

IN THE COURT OF APPEALS OF IOWA

No. 2-360 / 91-1954

FILED

JUN 29 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF REBECCA LYNNE McCLATCHEY AND
TERRY JAMES McCLATCHEY

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Upon the Petition of
REBECCA LYNNE McCLATCHEY,

Appellee,

And Concerning
TERRY JAMES McCLATCHEY,

Appellant.

Appeal from the Iowa District Court for Wright County,
Louie F. Beisser, Judge.

The husband appeals the economic provisions of a
district court decree of dissolution. **AFFIRMED AS
MODIFIED.**

Lee E. Poppen of Knoshaug & Poppen Law Firm, Clarion,
for appellant.

Robert W. Brinton and David R. Johnson of Brinton,
Bordwell & Kay, Clarion, for appellee.

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

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SCHLEGEL, J.

Terry and Rebecca were married on August 20, 1977. Three children were born of the marriage, Kristin in 1981, Ryan in 1985, and Sean in 1989.

Rebecca was born in October 1956. She did not work outside the home during most of the marriage. She is in good health. At the time of trial, she was attending Buena Vista College in Storm Lake part-time in order to obtain a degree in elementary education. She plans to finish her degree in two and one-half to three years.

Terry was born in November 1953. He is employed as a merchandising manager by Ag Processing and earns about \$60,000. His net monthly income is \$3,013. He has been transferred to different job locations several times. In some years he receives an annual bonus. Terry is in good health. He obtained his college degree during the marriage through the GI Bill.

Following trial, the district court entered its decree of dissolution. The court awarded the parties joint legal custody of the children, with Rebecca having primary physical care. The court applied the child support guidelines and ordered Terry to pay child support of \$1,311 per month for the three children. The court also required Terry to pay a portion of the bonuses he receives as well as the net difference between Terry's and Rebecca's income tax refunds as additional child support. The court also ordered Terry to pay \$200 per month alimony to Rebecca until she remarries or either party dies.

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The parties' property was also divided. They had sold the marital residence, and the proceeds were equally divided between the parties. The court awarded Rebecca property worth about \$88,597 and Terry property worth about \$89,235. Terry was ordered to pay Rebecca a cash property settlement of \$319 in order to more closely equalize the division of property. Terry was ordered to pay \$2,000 towards Rebecca's attorney fees. Terry has appealed.

I. Scope of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Property Division.

Terry contends the division of property is inequitable to him. He first states that he brought property worth about \$20,000 into the marriage, which he believes should be set aside to him. Terry also claims Rebecca received appliances worth \$1,500 which were not included in the division of property. Furthermore, he believes the district court incorrectly valued two time-share properties owned by the parties, which were awarded to him.

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 Russell, 473 N.W.2d 244,

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246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

We note the parties in this case were married for fourteen years. The actual assets Terry brought to the marriage have long since been dissipated. We also note Rebecca needs sufficient assets to find a suitable residence for herself and the three children. We agree with the district court's conclusion that it would be inequitable to set aside to Terry the property he brought to the marriage. For these same reasons we agree Rebecca is entitled to the appliances.

The parties purchased two time shares during the marriage. They paid \$6,000 for one by Lake Okoboji and \$11,800 for one in Kissimmee, Florida. At the trial Terry testified each of these time shares was worth only \$5,000. However, he admitted he just pulled this number out of the air. The district court valued these properties at their purchase price. We find the value placed on the time shares is well within the permissible range of the evidence and will not disturb it on appeal. See Russell, 473 N.W.2d at 246.

We conclude the property distribution as set forth by the district court is equitable, and we affirm it.

III. Alimony.**000167**

Terry also disputes the award of alimony to Rebecca. He believes she will be self-supporting once she finishes her college degree. Terry contends his alimony obligation should cease once Rebecca obtains her degree.

Alimony is not an absolute right; an award depends upon the circumstances of each individual case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

We determine Rebecca is entitled to rehabilitative alimony instead of permanent alimony. Rehabilitative alimony is a way of supporting an economically dependent spouse through a limited period of education or retraining following divorce, thereby creating incentive and opportunity for that spouse to be self-supporting. In re Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989). Rebecca expected to finish her college degree within three years. We determine Rebecca is entitled to alimony of \$200 per month. However, we modify the decree to provide this alimony will terminate at the earliest of the following events: the passage of thirty-six months; Rebecca's remarriage; or the death of either party.

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IV. Child Support.

Terry contends the district court should not have ordered him to pay a portion of his annual bonus and tax refunds as child support. The court found that under the child support guidelines Terry should pay 43.5% of his net monthly income as child support. The court ordered Terry to pay 43.5% of his annual bonus and tax refunds.

In applying the child support guidelines, the court must determine the parent's current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parent's income. Id.

We determine that under the particular circumstances of this case, Terry's child support obligation should be based only on his regular net monthly income of \$3,013. It is uncertain that Terry will receive a bonus every year, and if he does receive a bonus, he does not know the amount until he receives the bonus. Additionally, any amount Terry may receive as a tax refund is speculative. We modify the decree to eliminate the provision requiring Terry to pay a portion of his annual bonus and tax refunds as child support.

V. Trial Attorney Fees.

Terry claims the district court abused its discretion in ordering him to pay \$2,000 towards Rebecca's trial attorney fees. Iowa trial courts have considerable

discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that the trial court abused its discretion. Id. We find no abuse of discretion here.

VI. Appellate Attorney Fees.

Rebecca seeks attorney fees for this appeal. She states these fees were \$4,050. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id. We conclude each party should pay his or her own attorney fees for this appeal.

Except as we have modified within this opinion, we affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.

Habhab, J., concurs; Oxberger, C.J., specially concurs.

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OXBERGER, C.J., (specially concurring)

I specially concur. Rebecca is attending college and does not have funds to pay counsel. I would award her appellate attorney fees.