IN THE COURT OF APPEALS OF IOWA

No. 8-711 / 97-2244

IN RE THE MARRIAGE OF ANN L. BISHOP AND JOHN W. BISHOP

Upon the Petition of ANN L. BISHOP,

Petitioner-Appellee,

And Concerning JOHN W. BISHOP,

Respondent-Appellant.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Respondent appeals from various provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

Wayne M. Newport, Davenport, for appellant.

Dennis D. Jasper, Bettendorf, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Respondent John Bishop appeals from certain provisions of the decree dissolving his marriage to petitioner Ann Bishop. John maintains the district court erred in: (1) distributing seventy-eight percent of the residence equity to Ann and only twenty-two percent to John; (2) awarding child support in the amount of $93 per week; and (3) ordering visitation to be determined by mediation. John and Ann both request appellate attorney fees. We affirm as modified and remand with directions.

John and Ann were married in June 1992 after meeting through a newspaper dating service in April 1991. John and Ann have one child together, Katelyn, born April 12, 1994.

Ann, born in June 1957, has been employed as an E.S.L. teacher in Davenport since 1984. John, born in May 1945, has been unemployed since November 1994. Prior to November 1994, John worked as a sales representative. Between 1990 and 1994, John had been fired from at least four jobs; he had been employed by Federal Express, Honeywell, Cummins-Allison, and Xerox during this time period. He was also the subject of an unemployment compensation fraud investigation, which was resolved when he repaid the money he had received.

John's job applications and resumes contain misrepresentations and false information about his employment and educational history. For example, John stated he had attended one year of marketing courses at St. Ambrose (Xerox application) or the University of Iowa (Honeywell application); neither school has any record of his attendance. John has also failed to return phone calls, and fabricated excuses to avoid

meetings regarding problems at work. At trial, John indicated he wanted to be a "homemaker" and live off lifetime alimony, child support, and savings. He stated he was looking for employment, but at age fifty-two it was unlikely anyone would hire him.

At the time of trial, John and Ann were continuing to have difficulty communicating about visitation. John repeatedly sent notes to Ann requesting her to supply all of Katelyn's needs for diapers, food, clothing, and toys while she was in John's care. John has also been inflexible about varying from the visitation schedule, even by a matter of a few minutes. John and Ann also seem to have had difficulty communicating about Katelyn's needs, such as when she should eat and whether or not she should attend daycare. At trial, both John and Ann testified they would participate in mediation.

The district court found John made little, if any, economic, homemaking, or child care contributions to the marriage after October 1994. The district court further found John is able to obtain employment with a gross income of at least $30,000 per year.

I. STANDARD OF REVIEW. Our review of this equitable action is de novo. Iowa R. App. P. 4. We give the trial court's factual findings weight in considering the credibility of witnesses, although we are not bound by them. *In re Marriage of Clinton*, 579 N.W.2d 835, 838 (Iowa App. 1998); *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. DISTRIBUTION OF THE RESIDENCE EQUITY. The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determines what is fair and equitable. *Id.*

At first glance, the distribution of the residence equity between the parties appears unfair to John. The district court's rationale was that the marital residence was not purchased with any of the parties' assets. The original purchase price of the residence was $90,000. Ann's parents provided $40,000 for the downpayment and loaned the $50,000 balance to the parties at six percent interest. It is clear the only premarital money that went into the house was that of Ann's. The joint efforts of the parties contributed little to the equity.

Ann's financial, homemaking, and child care contributions to the marriage far outweigh John's contributions. Ann was the sole wage earner throughout much of the marriage. Katelyn attended daycare and Ann took care of Katelyn and much of the housework despite John's availability to be a "homemaker." The district court properly considered this disparity in dividing the residence equity. *See In re Marriage of Kleist*, 538 N.W.2d 273, 278 (Iowa 1995). We find this division equitable and within the permissible range of the evidence.

III. CHILD SUPPORT. Earning capacity may be used when substantial injustice would result from the use of actual earnings or when adjustments would be necessary to do justice between the parties. *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa App. 1996). 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. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). After review of the record, we find substantial injustice would result if John's actual earnings were used to calculate his child support obligation. John's unemployment is a result of his own misdeeds and insubordination. Furthermore, it appears John had little, if any, interest in or intent to obtain employment. Finally, we find $93 per week is not too much for John to pay under the circumstances.

IV. VISITATION. In its final decree, the district court should not have awarded John reasonable visitation as determined by mediation. Pursuant to Iowa Code section 598.7A (1997), the district court may order the parties to participate in mediation any time *prior* to the entering of a final order or the granting of a final decree. It is contemplated the results of this mediation would be available to the district court before the final decree is entered. The court may then make appropriate orders to fit the particular circumstances of the case. That was not done in this case. The resolution of the visitation dispute was left unsettled and was not specifically decided upon by the district court. The visitation provision of the decree is remanded for a hearing and entry of a visitation schedule.

V. ATTORNEY FEES. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Under the circumstances of this appeal, we do not award attorney fees to either party.

We affirm the decision of the district court with the exception of the visitation provisions. We therefore modify to remand for hearing on this issue and the entry of a specific order concerning visitation. We do not retain jurisdiction.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.