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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-458 / 92-631

IN RE THE MARRIAGE OF DAVID L. REVES AND NATALIE L. REVES

Upon the Petition of
DAVID L. REVES,

Appellee/Cross-Appellant,

And Concerning
NATALIE L. REVES,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dallas County, Robert A. Hutchison, Judge.

The wife appeals the economic and custodial provisions of the parties' dissolution decree, and the husband cross-appeals. **AFFIRMED AS MODIFIED.**

Karen K. Emerson, Guthrie Center, for appellant.

Bryan R. Jenning of Reich Law Firm, Adel, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

The wife appeals the economic and custodial provisions of the parties' dissolution decree. She contends the district court erred in (1) placing physical custody of the children with the husband; (2) failing to grant a midweek overnight visit; and (3) failing to award her more than four years of rehabilitative alimony. The wife seeks the marital residence in the event she is awarded physical custody of the children. She also requests her trial attorney fees. The husband cross-appeals, contending the district court should have considered the wife's earning capacity in its determination of child support and alimony. In addition, he argues the court erred in including his receipt of a corporate director's fee in calculating his income. The husband seeks attorney fees and costs on appeal.

Natalie and David Reves were married on October 7, 1978. The parties have three children: Nicole, born April 2, 1980; Jonathan, born July 10, 1982; and Richard, born May 20, 1984. Natalie is currently thirty-three years of age, and David is forty-three.

Natalie quit high school during her senior year but later obtained her GED. During the marriage Natalie was the primary caretaker of the children, and she occasionally worked part-time jobs. In 1991 Natalie returned to school at a local community college, and she may enroll in a four-year college in the future. She has obtained a

work-study position and nets approximately $125 per month.

David completed three years of college but did not obtain his degree. He is currently employed by the State of Iowa. Prior to the dissolution proceedings, David's position required him to travel extensively. His current position, however, requires little travel. He earns approximately $2,450 per month from this position, and he is paid a corporate director's fee of approximately $1,200 per year from a company owned by his parents.

On June 3, 1991, David filed this petition for dissolution. The parties unsuccessfully attempted reconciliation. During the dissolution hearing Natalie made serious allegations of mental and physical abuse, claiming David forced sex upon her. Natalie alleged David abused alcohol, and David alleged Natalie frequented bars, staying until closing. An in-home evaluation conducted by an employee of Lutheran Social Services recommended that physical care of the children be placed with David subject to generous visitation. Natalie objected to the report claiming the preparer failed to give credence to her allegations of abuse and claiming the preparer penalized her for returning to school.

On March 18, 1992, the district court filed its findings of fact and conclusions of law. The primary issue before the court was the custody of the children. The court concluded Natalie's allegations of David's emotional and physical abuse were unfounded. The court found both

parents to be appropriate and capable primary caretakers, but the court found Natalie would have a difficult time supporting the children, even with child support. Based upon these findings, the district court awarded primary physical custody of the children to David subject to visitation.

In addition, the court awarded Natalie rehabilitative alimony for four years in the amount of $500 per month and awarded David the homestead, his IPERS account, and his deferred compensation plan. The court awarded each party personal property and awarded Natalie the sum of $24,500 as a property settlement, payable over a period of fifteen years in monthly installments. In determining child support, the district court included Natalie's $500-per-month alimony and assumed that Natalie's monthly income would not exceed $125 until she completed school. The district court found David's net income to be $2,550 per month, including his director's fee.

Based upon these findings, the district court ordered Natalie to pay child support in the amount of $111.87 per month. The district court also ordered the parties to pay their own attorney fees. Natalie had requested a midweek overnight visit, but the court decided a midweek visit without an overnight stay was more appropriate. Natalie appeals, and David cross-appeals.

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).

In child custody cases the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1991), in Weidner, 338 N.W.2d at 356, and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

After thoroughly reviewing the present record in light of these guiding principles, we conclude the district court properly awarded joint legal custody of the children with David receiving primary physical care. We agree with the district court that both parties are suitable parents, but

we determine David to be better equipped to raise the children.

Next Natalie requests that her one week-night visit per week, which was granted as a part of her visitation with the children, be extended into an overnight visit. The current arrangement includes visitation with the children one week-night each week commencing when the children finish school and ending at 8 p.m. We believe the current visitation schedule is suitable to the best interests of the children. Accordingly, we deny Natalie's request to disturb the decree on the issue of midweek visitation.

Similarly, we conclude the district court's alimony award of $500 per month for forty-eight months is appropriate in this case. 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) (1991). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). Natalie is currently a part-time student at a community college, and her goal is to achieve a degree from a four-year college. The district court's award of rehabilitative alimony will enable Natalie to acquire the requisite training and education needed to reenter the job market and become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

On cross-appeal David contends the court incorrectly included his receipt of a $1,200 corporate director's fee in the determination of his net monthly income for the purpose of determining the child support and spousal support awards. We disagree. This fee is included as income on David's financial affidavit, and we find the fee to be more indicative of bonus income rather than overtime income. However, regardless of whether the fee is characterized as bonus income or overtime income, the district court properly included the income in the determination of David's net monthly income for the purpose of determining the support awards.

In In re Marriage of Lalone, 469 N.W.2d 695 (Iowa 1991), the court held the trial court properly included the husband's bonus income in determining the child support award. Id. at 698. David contends to do so in this case is unfair. We disagree. David's corporate director's fee is not uncertain or speculative; he has received such a fee from his parents' small family corporation for several years. The amount of the fee has increased from $800 per year to $1,200 per year in recent years. Payment of the fee is entirely in the discretion of the CEO of the corporation--David's father. A pattern of David's regular receipt of the director's fee is apparent.

We believe the Lalone court's analysis applies with equal force to the question of whether bonus income should be considered in establishing net monthly income for the

purpose of determining an award of spousal support. Nothing in the record indicates David's bonus income from the director's fee will decrease in the future. To the contrary, the record indicates David will continue to receive the bonus income.

Similarly, in In re Marriage of Brown, No. 91-182, slip op. (Iowa July 22, 1992), the court addressed the issue of whether overtime income should be considered in establishing net monthly income for the purposes of determining the proper amount of child support under the child support guidelines. The court stated, "[o]vertime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes." Id. at 5. Applying the Brown court's analysis to the question of spousal support, we hold that overtime income should be considered in establishing net monthly income for the purpose of determining an award of spousal support as well.

David also argues the district court should have considered Natalie's earning capacity instead of her current income in its determination of the support awards. We disagree. We find the district court reasonably concluded that Natalie's net monthly income will probably not exceed its current amount of $125 per month until she has completed her education. We believe the more logical long-range solution is for Natalie to concentrate on the completion of her degree instead of on increased employment

at this time. We find this approach to be more conducive to the goal of Natalie becoming self-supporting.

Therefore, we conclude the district court correctly determined David's net monthly income to be $2,550 and Natalie's net monthly income to be $625. Application of the child support guidelines reveals Natalie's child support obligation is $147.50 per month ($625 x .236) rather than $111.87 per month as previously determined by the district court. Aside from this upward adjustment in Natalie's child support obligation, we affirm the district court's support awards.

Finally, both parties seek attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

We affirm the district court's denial of Natalie's request for trial attorney fees, and we deny David's request for attorney fees on appeal. Each party shall pay one-half the costs of this appeal.

AFFIRMED AS MODIFIED.