IN THE COURT OF APPEALS OF IOWA

No. 1-04 / 99-1116
Filed April 27, 2001

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF ARTHUR JOHN VANDER ZEE AND MARY JOHANNA MILLER VANDER ZEE

Upon the Petition of
ARTHUR JOHN VANDER ZEE,
Petitioner-Appellant/Cross-Appellee,

And Concerning
MARY JOHANNA MILLER VANDER ZEE,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

The petitioner appeals, and respondent cross-appeals, from the child custody and economic provisions of the district court's dissolution decree. **AFFIRMED AS MODIFIED.**

Matthew J. Brandes of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellant.

Daniel L. Bray, Lori L. Klockau, and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

According to Lord Chesterfield, "The only solid and lasting peace between a man and his wife is doubtless a separation." John and Johanna Vander Zee's dissolution of marriage has brought them little peace. John appeals, and Johanna cross-appeals, many of the dissolution decree's custodial and economic provisions. We affirm as modified.

I. Background Facts & Proceedings.

John and Johanna Vander Zee were married in May 1985. They have three daughters: Catherine (born February 1988), Christina (born January 1990), and Emily (born March 1992). John adopted Johanna's son from her first marriage (Daniel, born August 1976).

John is a forty-four-year-old plastic surgeon. He graduated from medical school in 1984 and completed his second residency in 1992. His Cedar Rapids surgery practice yields roughly $310,000 in gross income per year. The district court described him as "strong-willed, assertive, controlling, very reserved in social situations, temperamental and, on occasion, harsh and vocal."

Johanna is a forty-eight-year-old who was employed as an occupational therapist prior to the parties' marriage. She has not been employed full-time since the birth of the parties' eldest daughter; her earning capacity is, according to the district court, between $40,000 and $50,000 a year. The district court described her as "tractable, somewhat reserved, friendly, insecure, temperamental, and sophisticated."

Johanna's alcohol use has at times negatively affected her demeanor and her care of the parties' children. Particularly troubling is a June 1997 incident that led to operating-while-intoxicated and child-endangerment charges against her. Since that incident, however, Johanna has received treatment for her alcohol dependence and apparently has abstained from alcohol.

John and Johanna's fourteen-year marriage was dissolved in June 1999. Pursuant to the dissolution decree, they have joint legal custody of their daughters with Johanna having primary physical care. John was ordered to pay $3000 in child support per month and $2500 in alimony per month for ten years. John received roughly $358,000 of the parties' net worth while Johanna received roughly $267,000. John was ordered to pay Johanna a $50,000 property settlement and contribute $10,000 towards her attorney fees.

John appeals, and Johanna cross-appeals. They contest all of the aforementioned provisions of the dissolution decree.

II. Scope of Review.

In an equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa Ct. App. 1993). We have a duty to examine the entire record. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by those findings. *Id.*

III. Primary Physical Care.

In child custody cases, our first and governing consideration is the best interests of the children. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998). We must select a primary caregiver who can minister more

effectively to the long-range best interests of each child. *See In re Marriage of Kunkel,* 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We consider the factors listed in section 598.41(3). *See also In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974).

John and Johanna, through their trial testimony, witnesses, exhibits, and briefs, have portrayed each other as rather contemptible individuals. If John is to be believed, Johanna is a dishonest, manipulative, psychopathic, recovering alcoholic who is teetering on the brink of a relapse. Conversely, if Johanna is to be believed, John is a dishonest, manipulative, domineering, wife-abuser who has been an absentee father for much of their daughters' lives.

Given the manner in which John and Johanna have presented their respective positions in this custody battle, the input of more objective observers is particularly important. Accordingly, we turn first to the conclusions reached by the court-appointed "custody evaluator," Kathleen Ruyle. Ruyle met with John, Johanna, and their three daughters from October 1997 to December 1997 and conducted various interviews and tests with them. Ruyle stated both John and Johanna "seemed equally strong in the conveying of their love for their children," "have reasonable expectations and limits for their children," "enjoy spending time with their children," and "appeared to be warmly connected to their children." She also stated, however, "John may be controlling, and even manipulative," and "[she] did not see Johanna as being either honest or open." Additionally, she voiced repeated concerns regarding Johanna's alcoholism. Ruyle recommended John have primary physical care of the parties' daughters.

A second objective observer in this case is, of course, the district court itself. During the two-week trial, the district court had an opportunity to hear all of the parties' witnesses and to asses the witnesses' credibility.[1] Afterwards the district court stated, "At such time as the attacks on each other and the triangulation stops, each parent would be a suitable custodian for the children." The district court also stated the following:

> While both parents have provided for the needs of the children for the past couple of years, they are also the ones who have been responsible for the turmoil in the family environment, and it cannot be said that one or the other is primarily responsible for that turmoil. [John] is trying to become a better parent and his devotion of time and effort is improving. [Johanna], except for the alcohol dependence, has been a good parent. She is the one who has provided, since the birth of the first child, a constant loving, supportive, nurturing and caring parental figure.

The district court placed the parties' daughters in Johanna's primary physical care.

We are not bound by either the custody evaluator's recommendation or the district court's findings. *See Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994); *Brauer*, 511 N.W.2d at 646. But, having reviewed the record, we are persuaded the district court reached the right result. When Ruyle released her recommendation in January 1998, her primary concern was Johanna's alcoholism. By the time this case came to trial in May 1999, Johanna had been alcohol-free for nearly two years. We realize her past use of alcohol at times jeopardized her daughters' well-being. We also realize she may relapse.

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[1] In its dissolution decree, the district court stated the following: "The reputation evidence offered during trial was considered in making determinations affecting the Dissolution Decree."

However, our goal is not to punish either parent for their respective shortcomings. Rather, it is to "place [the parties' daughters] in the environment most likely to bring [them] to healthy physical, mental and social maturity." *Kunkel*, 555 N.W.2d at 253. Johanna appears more capable of providing such an environment. She shall have primary physical care of Catherine, Christina, and Emily.

IV. Child Support.

Johanna claims John's child support obligation should be increased from $3000 per month to $5160 per month. She also claims the dissolution decree's existing termination provision is not consistent with section 598.1(9). John, through a motion for supplemental relief, claims he is entitled to a thirty-five percent credit on his child support obligation because he has overnight visitation with the parties' daughters in excess of 167 nights.

A. Amount & Credit.

John's net monthly income is between $12,300 and $15,200. The child support guidelines provide the following: "In this range the appropriate figure is deemed to be within the sound discretion of the court or the agency fixing support by administrative order." If Johanna had no net monthly income, John's minimum child support obligation would be roughly $2000 per month. Here, a child support obligation of $3000 per month is appropriate given the children's needs, their prior standard of living, their parents' respective incomes, and the number of days they spend every year with each parent pursuant to the district court's visitation schedule.

The revised child support guidelines state "[i]f the noncustodial parent's court-ordered visitation exceeds 127 days per year, the noncustodial parent shall receive a credit to the guideline amount of child support." The revised guidelines also state they "apply to cases pending on August 1, 2000." This language has been interpreted to include cases pending on appeal as of August 1, 2000. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996). Although this case was on appeal at that time, the credit for extraordinary visitation cannot be calculated simply by multiplying $3000 by the applicable percentage because the amount of John's child support obligation is discretionary. Rather, the number of days John has visitation is one of the factors that should be considered in determining that discretionary amount. Given this factor and the other factors we have noted above, John's child support obligation for the parties' three daughters should be $3000 per month.

B. Termination.

Section 598.1(9) states child support obligations

> shall include support for a child who is between the ages of eighteen and nineteen years who is engaged full-time in completing high school graduation or equivalency requirements in a manner which is reasonably expected to result in completion of the requirements prior to the person reaching nineteen years of age.

The dissolution decree's termination provision states John's obligation for each daughter

> will end upon the child's death, marriage, attainment of age eighteen, commencement of active duty in the United States Armed Forces, establishment of a residence separate from either parent, whichever event occurs earlier, or graduation from secondary school if such event occurs later.

The termination provision is consistent with section 598.1(9). However, we clarify the provision by adding "as provided by section 598.1(9)" to the end of it.

V. Alimony.

Johanna claims John's alimony obligation should be increased from $2500 per month to $8784 per month. John claims his obligation should terminate upon the death of either party or Johanna's remarriage.

A. Amount.

Alimony is not an absolute right. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). We consider the factors listed in Iowa Code section 598.21(3). Among those factors are the length of the parties' marriage, the parties' ages and health, the parties' earning capacities, the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage, and the property distribution each party received. Iowa Code § 598.21(3) (2001). Given these factors, Johanna received an appropriate alimony award.

B. Termination.

The dissolution decree does not explicitly state any circumstances that will terminate John's alimony obligation before the ten-year support period ends. It does, however, include the following provision:

> So long as [John] has any support obligation under the terms of this Decree, he shall maintain existing life insurance policies or comparable face value life insurance policies in the total face amount of $500,000. The proceeds, upon his death, are to be used for payment of his support obligations hereunder. . . . The total amount of the face value of the policies may be reduced at such time the total of the face value of the policies exceeds [his] maximum support obligations. Under no circumstances will the

> face amount of the policies be reduced below the amount of maximum unpaid support obligations.

If John dies before his alimony obligation has ended, his obligation must be satisfied per the above-quoted provision. However, if Johanna dies before John's alimony obligation has ended, John's obligation will terminate upon her death. *See In re Marriage of Smith*, 573 N.W.2d 924, 927 (Iowa 1998). It will not automatically terminate upon her remarriage. *See id.* These provisions are fair.

VI. Property Distribution.

Johanna claims John's lump-sum property settlement payment should be increased from $50,000 to $101,487 because the district court undervalued John's interest in a real estate holding company, undervalued his medical practice, undervalued the personal property given to her and overvalued the personal property given to John, and misallocated the parties' debts. John claims the district court overvalued his interest in the real estate holding company and should have ordered the parties' personal property to be divided by alternate selection.

A. Group 411, L.C.

John owns a forty-percent interest in Group 411, L.C., a real estate holding company in Cedar Rapids. The district court valued his interest at $178,000 by multiplying $445,145 (the shareholders' equity) by forty percent. Because John financed his interest through a $161,131 loan that remains outstanding, his personal equity in Group 411 is roughly $17,000.

John argues the value of his interest is $128,000 if proper discounts for lack of control and marketability are applied—and thus has a negative equity of over $33,000. Discounts for lack of control and marketability may be necessary in some cases where no ready market exists to assess the fair market value of an ownership interest is illiquid or where the interest is illiquid. *See* 2 Robert D. Feder, *Valuation Strategies in Divorce* §§ 15.50-52, at 457-66 (4th ed. 1997); *see, e.g.*, *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 660 (Iowa 1989); *In re Marriage of Hoak*, 364 N.W.2d 185, 192 (Iowa 1985). Here, however, Group 411's underlying valuation was asset-based—and its primary assets are land and a building. We decline to apply discounts for lack of control and marketability.

Johanna argues the value of John's interest in Group 411 is $48,922—the amount she contends he actually invested. A review of the record shows she reached this amount by subtracting $128,000 (John's opinion regarding the market value of his interest) from $176,922 (John's capital account, *i.e.*, the money John invested through original capital and by leaving his share of the net income generated by the property in the property). Johanna's argument has no merit. For purposes of the property distribution in this case, the value of John's interest in Group 411 is $178,000.

B. Medical Practice.

John is the sole proprietor of a plastic and reconstructive surgery practice in Cedar Rapids. The district court valued his practice at $79,000. It apparently adopted the value proposed by John's expert, who explained the fair market value of John's practice is roughly $79,000 if the practice's accounts receivable

(totaling roughly $37,000[2]) are deducted from the practice's net asset value. The expert testified this approach was appropriate for the following reason: "The accounts receivable are used to pay his future alimony, and since that's a separate item, he needs to collect those receivables to pay his alimony. It's not a value associated with his practice." We decline to accept this "double dipping" argument given that using the accounts receivable to value John's practice will not remove these assets from the practice or otherwise limit John's access to them. *See Skrabak v. Skrabak*, 673 A.2d 732, 740-42 (Md. 1996). For purposes of the property distribution in this case, the value of John's practice is $116,000.[3]

C. Personal Property.

At the time of trial, John and Johanna were living in separate homes. The district court valued the contents at John's home (furniture, appliances, and piano) at $15,000 and awarded them to John. It valued the contents at Johanna's home (furniture, appliances, piano, and art) at $28,000 and awarded them to Johanna. Johanna argues John's household contents should be valued at $20,000 given John testified he spent this amount to furnish his home after the parties separated. She further argues her household contents should be valued at $19,980 in accordance with the total estimated value of the items listed in her

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[2] John's expert did not make a downward adjustment to these accounts receivable for uncollectibles because the majority of his work requires payment before surgery or is billed to insurance.

[3] John contends Johanna has refused to return to him certain items used in his medical practice that are located in her home. Assuming these items were assets used in the valuation of John's practice and thus awarded to him, John must seek appropriate remedial measures from the district court. We cannot modify the dissolution decree to include such measures or otherwise enforce the decree on appeal.

household inventory. John counters his household contents should not be valued at their purchase price and Johanna's inventory was incomplete. The district court's valuations of these items were within the permissible range of evidence; we will not disturb them on appeal. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997).

As was discussed above, the district court awarded each party the contents of their respective homes. John argues he has not received any items of significant sentimental value under the district court's method of division and thus the parties' personal property should instead be divided by "alternate selection." This method of division would involve the parties alternatively selecting an item or group of items until all of their personal property has been divided. We question the feasibility of alternate selection in this case. We are convinced the district court's method of division was equitable. The parties' personal property shall be distributed as provided by the dissolution decree.

D. Debts.

John and Johanna incurred significant debts during their marriage. The district court included John's credit card debt of $48,377 in its property distribution. Johanna argues John incurred this debt after the parties separated and thus should not negatively affect her share of the property distribution. In dissolution cases, parties' assets and liabilities are generally valued at the time of trial. *See Driscoll*, 563 N.W.2d at 642. Here, John incurred $20,000 of the credit card debt to purchase furnishings and other items for his home. Given the parties' daughters were living with him at that time, this portion of the debt should

be included in the property distribution. However, while John acknowledges he incurred the remaining $28,000 of the debt after he and Johanna separated, he has not identified how he used the money. Nothing in the record suggests the money was used for the benefit of Johanna, the parties' daughters, or the family as a whole. It is not equitable, under these circumstances, to include $28,000 of the postseparation credit card debt in the property distribution.

VII. Attorney Fees.

Johanna claims she incurred roughly $115,000 of attorney fees prior to and during trial. She requested the district court order John to contribute $40,000 towards these fees. The court ordered him to pay $10,000. Finding no abuse of discretion, we affirm the award. *See In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994).

Johanna also requests we order John to pay the roughly $30,000 of attorney fees she has incurred on appeal. In evaluating such requests, we consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). In light of these factors, we order John to pay $2500 of Johanna's appellate attorney fees. Costs of this appeal are assessed to John.

VIII. Disposition.

We affirm the dissolution decree as modified: (1) John's child support and alimony obligations will terminate as discussed above. (2) Johanna is entitled to an additional property settlement payment of $25,000 because we have valued

John's medical practice at $116,000 rather than $79,000 and have taken $28,000 of the postseparation credit card debt out of the overall property distribution. Requiring John to pay Johanna a total lump-sum property settlement of $75,000 results in a distribution of property that is roughly equal. *See In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa Ct. App. 1996). (3) The decree is affirmed in all other respects; John shall pay $2500 of Johanna's appellate attorney fees.

AFFIRMED AS MODIFIED.