

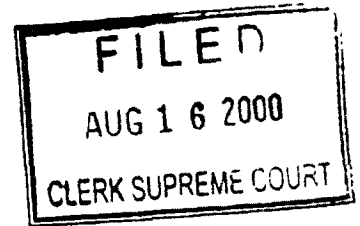
IN THE COURT OF APPEALS OF IOWA

No. 0-276 / 99-1558
Filed August 16, 2000

**IN RE THE MARRIAGE OF JON M. HARVEY
AND LORI A. HARVEY**

**Upon the Petition of
JON M. HARVEY,**
Petitioner-Appellant,

**And Concerning
LORI A. HARVEY,**
Respondent-Appellee.



Appeal from the Iowa District Court for Muscatine County, John A. Nahra,
Judge.

Jon Harvey appeals the child support and health insurance provisions of
the parties' dissolution decree. **AFFIRMED.**

Brett A. Nelson of Nelson, Keys & Keys, P.C., Rock Island, Illinois, for
appellant.

Robert DeKock of DeKock Law Office, P.C., Muscatine, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

99-1558

MILLER, J.

Jon Harvey appeals certain provisions of the parties' dissolution decree. He claims he was ordered to pay an excessive amount of child support. He also claims he should not be responsible for Lori Harvey's health insurance premiums for the next three years. Both parties seek attorney fees on appeal. We affirm the decision of the district court.

Jon and Lori were married in 1990. They have two children, Ashley, born in September 1991, and Alekzander, born in April 1994. During the marriage the parties lived in Muscatine.

Jon is employed by HON Industries. Shortly before the dissolution hearing in August 1999, Jon accepted a position as a rapid continuous improvement manager with HON in North Carolina. He will have annual income of \$50,400. Jon is sharing expenses with his live-in girlfriend. He has good health.

Lori is employed by Vision Center, P.C., as an business office assistant. In 1998, she earned \$15,044, and expected to earn about the same income in 1999. Lori suffers from hypothyroidism and allergy induced asthma. She is required to take medications for her conditions.

The parties went through bankruptcy in February 1999. Subsequently, they have few assets or debts.

The district court entered a dissolution decree for the parties on September 15, 1999. The parties have joint legal custody of the two minor children, with Lori having physical care. Based on Jon's income of \$50,400 and Lori's income of \$15,044, the court applied the child support guidelines and

ordered Jon to pay support of \$957.78 per month. In addition, Jon is required to pay \$141.29 per month for a period of three years in order to allow Lori to maintain health and dental insurance through his employer under the COBRA program. The court awarded Jon assets with a negative value of \$900. Lori was awarded assets worth \$4495. Jon was ordered to pay \$600 toward Lori's trial attorney fees. Jon appealed.

I. Scope of Review

Appellate review of this equitable proceeding is de novo. Iowa R. App. P. 4. The court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa App. 1993). The appellate court gives weight to the fact findings of the district court, especially in determining the credibility of witnesses, but is not bound by them. Iowa R. App. P. 14(f)(7).

II. Child Support

Jon contends the district court should have considered Lori's earning capacity instead of her actual earnings. Lori has a B.A. degree in accounting. Jon presented the testimony of Randy Dixon, who owns a temporary placement firm in Bettendorf. Dixon testified a person with Lori's education and experience could earn between seven to ten dollars per hour in the Quad Cities area. Nancy Nelson, vice president of human resources for HON, testified a person with Lori's qualifications could earn ten dollars to \$10.50 per hour with HON. If Lori worked full-time for ten dollars per hour she would have annual income of \$20,800.

In calculating child support, the first step is to determine the parents' current monthly net incomes from the most reliable evidence presented. *In re*

Marriage of Knickerbocker, 601 N.W.2d 48, 51 (Iowa 1999). This often requires the court to carefully consider all of the circumstances relating to the parents' incomes. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996).

In some circumstances, it is appropriate for us to consider earning capacity rather than actual earnings when applying the child support guidelines. See *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 child and to do justice between the parties. *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa App. 1995). We examine the employment history, present earnings, and reasons for failing to work a regular work week when assessing whether to use the earning capacity of a parent. *Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable*, 474 N.W.2d 581, 583 (Iowa App. 1991).

Lori presently earns \$8.23 per hour. Full-time employment with Vision Center is thirty-six hours per week. Her job allows her a flexible lunch hour. It also allows her to leave work early to attend the children's extracurricular activities, as long as her work is completed.

We find it to be very significant that Lori's present employment situation was agreed upon by the parties during the marriage because it gives her the flexibility to be primarily responsible for the children. Lori needs this flexibility more than ever because Jon plans to move to North Carolina, where he will no longer be available for day-to-day childcare. We determine the district court properly found it was not unreasonable for Lori to maintain her current

employment. The trial court appropriately used her actual earnings when applying the child support guidelines.

III. Health Insurance

Jon claims he should not be required to pay \$141.29 per month, for a period of three years, for Lori's health insurance under the COBRA program. He asserts the payments are actually a type of rehabilitative alimony. He then asserts the payments do not achieve the purpose of rehabilitative alimony because they are not designed to make Lori self-sufficient. Jon claims alimony is not warranted in this case.

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 Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997). Transitional or rehabilitative alimony may be awarded to allow a spouse a better chance to become secure in the job market. See *In re Marriage of Smith*, 573 N.W.2d 924, 927 (Iowa 1998).

Given the property division in this case, requiring Jon to pay Lori's health insurance premiums for three years can only be justified as rehabilitative or transitional spousal support. Lori has health problems and requires prescription medications. Jon's income exceeds that of Lori, and he has the ability to pay her health insurance premiums. In addition, Lori is responsible for the children's physical care with little assistance from Jon, who will be in North Carolina. See Iowa Code § 598.21(3)(e) (1999). For all of these reasons, we find it is equitable to have Jon pay Lori's health insurance premiums for a period of three years.

IV. Attorney Fees

Both parties seek attorney fees for this appeal. We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998). We determine Jon should pay \$1000 toward Lori's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Jon.

AFFIRMED.