IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MOLLY BAIR DONAHUE
AND MICHAEL P. DONAHUE

FILED
JAN 27 1988
CLERK SUPREME COURT

52

Upon the Petition of)

MOLLY BAIR DONAHUE,)

Petitioner-Appellee,) Filed January 27, 1988

And Concerning) 7-276
86-1426

MICHAEL P. DONAHUE,)

Respondent-Appellant.)

Appeal from the Iowa District Court for Linn County (No. DM 13682), Lynne E. Brady, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage **AFFIRMED AS MODIFIED.**

William L. Meardon of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellant.

David S. Good of Nazette, Hendrickson, Marner & Good, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J. 53

Respondent, Michael Donahue, appeals the decree dissolving the parties' marriage. He asserts: (1) that the property division is inequitable; (2) that the child support and alimony awards are excessive and improperly allocated, and (3) that petitioner, Molly Donahue, should not have been awarded attorney fees. Molly Donahue requests attorney fees for this appeal. We affirm as modified.

The parties were married in 1977 and have two children, ages 8 and 6. Molly did not work outside the home during the marriage, but is now studying nursing and working part-time. Michael has been a partner in a Cedar Rapids law firm throughout the marriage. He currently earns $98,000 annually, while Molly earns $200 monthly. The two children were placed with Molly and Michael was ordered to pay $1,700 per month in child support. He also pays alimony of $850 per month.

The trial court awarded each party their individual personal property, a car, their individual life insurance, bank accounts and IRA's, and one-half of the country club stock. Molly was awarded the marital residence subject to the mortgage, and also received a certificate of deposit she cashed prior to the dissolution. Michael was given his law partnership in light of the alimony award made by the trial court.

The trial court awarded each party one-half of the parties' stocks; it directed, however, (1) that Michael was to continue to use his investment expertise to manage the stock and to hold Molly's one-half in trust for payment of her portion of the children's post-high school education expenses, and (2) that when the parties' younger child reached age 25 or completed his post-high school education, Michael was pay Molly's one-half over to her.

The trial court also awarded each party one-half of the parties' 1984 tax refund. Molly was to apply her share to the payment of certain specified small debts. She would also be responsible for paying the smaller debts. Michael was ordered to pay the larger debts totalling over $100,000.

The first issue raised by Michael concerns the property settlement. He claims the property settlement, particularly the placing of certain property into a trust, was inequitable. We will only address the trust provisions of the decree since we find the remainder of the property division equitable.

Michael argues that the trial court has placed two inequitable burdens on him by placing the investment assets in a trust. First, he argues Molly will receive all the benefits of the assets without the associated debt burden. Second, he argues the trust grants Molly a future gain from Michael's efforts. We agree with Michael.

Our examination of the record convinces us that a trust fund is unnecessary in this case. The record is devoid of any evidence that would indicate Michael is unwilling or unable to fulfill his legal obligation to support his children or contribute to their post-high school education. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984) (trust unnecessary to secure child support obligation); but see Neiderhiser v. Neiderhiser, 254 Iowa 791, 119 N.W.2d 245 (1963) (trust only means available to ensure support obligation would be met). Thus, we see no reason to create a trust and abrogate the trust provision of the decree.

We now address the question of how this property identified as Cebal Investments, Alpha Development Company and Signet Cablevision, should be allocated between the parties. When possible a trial court should divide assets rather than decree joint ownership. In Re Marriage of Mentel, 359 N.W.2d 505, 506 (Iowa App. 1984). Joint ownership frequently results in problems at a later

date. Id. In order to achieve an equitable distribution we award the investment assets to Michael. He is also responsible for the entire indebtedness associated with the assets.

These assets, as recognized by the trial court, have little or no value. Their future value, if any, will be the direct result of Michael's sole future efforts. He is responsible for satisfying the heavy indebtedness associated with the assets and must manage them prudently if he is to ever realize a benefit from them. It would be inequitable to allow Molly to share in benefits that will be the product of her ex-spouse's efforts.

The second issue raised by Michael concerns the alimony and child support awards. Michael argues the child support award is excessive, and that too much of the total support award is allocated to child support.

Child support awards should not be any set percentage of net income, but should be assessed in accordance with factors such as the age of the parties, present earning capacity, future prospects, resources of the parties, contributions of each to joint accumulations, duration of marriage, indebtedness, and other relevant factors. In re Marriage of Anderson, 900 N.W.2d 84, 85 (Iowa App. 1986); In re Marriage of Byall, 353 N.W.2d 103, 107-08 (Iowa App. 1984).

We hold that Michael's child support obligations will be reduced to $600 per child per month. The record reveals the children's monthly needs are not $850 as the trial court found. The record also indicates Michael is heavily indebted and has a serious cash flow problem. Molly has reentered the work force and earns $200 per month. Upon completion of her studies, Molly's earning capacity will increase dramatically. She also earns some money through singing at weddings and funerals. We conclude this child support award will promote the best interests of the children without inequitably burdening either party.

The trial court ordered Michael to pay alimony in the amount of $850 per month. We find this amount is reasonable. The payment of alimony is not an absolute right; it must be determined in light of all the circumstances. In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982). When determining the appropriateness of alimony, the trial court must consider the earning capacity of each party, present standards of living, and ability to pay balanced against the relative needs of the other. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

An alimony award is entirely appropriate in this case. The parties were married while Molly was a junior in college. She ended her academic career in order to take on the duties of homemaker. She is now enrolled at Coe College pursuing a Bachelor of Science and Nursing Degree. She anticipates graduating in June of 1989. Her educational expenses are $425 a month.

An alimony award is necessary to allow Molly the opportunity to complete the education she sacrificed when she married. We hold therefore that Michael shall pay $850 per month in alimony until July 1, 1990. The alimony will not cease until that date for any reason except the death of either party. This alimony award will allow Molly to complete her education and successfully begin a new career.

The final issue raised by Michael is that the trial court erred in awarding Molly attorney fees at the trial court level. He claims Molly has the financial ability to pay her fees. Molly argues the trial court did not award her sufficient fees. We will also address Molly's request for appellate fees.

An award of attorney fees is not a matter of right, but is based upon the parties' respective ability to pay. In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). An examination of the record reveals that Michael has the greater ability to pay. We hold the trial court's award of attorney fees

was appropriate We cannot increase this award since Molly's cross-appeal of the issue was dismissed by Chief Justice McGiverin as untimely on June 11, 1987

We also conclude that Michael has the financial ability to pay Molly's appellate fees She has requested $1,750 and we hereby order Michael to pay that amount He is also ordered to pay the costs of this appeal

In summary, we affirm the parties' dissolution decree with the following changes (1) the trust fund provisions are abrogated and Michael is awarded the investment assets and the associated indebtedness, (2) the child support obligation is reduced to $600 per child per month, and (3) the alimony award is affirmed at $850 a month and will continue until July 1, 1990. All other provisions of the trial court's decree are affirmed

AFFIRMED AS MODIFIED.