IN THE COURT OF APPEALS OF IOWA

FILED
NOV 27 1995
CLERK SUPREME COURT

No. 5-591 / 94-2062

IN RE THE MARRIAGE OF LORI F. COOLICAN AND JON P. COOLICAN

Upon the Petition of
LORI F. COOLICAN,

Appellee/Cross-Appellant,

And Concerning
JON P. COOLICAN,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

Jon Coolican appeals various economic provisions of the parties' dissolution decree, and Lori Coolican cross-appeals. **AFFIRMED.**

Donald L. Carr and Brent A. Cashatt of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellant.

Kristy B. Arzberger of Arzberger Law Offices, Mason City, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

HUITINK, J.

Jon Coolican appeals various economic provisions of the decree dissolving his marriage to Lori Coolican. We affirm.

Jon and Lori Coolican were married in 1982 and had two children. Brittany, born December 25, 1986, and Erica, born, March 11, 1994. The parties separated in August 1993 when Lori was two months pregnant. Lori filed a petition for dissolution in May 1994.

Jon has worked for the Chicago Northwestern Railroad since 1973. Currently he "run[s] a steel gang" and works a substantial number of overtime hours. His base pay is $2817 per month. Lori worked for Unisys from 1983 until 1990 when she was laid off. She currently offers in-home day care services and earns $303 per month. Lori also has a cosmetology degree but allowed her license to expire in 1983 and has not maintained continuing education requirements.

Following a hearing, the district court awarded Jon marital assets it valued at $19,625 and ordered him to pay the marital debts. Lori was awarded assets the court valued at $14,533 and rehabilitative alimony of $300 per month for two years. She was also awarded 27.5 percent of Jon's Tier 2 railroad retirement benefits as they stood in August 1993. The court averaged Jon's 1993 gross income with a projected 1994 income and concluded his net monthly income for purposes of child support is $2347.27. Lori's actual net monthly income is $255.13. Jon was therefore ordered to

pay $840 per month in child support pursuant to the child support guidelines. Jon was awarded the dependency exemptions for tax purposes. Finally, Jon was ordered to pay $750 toward Lori's attorney fees.

Jon appeals the economic provisions of the decree, and Lori cross-appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Jon first asserts the district court erred in determining his child support obligation. He contends the district court incorrectly set his income at $38,902 for purposes of applying the child support guidelines. He claims this figure is unreasonably high because it assumes Jon will receive overtime pay when such compensation is, in fact, speculative.

It is well established that parents have a legal obligation to support their children. *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. *In re Marriage of Bornstein*, 359 N.W.2d 500, 504 (Iowa App. 1984). Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. *In re Marriage of Close*, 487 N.W.2d 852,

854 (Iowa App. 1991). If, however, overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the child support guidelines may be appropriate. *Id.* Where a parent's income is subject to fluctuation, the court may average the income over a reasonable period of time in applying the child support guidelines. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991).

The district court determined Jon's average income to be $38,902 and applied the child support guidelines accordingly. The court arrived at this figure by averaging Jon's 1993 income of $34,464 and his 1994 projected income of $43,340. The 1994 projection was based on Jon's income to the date of trial, plus his projected base pay and unemployment compensation through year's end.

We find the trial court did not err in its determination of Jon's income. In projecting Jon's 1994 income, the trial court added Jon's base salary and unemployment compensation to his actual income established to the date of trial. This figure did not include any speculative overtime and accounted for the possibility that Jon would be laid off in the winter months. Accordingly, we conclude this projection was not speculative and accurately predicted Jon's earnings for the remainder of the year. We also find the trial judge was correct in averaging Jon's 1993 and 1994 incomes for purposes of applying the guidelines. Not only are these figures most recent, they are also reflective of Jon's earnings throughout the last several years. The trial court did not err in setting Jon's income at $38,902.

The trial court was also correct in setting Lori's income at $255.13 per month. This figure is Lori's actual monthly income as a day care provider. Jon contends the district court should have applied the guidelines using Lori's earning capacity as a cosmetologist rather than her actual earnings. We disagree. Before using earning capacity rather than actual earnings, a court must make a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the children and to do justice between the parties. *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa App. 1992). Here, we determine no such injustice would result from using Lori's actual earnings. The district court correctly set Lori's monthly income at $255.13. Accordingly, we find the trial court correctly determined Jon's child support obligation to be $840 per month.

Jon also contends the district court erred in awarding rehabilitative alimony to Lori. We disagree. Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). We find the amount and duration of the award reasonably necessary to accomplish these objectives, particularly in view of Lori's primary care obligations. The district court did not err in awarding rehabilitative alimony.

Jon also asserts the district court erred in dividing the property and debts between the parties. The district court's division resulted in Jon and Lori receiving

$19,625 and $14,533 of this property respectively. Jon claims this division failed to give effect to the cost of disposition of the marital homestead. He also contends the court erred in assessing the parties' marital debts, which exceed $8000 to him. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). The parties' earning capacity should be considered in reviewing the equities of the economic provisions of a dissolution. *In re Marriage of Bethke*, 484 N.W.2d 604, 607 (Iowa App. 1992).

After reviewing the record, we conclude the district court's property division was equitable. Jon has a significantly higher earning capacity than Lori. He was also awarded $5000 more property. We accordingly affirm on this issue.

Finally, Jon asserts the district court erred in awarding $750 in attorney fees to Lori. 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 agree with the district court's assessment of the parties' financial resources and accordingly affirm the district court's decision as to trial attorney fees. We further determine the parties' financial positions establish that Jon should assist Lori in the cost of defending this appeal. We award Lori an additional $750 in appellate attorney fees.

On cross-appeal Lori argues the trial court erred in dividing the property of the parties and in the amount of attorney fees awarded to her. We find Lori's cross-appeal was untimely and, as a result, decline to consider these arguments on appeal. *See Carpenter v. Ruperto*, 315 N.W.2d 782, 786 (Iowa 1982).

In summary, we conclude the district court did not err in setting Jon's child support obligation at $840 per month and in awarding rehabilitative alimony of $300 per month for two years. We also find the district court correctly divided the parties' property and debts. Finally, we conclude the district court was correct in awarding Lori $750 in attorney fees.

We have carefully considered all issues raised by both parties and find them to be either covered by this opinion or without merit. The district court is affirmed in its entirety.

AFFIRMED.