

IN THE COURT OF APPEALS OF IOWA

No. 3-439 / 92-1994

FILED

AUG 25 1994

CLERK SUPREME COURT

IN RE THE MARRIAGE OF BARBARA JEANNE MCINTYRE AND
TIMOTHY J. MCINTYRE

Upon the Petition of
BARBARA JEANNE MCINTYRE,

Appellee,

And Concerning
TIMOTHY J. MCINTYRE,

Appellant.

Appeal from the Iowa District Court for Page County,
Glen M. McGee, Judge.

The husband appeals a decision of the district court
dissolving the parties' marriage, setting child support and
custody, and dividing marital property. **AFFIRMED AS
MODIFIED.**

Timothy J. McIntyre, Shenandoah, pro se.

Michael J. Murphy, Council Bluffs, for appellee.

Considered by Donielson, C.J., and Sackett and Huitink,
JJ.

DONIELSON, C.J.

Barbara and Timothy McIntyre were married on September 10, 1982. They have one child, Matthew, born on March 30, 1983. Barbara filed this petition to dissolve the parties' marriage in November 1990.

A hearing on the issue of temporary support was held and Timothy was ordered to pay temporary child support in the amount of \$314 per month and attorney fees in the amount of \$300. Despite being gainfully employed, Timothy did not pay temporary support.

Barbara was born on August 29, 1961. She is a licensed practical nurse. Barbara is taking classes in order to become a registered nurse. She is employed part-time as a nurse earning gross wages of approximately \$302.72 per month. Before Barbara returned to school, she was earning approximately \$795 net per month.

Timothy was born on June 19, 1958. He is employed as a skilled laborer with gross weekly earnings of approximately \$473.20. Timothy claimed to be disabled at the time of the hearing. In addition, Timothy filed for bankruptcy during the proceedings.

After a hearing on November 19, 1992, the district court entered an order on November 23, 1992, dissolving the parties' marriage. The court gave the parties joint legal custody of Matthew and placed him with Barbara. The district court ordered Timothy to pay child support of \$315 monthly. The district court divided the remaining assets

and ordered the parties to pay their own liabilities. Finally, the district court ordered Timothy to pay \$750 towards Barbara's attorney fees.

Timothy appeals. We affirm the decision of the district court as modified.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). We review without regard as to whether a party did or did not employ counsel. Metropolitan Jacobson Dev. Venture v. Board of Review, 476 N.W.2d 726, 729 (Iowa App. 1991). "If lay persons choose to proceed pro se, they do so at their own risk." Id.

Timothy alleges the district court erred in setting child support, setting visitation, dividing marital property, denying him alimony, awarding Barbara attorney fees, and not admitting several exhibits. We address each issue in turn.

Timothy first argues the child support award was incorrect. The dissolution decree does not reveal a determination of the net monthly income of each party nor application of the child support guidelines. The decree

also does not reveal any finding that application of the guidelines would be unjust or inappropriate. The amount set by the court does not follow the guidelines. Our review of the record and the affidavits of financial status of the parties allows us to make the necessary findings and apply the guidelines. Timothy made \$2034 gross monthly. Subtracting allowable deductions, his net monthly income was \$1471. Barbara made \$1029 gross monthly when she filed the petition for dissolution. Subtracting allowable deductions, her net monthly income was \$816. At the time of the hearing Barbara was only working every other Friday evening so she could attend school. This voluntary reduction in work gave her a net monthly income of approximately \$300. Both parents have an obligation to support their children in accordance with their ability to pay. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984). We can consider a party's capacity to earn in addition to current earnings. See In re Marriage of Wahlert, 400 N.W.2d 557, 560 (Iowa 1987); In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983). Barbara's income likely will increase when she completes her training to become a registered nurse. Applying the guidelines to net monthly incomes of \$1471 and \$816 sets Timothy's support obligation at 23.2 percent, which is \$341 monthly. We find nothing in the record to require an adjustment upward or downward from the amount calculated according to the guidelines. Nor does the record reveal any agreement

or stipulation of the parties concerning child support. We therefore modify the dissolution decree to reflect the amount calculated pursuant to the guidelines.

Timothy next argues the visitation set by the court is inadequate. We disagree. The decree sets "reasonable and liberal rights of visitation" and specifically delineates certain regular times for visitation. The decree specifically states the specific times are not set as a limit on visitation. Nothing in the decree or the record prohibits the parties from agreeing to much broader visitation than the basics set forth in the decree.

Next Timothy argues the district court divided the marital property inequitably. We disagree. The court gave the parties the personal property in their possession after two years of separation; their own bank accounts, insurance policies, and retirement accounts; and the car(s) each possessed. The court also made the parties responsible for their own debts. Nothing in the record suggests the property division was inequitable or contrary to any agreement between the parties.

Timothy next asserts the district court should have awarded him alimony because he is disabled. When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation

omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). Our application of the statutory factors to the circumstances of this case brings us to the same conclusion as the district court -- no award of alimony is appropriate.

Timothy argues the district court should not have awarded Barbara any attorney fees. We disagree. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). Timothy's monthly income is much greater than Barbara's. She has the physical care of Matthew and school debts. We conclude the district

court did not abuse its discretion in awarding Barbara \$750 in attorney fees.

Finally, Timothy argues the district court improperly excluded exhibits necessary for his case. Timothy had several documents relating to his claim he is disabled marked as exhibits during the dissolution proceeding. He sought to question Barbara concerning the documents to lay a foundation for their admission. The court sustained objections of opposing counsel to the questions. Timothy did not respond, make any offer of proof, or offer any of the exhibits to the court.

Ordinarily, the district court sitting in equity should not rule on evidentiary objections, but should receive the evidence or testimony subject to the objection to preserve a record for our de novo review. Leo v. Leo, 213 N.W.2d 495, 497 (Iowa 1973); In re Marriage of Anderson, 509 N.W.2d 138, 142 (Iowa App. 1993). Ruling on objections, however, does not necessarily require reversal on appeal. See Anderson, 509 N.W.2d at 142. Our review of the transcript of the hearing brings us to the same conclusions as the district court -- the testimony would have been hearsay and no proper foundation was laid for introducing the exhibits into evidence. Therefore, the district court properly excluded them. Consequently there is no evidence in the record to support Timothy's claim he is disabled.

We have carefully considered the issues raised by the parties on appeal. We conclude any arguments not

specifically discussed are either covered by this opinion or are without merit. We affirm the decision of the district court entirely, with the modification in the amount of child support.

AFFIRMED AS MODIFIED.

Huitink, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J.

I concur in part and dissent in part.

I would affirm.

The only issue on appeal was whether the trial court awarded too much child support.

The majority has increased child support awarded to Barbara by \$26 a month even though she did not cross-appeal.