IN THE COURT OF APPEALS OF IOWA

No. 6-408 / 95-1572

000312

IN RE THE MARRIAGE OF STEPHEN JOSEPH ROEPSCH AND KATHLEEN LYNN ROEPSCH

Upon the Petition of
STEPHEN JOSEPH ROEPSCH,

Petitioner-Appellee,

And Concerning
KATHLEEN LYNN ROEPSCH,

Respondent-Appellant.

FILED
FEB 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Allan L. Pearson, Judge.

Respondent appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Russel A. Neuwoehner of Lang & Neuwoehner, Dubuque, for appellant.

Joseph J. Bitter of Joseph J. Bitter Law Offices, Dubuque, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Respondent-appellant Kathleen Lynn Roepsch appeals challenging certain economic provisions of the decree dissolving her marriage to petitioner-appellee Stephen Joseph Roepsch. She contends (1) the district court did not use her correct earnings in fixing child support; (2) Stephen should be ordered to pay the children's medical insurance; (3) she should be awarded two of the three children's dependency deductions for tax purposes until only two children are eligible, at which time she should be awarded one exemption; (4) the trial court did not make an equitable division of the property; and (5) she should be awarded trial and appellate attorney fees and costs. We affirm as modified.

Stephen and Kathleen were married in 1988. They have three children, Colton, born in 1988; Rose, born in 1991; and Autumn, born in 1994. Stephen is twenty-nine years of age and Kathleen is twenty-seven.

The parties stipulated they would assume joint custody of the children and Kathleen would have physical care. They also agreed child support would be set pursuant to the Child Support Guidelines. The decree followed this stipulation on the issue of custody. The custody decision is not appealed.

The district court ordered Stephen to pay $470 per month in child support. In calculating the amount of support, the court used Kathleen's earning capacity as opposed to considering her actual earnings. Stephen was awarded the income tax exemptions for the two youngest children.

The trial court allocated property and debts. The court found the property division gave Stephen an additional $3581 and ordered Stephen to pay Kathleen $100 per month for twenty months as a property settlement. The court ordered each party to pay their own attorney fees and taxed the costs to both parties.

Kathleen subsequently filed a rule 179(b) motion claiming the court erred in using her earning capacity in fixing child support. She admits she could work full time, but because of the ages of the children, the expense of child care would take most of what she earned. She further argued the court should have ordered Stephen to pay for the children's medical insurance. The district court denied the motion. Kathleen has appealed.

We review a district court's modification of a dissolution decree de novo. Iowa R. App. P. 4; *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992); *Myers v. Myers*, 195 N.W.2d 113, 114 (Iowa 1972). We give weight to the trial court's findings of fact but they do not bind us. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988). Even though we engage in a de novo review, we will not disturb the trial court's conclusions unless there has been a failure to do equity. *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987).

We first address Kathleen's contentions the district court should have computed child support by applying her actual earnings rather than her earning capacity to the Child Support Guidelines. She contends because of the child care expenses she would be required to pay to work outside the home, to use her earning

capacity results in a substantial injustice to the children. Kathleen further contends the trial court did not properly allocate the income tax exemptions for the children.

The trial court fixed Stephen's net monthly income as defined by the Child Support Guidelines at $1350. Kathleen is a registered nurse. She obtained her education during the marriage. The district court found if she worked full time she would have a net monthly income as defined by the Child Support Guidelines of $1500. The trial court's computation of net income for the purpose of applying the Child Support Guidelines resulted in increasing both parties' incomes over what they had earned the previous year. We find the incomes fixed for both parties to be in the permissible range. Earning capacity can be used to fix child support. *See In re Marriage of Spears*, 529 N.W.2d 299, 303 (Iowa App. 1994). We find no reason to disagree with the income and tax exemption determinations made by the trial court.

Kathleen contends the decree should provide that Stephen carry medical insurance for the children through his employer. Stephen contends he carries the insurance. It appears the trial court considered Stephen would continue the insurance in making the child support calculations and it was an oversight in not specifically ordering that he continue to do so. We modify to provide that Stephen should carry the medical insurance currently available through his employer or medical insurance providing similar coverage.

Kathleen contends for a number of reasons the allocation of assets and debts made by the trial court is not correct. The question is whether it is equitable. *In re*

Marriage of McNerney, 417 N.W.2d 205, 209 (Iowa 1987). The division is nearly equal. We find no reason to modify the trial court's allocation of assets and liabilities.

Kathleen asks for trial and appellate attorney fees and costs. Trial courts have discretion in awarding attorney fees. *In re Marriage of Titterington*, 488 N.W.2d 176, 181 (Iowa App. 1992). The trial court did not abuse its discretion in not awarding attorney fees. We award no attorney fees on appeal. In doing so, we have considered the needs of the person requesting, the ability of the other person to pay, and the fact Stephen was required to defend the trial court's decision on appeal. *See In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). The costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.