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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-20 / 90-589

IN RE THE MARRIAGE OF SHARON LOUISE ORR AND ROGER FAYE ORR

Upon the Petition of
SHARON LOUISE ORR,

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Appellee/Cross-Appellant,

And Concerning
ROGER FAYE ORR,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Peter A. Keller, Judge.

Husband appeals a dissolution decree, challenging its economic provisions. Wife cross-appeals. **AFFIRMED AS MODIFIED.**

Kenneth W. Rittgers and Brent R. Zimmerman, Des Moines, for appellant.

Leslie Babich of Babich, Bennett & Nickerson, Des Moines, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Sharon and Roger Orr were married in May 1960. They had two children during their marriage, and they also raised a child born to Sharon prior to the parties' marriage. All children are adults now. Both parties were relatively young when they were married, and neither graduated from high school. Roger is in good health, but Sharon suffers from chronic depression, anxiety, and phobias.

Since 1967 Roger has owned his own drywall business from which the district court found he grossed about $50,000 per year. Roger is the sole shareholder, director, and officer of this corporation.

Since the parties' marriage Sharon's only employment outside the home has been doing cooking and housework for a family for the first seven years of the marriage. Sharon almost exclusively fulfilled all child raising responsibilities and did all the homemaking. Additionally, Sharon helped Roger with his drywall and installation business until the parties' separation in November 1988. She assisted Roger by receiving his business calls, opening and sorting the business mail, cleaning the business office, and paying bills.

The district court entered a decree of dissolution for the parties. The court ordered Roger to pay Sharon $750 per month in alimony until Sharon's death, her remarriage, or when either party reaches age 62, whichever occurs

first. Roger also must maintain a $100,000 life insurance policy naming Sharon as the exclusive beneficiary. The court divided the assets and liabilities between the parties. Roger received all property relating to his business and several other properties, including a home. Sharon received the homestead, a twelve-plex apartment, and other property. Roger was ordered to pay $9,500 for Sharon's attorney fees.

After the decree Sharon filed an Iowa Rule of Civil Procedure 179(b) motion for reconsideration. An order partially granted her motion by awarding certain personal property to Roger and ordering him to pay Sharon $7400 in cash settlement. Roger appeals the dissolution decree, and Sharon cross-appeals.

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

I.

We must consider alimony and property division together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). We first discuss the alimony award.

Roger contends the amount of the alimony awarded is exorbitant. When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981).

Roger asserts he is unable to pay $750 per month in alimony. He feels the award of the twelve-plex rental properties to Sharon will enable Sharon to be self-supporting. Finally, Roger contends that if alimony is necessary, it should be limited to two years.

After extensive review of Roger's financial condition, including his recent earnings and present earning capacity, the division of the parties' assets and liabilities, Sharon's poor health, and Sharon's minimal earning capacity, we find the district court's award of alimony was clearly equitable to Roger. The parties were married for twenty-nine years. Sharon helped Roger with his business and took virtually all responsibility for raising the children, preparing meals, house cleaning, and finishing other homemaking duties. We consider Sharon's contributions to the home during this relatively long marriage. See In re Marriage of Ralston, 242 N.W.2d 269, 271 (Iowa 1976).

Sharon suffers from chronic depression, anxieties, and phobias. She continues to take medication to help control her mental problems. Her medications and treatment are expensive and, in light of her other expenses, cannot be covered by the rental property income. Sharon is now fifty-one years old; her education ended at the fifth grade. She testified she planned to get her G.E.D. and enter the work force. The district court determined this endeavor would take Sharon a year and then she would most likely be paid minimum wage. Two years of alimony will not be sufficient in light of Sharon's lack of education, age, health problems, and lack of marketable employment experience.

We find Roger is able to pay alimony of $750 per month. Roger seemed to be evasive with the trial court about his annual personal gross and net income. During his cross-examination, however, it became apparent that he earns more than $50,000 per year gross. Roger stated he will not be able to earn as much because of corporate debts of $108,000. We find these debts were already considered when the parties agreed and stipulated the value of the corporation. The district court found his testimony to not be credible and that he intentionally reduced his income for purposes of the dissolution trial. During cross-examination Roger was impeached with his deposition transcript:

> Q. How much are the corporation's accounts receivable at this time, approximately?
> A. Approximately?

> Q. Yes. A. Two grand. I'm not working, big boy, I quit. When you start taking and find out that I have to show you all my money, I quit.
> Q. When did you decide to quit? A. Three months ago.
> Q. And do you have people employed for you at this time? A. Two.
> Q. And who is employed? A. My son, part time, and another guy, part time.
> Q. And the reason you quit three months ago is because of this divorce, is that correct? A. That's true. Why work?

Despite his assertions, Roger is able to pay alimony. The evidence shows Roger was actually employing fourteen people and that he deposited almost $42,000 during a thirty-day period of time when by his own admission he was intentionally reducing his income.

In her cross-appeal Sharon argues she is entitled to alimony of $1250 per month. She asserts she now has additional expenses because she must pay for her own health insurance. We find Sharon will be able to pay her everyday expenses and her medical expenses with the income from her rental properties and the $750 per month alimony. We affirm the trial court's award of alimony to Sharon of $750 per month and determine it should continue until either party dies, Sharon remarries, or one party reaches age 62, whichever occurs first.

II.

Roger contends he should not have to maintain a $100,000 life insurance policy with Sharon as the beneficiary. He states this alimony obligation should end at his death. Alimony payments are presumed to terminate upon the obligor's death absent a provision in the

dissolution decree to the contrary. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa App. 1984). A court can, however, require alimony or child support to be secured in the event of an untimely death. In re Marriage of Weidner, 338 N.W.2d 351, 360 (Iowa 1983). We have modified the decree to terminate alimony on the death of either of the parties.

We believe Sharon will not be able to adequately support herself without the use of life insurance benefits were Roger to suffer an untimely death. She has no retirement plan or benefits from employment. Other than the rental income, Sharon's only means of supporting herself at the time of trial was alimony. We affirm the trial court order of maintenance of life insurance finding the amount reasonable in view of the parties' financial condition and Sharon's potential needs.

III.

The partners in a marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). Estlund, 344 N.W.2d at 280.

Roger contends the court should not have granted Sharon's rule 179(b) motion. In its ruling the court

ordered Roger to pay Sharon $7400 in exchange for two automobiles and a boat. Roger asserts that this order is an undue burden "on a person fighting for his financial livelihood." For the same reasons we affirm the alimony award we also affirm the trial court's order. Roger has shown to have enough assets to pay this amount and, if not, he can sell the cars and boat to satisfy this judgment.

Sharon also argues the property should have been divided more equally. Sharon states the trial court's original distribution of assets and liabilities resulted in Sharon receiving a postmarital net worth of $230,842 while Roger received a postmarital net worth of $369,594. She feels she should be awarded additional real estate valued at $119,000 or a property settlement judgment in a reasonable amount.

We cannot agree with Sharon's argument that the property should have been more equally divided. Equality need not be achieved with mathematical exactness. In re Marriage of Bornstein, 359 N.W.2d at 503 (citing In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979)). We find the distribution is equitable because in addition Sharon receives $750 per month alimony and the maintenance of a $100,000 life insurance policy for her benefit. We affirm the trial court's decision reached after hearing all the evidence coupled with the opportunity to watch the witnesses present their testimony. Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987).

IV.

Finally Roger contends he should not have to pay $9,500 for Sharon's attorney fees. He notes that Sharon received substantial assets in the property settlement. Sharon argues on cross-appeal, however, that the court should have awarded her the full amount of her attorney fees, $11,500.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We find no abuse of discretion by the trial court, see State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976), and affirm Sharon's award of attorney fees. The trial court noted that a substantial portion of Sharon's attorney fees were incurred due to Roger's failure to comply with discovery requests. We believe the trial court set the proper amount and affirm the $9500 award.

Sharon argues she should be awarded attorney fees for this appeal. 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). Considering these principles, we conclude the parties should pay their own appellate attorney fees. Costs of this appeal are assessed to appellant.

AFFIRMED AS MODIFIED.