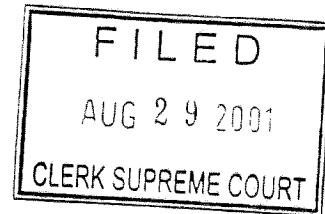


IN THE COURT OF APPEALS OF IOWA

No. 1-085 / 00-0302
Filed August 29, 2001

IN RE THE MARRIAGE OF JANICE M. LENZ
and GARY L. LENZ

Upon the Petition of
JANICE M. LENZ,
Petitioner-Appellee,



And Concerning
GARY L. LENZ,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H.
Fautsch, Judge.

Respondent appeals from the district court's order awarding temporary
spousal support and temporary attorney fees in a common law marriage
dissolution action. **AFFIRMED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Robert L. Day, Jr., Dubuque, until withdrawal, and then Janice M. Lenz,
Dubuque, pro se, for appellee.

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

PER CURIAM

A husband appeals the decision of the district court which required him to pay temporary spousal support and attorney fees. He claims the amounts awarded were excessive. We affirm on appeal.

Janice and Gary Lenz were married in 1971. They were divorced in 1975, but continued to live together, and Janice claims the parties had a common law marriage.¹

Gary controlled the parties' finances, and the parties' financial situations are vastly disparate. Gary owns his own business and admits to owning assets worth about \$1 million. A bank statements shows his net worth might be \$2.75 million. Janice has minimal assets and her father bought her a car so she could drive to work. Gary's average annual income is more than \$100,000. Janice works as a certified nurse's aide for \$7.75 per hour. Gary lives in a home worth \$225,000. Janice lives in a mobile home with her boyfriend.

Janice filed a new petition for dissolution of marriage in December, 1999, after she dismissed her petition in a previous action. She requested temporary spousal support and attorney fees. Gary was ordered to pay temporary spousal support of \$2000 per month, and temporary attorney fees of \$5000. He appeals.

I. SCOPE OF REVIEW

Our review in this equitable action is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew the issues

¹ Janice filed three earlier petitions to terminate the parties' common law marriage and these were all voluntarily dismissed. The parties continued to live together as husband and wife.

properly presented. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa Ct. App. 1996). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. TEMPORARY SPOUSAL SUPPORT

Gary contends he should not be required to pay Janice \$2000 per month in temporary spousal support. He points out that working full-time as a nurse's aide she earns \$310 per week, which would give her an annual income of \$16,120. Janice is also "on-call" at another nursing home, where she earns \$8 per hour if she is called in to work. He states she has minimal expenses because she lives with her boyfriend in his mobile home. Gary admits he had income of \$126,326 in 1998, but states he has a substantial debt load.

The pertinent provisions of section 598.11 provide:

The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the other party and the children and to enable such party to prosecute or defend the action.

In considering an alimony award, we look at the circumstances of each particular case. *In re Marriage of Hass*, 502 N.W.2d 286, 287 (Iowa Ct. App. 1993). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997).

Under the facts of the present case, we find the district court properly ordered Gary to pay temporary spousal support of \$2000 per month for Janice.

Gary's earning capacity is more than seven times greater than that of Janice. While Gary asserts he has a substantial amount of debt, he does not give any details about his debts. We determine Gary has the ability to pay spousal support and Janice needs support considering the parties' past standard of living.

III. TEMPORARY ATTORNEY FEES

Gary claims he should not be required to pay \$5000 as temporary attorney fees for Janice. He asserts the award is excessive because this dissolution litigation will not be particularly complex. He also claims Janice has the ability to pay her own attorney fees.

An award of attorney fees lies within the discretion of the trial court. *Erickson*, 553 N.W.2d at 908. Awards for attorney fees must be for fair and reasonable amounts. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). 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 Bell*, 576 N.W.2d 618, 625 (Iowa Ct. App. 1998). In order to overturn an award of attorney fees, a party must show the trial court abused its discretion. *Miller*, 552 N.W.2d at 465.

We find the district court did not abuse its discretion by ordering Gary to pay \$5000 for Janice's temporary attorney fees. While in his appellate brief Gary asserts, "The common law marriage issue has been previously tried so little discovery or preparation will be necessary," he does not concede there was a common law marriage, pointing out Janice has the burden of proof to establish this fact and stating there will not be a division of assets until Janice has

accomplished this. Also, as noted above, the parties' financial conditions are vastly different. Based on the parties' financial positions, we conclude there was no abuse of discretion here.

We affirm the decision of the district court.

AFFIRMED.