IN THE COURT OF APPEALS OF IOWA

No. 2-302 / 91-1541

FILED
OCT 27 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARYETTA MAE PINS AND RONALD WILLIAM PINS

Upon the Petition of

MARYETTA MAE PINS,

Appellee,

And Concerning

RONALD WILLIAM PINS,

Appellant.

Appeal from the Iowa District Court for Warren County, Gene L. Needles, Judge.

Husband appeals from the economic provisions of a dissolution decree. **AFFIRMED.**

Luis Herrera of Herrera & Schemmel, P.C., Des Moines, for appellant.

Kermit L. Dunahoo and Victoria E. Lawry of Dunahoo Law Firm, Des Moines, and Robert A. Gottschald, Indianola, for appellee.

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

OXBERGER, C.J.

Ronald and Maryetta Pins were married July 3, 1967. They have two minor children and one adult child. The parties agreed to Maryetta's physical care of Sarah, born September 2, 1978, and Emily, born November 4, 1983.

Maryetta is forty-four years old and is a high school graduate. She has not worked full time outside the home since her marriage, but has worked part time cleaning, baking and sewing. She has minor health problems, including a hearing impairment requiring a hearing aide and recent foot surgery.

Ronald is forty-eight years old and is a high school graduate. He has a wide variety of employment experience. He currently works for the U.S. Postal Service and plans to retire at age sixty. He works considerable overtime which he asserts causes fatigue and stress. Throughout the marriage Ronald controlled the parties' finances.

On January 22, 1991, Maryetta filed for dissolution of marriage. Shortly thereafter, she withdrew $5,400 from the parties' joint savings account. In addition, the district court ordered Ronald to pay $2,000, and $1,500 as temporary support. Ronald had not paid the $1,500 as ordered at the time of the dissolution hearing.

Shortly before the dissolution hearing, Ronald set up an irrevocable trust for his daughters' education. He indicated he planned to place previously purchased U.S. Savings Bonds in the trust. The bonds were not placed in

the trust, but Ronald indicated on his financial affidavit the value of the trust was $18,750.

Ronald's father testified he had given his son about $16,800 at various times, some of which was used as a down payment on the parties' home. Maryetta testified Ronald told her he had $15,000 she nor the judge would see.

Ronald's base salary plus a night shift differential was $33,642 in 1991. Due to extensive overtime pay, he earned approximately $33,000 in 1987, $35,500 in 1988, $37,600 in 1989 and $47,000 in 1990. His supervisor testified both mandatory and volunteer overtime would continue to be available. The district court concluded Ronald's earning capacity was at least $38,000 per year or $2,200 per month. The district court found Maryetta's earning capacity was $550 a month, based upon her obtaining a minimum wage job.

On September 24, 1991, the district court entered a decree dissolving the parties' marriage. The district court ordered Ronald to pay $740 per month child support and $500 per month as alimony which would terminate at Maryetta's death, remarriage or cohabitation. The court awarded Maryetta one-half of Ronald's Massey Ferguson retirement plan and twenty-five percent of his postal service retirement, the family homestead valued at $51,000, a car, one-half the value of Midwest Resources stock and some personal property. Ronald received a savings plan, savings bonds, cash value in his life insurance policy, a

truck, two motorcycles, and other personal property. Each party received one child for tax exemption purposes and an equal share in the 1990 income tax refund.

The district court ordered that Maryetta shall have a judgment against Ronald for the $1,500 unpaid temporary support and $250 for attorney fees she incurred to enforce the order. Finally, the district court ordered Ronald to pay $3,000 for Maryetta's attorney fees.

Ronald filed this appeal.

Maryetta requests Ronald pay appellate attorney fees.

Scope of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on 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. Child Support Award

Ronald contends the district court erred in including his overtime and night shift differential income when awarding child support. He argues the income is speculative and consideration of it is contrary to Iowa case law.

There is nothing in the record to support Ronald's claim that his overtime and shift differential income is

speculative. He worked 196 overtime hours in 1988, 373 overtime hours in 1989, 665 overtime hours in 1990 and had worked 182 overtime hours prior to trial in 1991. His supervisor testified both mandatory and voluntary overtime would continue to be available. In addition, Ronald has worked the night shift for seven years and no evidence was presented to indicate that would cease. We find Ronald's overtime and night shift differential income are predictable income sources.

Inclusion of overtime income is not contrary to current Iowa case law. The issue was most recently addressed in In re Marriage of Brown, No. 91-182 (Iowa July 22, 1992). In Brown, the court stated:

> Overtime wages are not excluded as income. Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. This conclusion does not necessarily mean, however, that a court must steadfastly adhere to the appropriate child support amount as determined by the guidelines using overtime pay if the amount results in injustice between the parties.

Brown, No. 91-182, slip op. at 5.

The court noted in circumstances where overtime pay appears to be an anomaly or is uncertain or speculative, it may not be considered. Brown, No. 91-182, slip op. at 5.

In Ronald's case, overtime is neither an anomaly nor uncertain or speculative. We find inclusion of Ronald's overtime pay a permissible consideration in determining child support. The district court applied the mandatory Uniform Guidelines accordingly and we affirm the child support award.

II. Alimony Award

Ronald also contends the district court erred in requiring him to pay $500 per month alimony to Maryetta. In the alternative, he complains the alimony should be rehabilitative and time limited.

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 relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). Factors considered when awarding alimony include the following:

> a. The length of the marriage.
> b. The age and physical and emotional health of the parties.
> c. The distribution of property made pursuant to subsection 1.
> d. The educational level of each party at the time of marriage and at the time the action is commenced.
> e. The earning capacity of the party seeking maintenance, including . . . employment skills, work experience, length of absence from the job market, responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> f. The feasibility of the party seeking maintenance becoming self-supporting. . . .

Iowa Code § 598.21(3)(1991).

Maryetta and Ronald were married twenty-four years. Maryetta is forty-four years old and has been out of the work force throughout her marriage. She has a high school diploma and no additional employment training. Although she has had occasional part-time positions sewing, cleaning, and baking, she would not be able to support herself with this type of work. The district court noted Ronald's superior ability "moving around in this world," given that he managed the finances and limited Maryetta's outside contacts. In addition, Maryetta has full-time child-rearing responsibilities for two children. The property distributed to Maryetta, while equitable, is not sufficient ongoing support.

Ronald argues, alternatively, in favor of rehabilitative alimony. However, rehabilitative alimony is typically reserved for shorter marriages which have not resulted in long-term absences from the work force. See In re Marriage of Francis, 442 N.W.2d 59, 62-63 (Iowa 1989). We find the district court relied on factors required by statute and properly awarded alimony. We affirm.

III. Dependents as Tax Deductions

Ronald contends the district court erred in awarding each party one dependent to claim as a deduction on their respective state and federal income tax returns. Maryetta concedes it would be equitable to allow Ronald to claim

both dependents as deductions each year he is current on his alimony and child support payments.

We adopt Maryetta's recommendation and require Maryetta to authorize Ronald to claim both dependents as tax deductions in every year Ronald is current with his alimony and child support obligations.

IV. Property Distribution

Ronald next contends the district court erred in determining a fair and equitable distribution of the assets of the parties.

Ronald first complains the court erred in including U.S. Savings Bonds, valued at $18,750, in his share of the property distribution. He claims he placed the bonds in an irrevocable trust for his daughters' post-high school education. However, the district court found that although the trust was established, the assets were never placed in trust.

We find nothing in the record to support or dispute the district court's finding the assets were never placed in the trust. We give weight to the district court's findings of fact and affirm the inclusion of those assets in Ronald's share of the property distribution.

Ronald also claims the court erred in including gifts from Ronald's parents as part of the property division. Ronald's father testified they had given Ronald $16,800 in cash gifts throughout the marriage.

Initially, we note Iowa Code section 598.21(2) (1991), which provides inherited property not be subject to the property division under this section "except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." We consider both the intent of the donor and the circumstances surrounding the inheritance or gift in determining whether the property constitutes marital property for the purposes of division. Our understanding of the Code, coupled with analysis of these factors, brings us to the conclusion the district court was correct in viewing the cash gifts from Ronald's parents as marital property subject to distribution.

First, Iowa Code section 598.21(2) (1991) allows division of gifted property when it would be inequitable to the spouse or children of the marriage to refuse to divide gifted property. We find it would be inequitable to refuse to consider the gifted property as a marital asset. Maryetta did not work outside the home on a regular basis for twenty-four years. Ronald managed the finances, advanced his employment position, and amassed numerous assets. He will continue to be employed at a competitive salary, and his assets will continue to grow. Maryetta will have difficulty obtaining a higher than minimum wage position due to her extended absence from the work force. She is also responsible for the day-to-day care of the parties' two children.

Second, we do not find the donor's intent was to limit the gift to Ronald. For example, $7,100 is listed as Christmas gifts from 1979 to 1990. Another $2,000 is listed as Christmas gifts for various years, and $200 is listed as an anniversary gift. Maryetta testified her mother-in-law told her the Christmas gifts were for both her and Ronald. Clarence Pins, Ronald's father, testified the money was given "to use it as they de--as he decided." This indicates the uncertainty of Ronald's father as to the intent of the receiver.

Finally, the circumstances surrounding the cash gifts indicates the property constitutes marital property. The gifts began in 1969, after the parties were married. As noted, nearly $10,000 of the cash is listed as "Christmas gifts" and another $200 as an anniversary gift. It is difficult to imagine Ronald's parents giving Ronald a wedding anniversary gift which did not include Maryetta, yet that particular gift is listed with the others and was given in the same fashion.

Arguably, the $1,000 inheritance from Ronald's grandmother and an additional $1,300 in stock are more easily viewed as exclusively Ronald's. However, the nearly $5,000 greater property distribution received by Ronald easily accommodates that amount.

We hold the district court was correct in considering the majority of cash gifts from Ronald's parents as divisible marital property.

V. Attorney Fees

Finally, Ronald contends the district court erred in requiring him to pay $3,000 toward Maryetta's attorney fees. He argues he received fewer assets and should not be required to pay additional amounts.

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 do not find an abuse of discretion. The amount awarded was fair and reasonable as shown by the statements provided. Maryetta has yet to find full-time employment and is caring for her daughters. She has a lesser ability to pay. We affirm the trial court's award of attorney fees.

Maryetta also requests appellate attorney fees.

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).

Maryetta has limited income sources. Ronald is currently employed in a stable position. Maryetta was required to defend this action on appeal. Accordingly, we require Ronald to pay an additional $1,000 toward Maryetta's appellate attorney fees.

We affirm the trial court.

AFFIRMED.