wages can be used. We find no reason to reverse this holding of the district court.

VI. PROPERTY DIVISION. Albert on cross-appeal contends that the division of assets was not equitable and we should modify to reduce the

equalization payment he is required to make to Renee to $11,000. The partners to a marriage are entitled to a just share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal percentage division. *Id*. The determining factor is what is fair and equitable in each circumstance. *Id*.

Adjudicating property rights in a dissolution action inextricably involves a division between the parties of both their assets and liabilities. *See In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). The district court arrived at an equitable division of the property and we affirm it in its entirety.

VII. PAYMENT OF FEE OF KINNAIRD FOR CUSTODY EVALUATION.

Albert contends he should not have been required to pay Kinnaird's cost of $2232 but that it should be taxed as a court cost for the evaluation. The district court in the decree provided that court costs should be divided equally. The district court declined Albert's request that the cost of Kinnaird's evaluation be divided equally, finding Kinnaird was listed as Albert's witness and absent a pretrial order stating Kinnaird's fees should be shared equally by the parties, the court refused to assess her fees as court costs. Albert contends Iowa Code section 598.12(5)[4] requires that Kinnaird's fees be taxed as court costs. Kinnaird

[4] Iowa Code section 598.12(5) provides in applicable part:

> 5. The court shall enter an order in favor of the attorney, the guardian ad litem, or an appropriate agency for fees and disbursements, and the amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent, in which event the fees shall be borne by the county.

was appointed by the court under Iowa Code section 598.12(4).[5] Kinnaird's fees should have been fixed as court costs.

VI. CONCLUSION. We affirm as modified on Renee's appeal. We affirm as modified on Albert's cross-appeal and remand to the district court to determine the fees of the child custody evaluator and fix the same as court costs. The costs on appeal are divided equally between the parties. We award no appellate attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.

[5] Iowa Code section 598.12(4) provides in applicable part:

> 4. The court may require that an appropriate agency make an investigation of both parties regarding the home conditions, parenting capabilities, and other matters pertinent to the best interests of the child or children in a dispute concerning custody of the child or children. The investigation report completed by the appropriate agency shall be submitted to the court and available to both parties. The investigation report completed by the appropriate agency shall be a part of the record unless otherwise ordered by the court.