IN THE COURT OF APPEALS OF IOWA

No. 0-033 / 99-0452
Filed June 14, 2000

FILED
JUN 14 2000
CLERK SUPREME COURT

IN RE THE MARRIAGE OF ALLISON M. OLP AND TODD C. OLP

Upon the Petition of
ALLISON M. OLP,
Petitioner-Appellee,

And Concerning
TODD C. OLP,
Respondent-Appellant.

Appeal from the Iowa District Court for Winnebago County, Gilbert K. Bovard, Judge.

The respondent appeals various provisions of the parties' dissolution decree. Respondent contends the district court erred in: (1) failing to consider petitioner's full earning capacity when figuring child support; (2) requiring him to provide documentation of health insurance four times per year; (3) setting a visitation schedule; (4) failing to order transportation costs associated with visitation be shared equally; (5) awarding petitioner alimony; (6) failing to require petitioner to provide documentation regarding her educational progress and earning information; (7) failing to award him the tax exemption for their minor child as long as he remains current in his child support obligation accrued before and after the date of trial; and (8) ordering him to pay petitioner's attorney fees. Petitioner requests an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellant.

Jay M. Shriver and Kristen N. Ollenburg of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City, for appellee.

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

MILLER, J.

Respondent/Appellant Todd Olp appeals various provisions of a dissolution decree entered by the district court. Petitioner/Appellee Allison Olp requests appellate attorney fees. We affirm as modified.

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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).

Todd and Allison were married in Jamaica in March 1995, and separated in January 1997. There is one child of the marriage, Sydney, born in August 1995. Todd suffers from bipolar affective disorder, but is able to control his illness with appropriate medication. At the time of trial, Todd resided in California due to his employment, and Allison had recently returned to post-secondary school full time. Further facts as necessary will be detailed below.

Todd's Appeal

On appeal, Todd challenges various provisions of the trial court's decree. Specifically, he contends the trial court erred: 1) in computing his child support obligation on Allison's actual earnings, instead of earning capacity; 2) in requiring him to provide documentation of health insurance coverage four times per year; 3) in setting a visitation schedule; 4) in not requiring the parties to share the cost of transportation for Sydney's visits; 5) in awarding Allison alimony; 6) in not requiring Allison to provide documentation as to her educational progress and current income; 7) in not allowing him to claim Sydney as a tax exemption

provided he remains current in his child support obligation; and 8) in ordering him to pay part of Allison's attorney fees.

Use of Actual Earnings In Computing Child Support

Prior to trial, Allison voluntarily reduced her income by returning to school and working only half-time in order to make higher wages in the future. Both parents have a legal obligation to support their children, not necessarily equally, but in accordance with his or her ability to pay. *In re Marriage of Reedholm*, 497 N.W.2d 477, 479 (Iowa App. 1993). When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines. *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. *Id.* 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. *Id.*

The trial court specifically found that Allison's decision to enhance her education is appropriate, and that no substantial injustice would result or adjustments be necessary to provide for the needs of the child and to do justice between the parties if her actual earnings were used. We agree. When working full time, Allison made $1,400 per month. Allison has made a decision to invest in education to make a better life for herself and her daughter. She had earlier completed one year of college and to complete a bachelors degree will take her

only three years before she returns to full-time employment. She now earns $700 per month. Todd pays only about twenty-one dollars per month more than if $1,400 were used as Allison's income. In all likelihood Allison's increased earning capacity and income which will result from acquiring further education will mean that after about three years Todd's child support obligation will be lower than it would be if Allison had not acquired further education.

Documentation of Health Care Coverage for Sydney

Todd complains the trial court should not have ordered him to provide Allison with proof of health insurance coverage for Sydney four times per year. He argues the frequency of action this requires on his part makes oversight on his part highly likely. He does not dispute the trial court's requirement that he provide Sydney's health insurance coverage. For two reasons we reject Todd's complaint. First, the dissolution decree in fact requires him to provide proof of coverage only twice per year, not four times per year. Second, Todd's employment history reflects a history of frequent relocation and employment changes. The responsibility of providing documentation of health insurance coverage twice per year cannot be seen as burdensome given Todd's work history and Sydney's needs.

Visitation

The trial court ordered if Todd obtains employment within 150 miles of Allison and Sydney, then the parties "may exercise visitation" by meeting each other at an intermediate location and sharing expenses, as was done during a period of separation when Todd lived in Green Bay, Wisconsin and Allison lived in the Mason City area. The trial court further ordered that during times Todd

demonstrated a record of stability of medication and good emotional health, extended visitation not to exceed three consecutive weeks and a total of six weeks would be appropriate, and that Todd be responsible for transportation costs until Allison obtains gainful employment.

Todd contends on appeal that the visitation "schedule" ordered by the trial court is unclear and does not ensure him summer visitation. He further contends that his summer visitation should be for a continuous period of weeks as the parties cannot, either individually or together, afford to provide transportation from Iowa to California twice per summer.

In determining visitation rights, the governing consideration is the best interest of the child. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). Liberal visitation rights are in the best interest of the child. *Id.* Iowa Code section 598.41(1) (1997) provides in pertinent part:

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. . . .

The district court found, and we agree, that the parties have been cooperative and recognized Sydney's need to associate with both parents. The district court further found, and we agree, that both parties are in a transitional period in regards to career and geographic location. Sydney was three and a half years old at the time of trial. Given these facts, we cannot agree with Todd that a fixed, non-flexible visitation schedule would be appropriate. If such a schedule as Todd is requesting were ordered, it would most likely need modification upon Sydney entering school and the parties obtaining new

employment in new geographic locations. However, under the district court's flexible approach, which greatly relies upon the parties continued cooperation in providing for Sydney's need for maximum contact with each parent, the need for the parties to return to court is greatly reduced. *See, e.g., In re Marriage of Hunt*, 476 N.W.2d at 103 (finding in modification action greater distance between parents than at time of original decree necessitated modification of visitation schedule to one weekend per month and one month per summer). The flexibility found in the trial court's order, along with Todd and Allison's mutual cooperation, must be commended.

We find little or no merit to Todd's contentions. The trial court's visitation provisions may be somewhat flexible, but they are not "unclear." While the parties continue to reside at a substantial distance from each other, Todd is to have up to six weeks of visitation with Sydney, no more than three weeks of which are to be consecutive. Nothing in the decree suggests or requires that all Todd's visitation be in the summer. However, the trial court's requirement that he notify Allison by June 1 of each year in which he wishes to exercise extended summer visitation indicates an intent he be able to exercise some or all of the visitation in the summer. His request that we order that summer visitation be for a continuous period of weeks implies the trial court's decree does not allow for a continuous period of weeks in the summer. To the contrary, the decree allows up to three continuous weeks. We agree with the trial court's view, implicit in its visitation provisions, that for the foreseeable future Sydney's time away from home and the parent with responsibility for her physical care should not exceed three weeks at a time.

Transportation Costs

Todd contends the trial court erred in placing the responsibility for paying for Sydney's transportation to California for visitation entirely upon his shoulders during the time Allison completes her schooling. Given Todd's relatively superior financial position and the fact it was his relocation, and not Allison's, that necessitates Sydney's extensive travel, we find the trial court's order in this matter to be fair and equitable.

Alimony

The trial court awarded Allison rehabilitative alimony in the amount of $250 per month for thirty-six months, or until she obtains her degree or terminates her schooling, whichever comes first. Todd contends the trial court erred in awarding Allison rehabilitative alimony in light of his limited income, high cost of living, and child support obligation.

Factors for the court's consideration in determining whether or not an order for spousal support is appropriate, and, if so, the amount and duration of an award, are set forth in Iowa Code section 598.21(3). *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Any form of alimony is discretionary with the court. *Id.* The trial court is vested with some discretion in considering the ability to pay. *Mitvalsky v. Mitvalsky*, 191 Iowa 8, 10, 179 N.W. 520, 521 (1920) Alimony is not an absolute right; an award depends on the circumstances of ear particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa A 1998).

Rehabilitative alimony was conceived as a way of supportir economically dependent spouse through a limited period of re-educ

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, 63 (Iowa 1989). Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses. *Id.* at 64.

We agree with the trial court's award of rehabilitative alimony to Allison. At the time of the parties' marriage, Todd had obtained his college decree, while Allison had completed only one year of college before becoming pregnant, marrying Todd, and caring for their new-born baby. During the parties' marriage Allison did not work outside the home until November 1997, well after the parties separated. When compared with Todd's ability to currently earn more and his superior educational background, Allison's need to improve herself through education in order to better support herself and her daughter in the future warrants the rehabilitative alimony award of $250 per month. Upon completion of her degree, Allison stands to increase her earnings, a fact that strengthens her need for the alimony. *See In re Marriage of Peterson*, 491 N.W.2d 535, 538 (Iowa App. 1992) (holding rehabilitative alimony appropriate where spouse re-enters school to increase earning potential). We find the court's award of modest monthly support, terminable after three years, equitable under the circumstances.

Documentation of Allison's Educational Progress and Income Information

Todd requests on appeal that Allison be required to provide him with 1) education documentation, including proof of attendance, course grades, and

financial aid information; and 2) her annual federal and state income tax returns, including a mid-year report. However, we do not find in the record where Todd requested such an order in pleadings, evidence or argument. Nor do we find such a request was made by a motion pursuant to Iowa rule of civil procedure 179(b). *See Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994) (holding a 179(b) motion is necessary to preserve error when the court fails to resolve a matter properly submitted). While we review this equitable action de novo, our duty is limited to adjudicating anew rights on issues properly presented. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995). This claimed error appears to be an afterthought on appeal. The trial court did not err in not ordering relief not requested of it. Matters not raised in the trial court will not be considered on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa App. 1994). We therefore affirm this portion of the dissolution order.

Tax Exemption for Sydney

The trial court allowed Todd to claim the income tax dependency exemption for Sydney for any calendar year in which he is fully paid and current in his child support obligation. As of April 15, 1998, Todd was in arrears of $2,771.12 in child support; and was ordered to pay $50 per month against the arrearage in addition to current child support in a separate administrative action. He apparently had not paid off the arrearage as of the February 1999 trial date.

Todd contends on appeal that he should be allowed to claim Sydney as a dependent provided he pays his current child support obligation and $50 per month toward his child support arrearage. He contends the arrearage occurred at a time he was unable to work due to his mental illness. However, the record

discloses that as long as Todd takes his medication regularly, he is able to work. Therefore, his child support arrearage was actually caused by his failure to take his prescribed medication.

To follow Todd's suggestion would be somewhat contrary to public policy and to Sydney's welfare. The trial court gave Todd an incentive to pay as soon as possible what he rightfully owes, and we will not take away this incentive. We do note that while Allison attends school and has low income as a result of working part-time it may well cost her nothing to allow Todd to claim Sydney as a dependent, and may save Todd significant amounts of income taxes if he is allowed to claim Sydney. Whenever such is the case, Allison shall take the steps necessary to allow Todd to claim Sydney, provided Todd has paid all current support for the year in question, including the $50 per month payments toward the arrearage.

Trial Attorney Fees

The trial court ordered Todd to pay $750 of Allison's $2,552 attorney fee. Todd contends on appeal he is unable to pay her attorney fees, and that because the record discloses that Allison has paid the full attorney fee, she obviously has the ability to pay them.

An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli,* 570 N.W.2d 761, 765 (Iowa 1997). The court should make an attorney fee award which is fair and reasonable in light of the parties' financial positions. *In re Marriage of Grady-Woods,* 577 N.W.2d 851, 854 (Iowa App. 1998).

We cannot conclude from the fact Allison has paid her attorney fees that no award of fees is needed or appropriate. She may have been forced to sacrifice her and Sydney's personal needs to meet her financial obligation to her attorney. We find, as did the trial court, that given the respective financial positions of the parties Todd should pay $750 of Allison's attorney fees. We therefore affirm that portion of the decree.

Allison's Request for Appellate Attorney Fees

Allison asks for attorney fees for this appeal. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). 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). Allison was obligated to defend the trial court's decision on appeal, she did so successfully (with the exception of the one minor modification we make), and Todd is not without ability to contribute something to those fees. We award Allison $750 in appellate attorney fees.

Summary

We modify the trial court's ruling to allow Todd to claim the income tax dependency exemption for Sydney for those years for which he has paid all current support, including the $50 per month payments against his child support arrearage, and allowing him to claim Sydney does not cause Allison to pay any income taxes. In all other respects we affirm the trial court's ruling. We award Allison $750 appellate attorney fees.

AFFIRMED AS MODIFIED.