



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DANIEL J. GRIMM AND SARAH J. (SALLIE) GRIMM

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UPON THE PETITION OF	)	
DANIEL J. GRIMM,	)	Filed August 30, 1983
Petitioner/Cross-Appellant,	)	
AND CONCERNING	)	<u>3-65</u>
SARAH J. (SALLIE) GRIMM,	)	2-67179
Respondent-Appellant.	)	

Appeal from Polk District Court, Ray A. Fenton, Judge.

Respondent-wife appeals and petitioner-husband cross-appeals from economic provisions of the parties' dissolution decree. AFFIRMED.

Thomas P. Hyland, Timothy G. Pearson, and Thomas P. Schlapkohl of Hyland, Laden & Pearson, P.C., Des Moines, for respondent-appellant.

Donald A. Wine, Donald J. Brown, and Patricia A. Shoff of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for petitioner/cross-appellant.

Considered by Oxberger, C.J., and Snell, Schlegel, and Hayden, JJ.
Donielson, J., takes no part.

OXBERGER, C.J.

Respondent-wife appeals and petitioner-husband cross-appeals from economic provisions of the parties' dissolution decree. The wife asserts: (1) that the trial court improperly considered her future interest in a trust; (2) that the trial court undervalued the husband's interest in pension and profit-sharing plans and stock in his company and that the property division was therefore inequitable; (3) that the alimony award was insufficient in both amount and duration; (4) that the child support award was inadequate; and (5) that she should be awarded attorney fees on appeal. The husband asserts: (1) that the trial court overvalued his stock; (2) that the property division was generally inequitable; and (3) that the wife should not have been awarded attorney fees of \$15,000 and expert witness fees of \$1,000. In reply the wife asserts that the court should not consider authorities cited by the husband in his brief that were not presented to the trial court. We affirm.

I. Scope of Review

Our review of dissolution proceedings is de novo. Iowa R. App. P. 4. We review the facts as well as the law, and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to the trial court's findings and facts, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. The Wife's Future Interest in a Trust

Among the assets the court enumerated as having been accumulated by the parties during their marriage was an interest that the wife, Sallie, has in the J. W. Cownie Trust in the amount of \$250,000. Sallie argues that her interest in this trust should not have been included among the marital assets of the parties. We agree.

The trust arose out of the will of Sallie's grandfather. It provides for payments to Sallie's father, including payment out of the principal, in such amounts as are necessary for the care, support, and maintenance of her father, his wife, or his two children. Upon the death Sallie's father, half of the remainder goes to his wife, and the other half to Sallie and her brother. Upon the death of Sallie's father's wife, Sallie and her brother will receive the remaining half of the trust. If Sallie's father's wife does not survive him, the principal passes to Sallie and her brother.

Although Sallie's interest in this trust is vested, the nature of the trust is such that the amount of any benefits that Sallie might realize is highly speculative. The assets of the trust could be substantially depleted, either by Sallie's father or by his wife if she survives him. It is therefore very difficult for us to accept the valuation of \$250,000 placed upon Sallie's future interest in the trust that was adopted by the court.

We conclude, therefore, that under the circumstances of this case, it was inequitable for the trial court to consider Sallie's future interest in this trust to be part of the marital assets when dividing the property of the parties between them. We do not reach the issue whether the inherited property is subject to property division under Iowa Code § 598.21(a)(1983).

It is obvious that the court attempted to divide the assets equally between the parties. The court's evaluation of the total marital estate, including Sallie's hypothetical \$250,000 interest in the trust, was \$1,365,387. Of that amount, the court allotted a total of \$702,533 to the husband, Dan, and \$662,854 to Sallie. Thus, Dan's share was fifty-one percent and Sallie's, forty-nine percent. If a marital estate is reduced by \$250,000 to reflect that fact that Sallie's future interest in the trust is no part of that estate, Dan's \$702,533 amounts of sixty-

three percent of the whole, while Sallie's share, \$412,854, amounts to thirty-seven percent of the whole. Sallie contends that under the facts, this represents an inequitable division of the property.

We will return to the equities of the property division. At this point, we merely wish to express our conclusion that under the facts of this case, Sallie's interest in the trust should not have been considered as the court divided the marital assets.

III. Valuation of Pension Assets

Sallie argues that the court erred in discounting certain assets to present value and taking into account the tax effects of sale of those assets. Included was a Keough plan, a profit-sharing plan, a pension plan, and a Burt Bell N.F.L. Plan.

If any of the retirement funds were invaded, those funds would lose their tax-exempt status, and the result would be a heavy tax liability relative to those funds. The Code provides that in dividing property, the court must consider the tax consequences to each party. Iowa Code § 598.21(1)(j)(1983). In In re Marriage Burham, 283 N.W.2d 269, 277 (Iowa 1979), the supreme court, in modifying the economic provisions of a dissolution decree, said:

The pension plan, to which both Robert and his employer contribute, is tax-sheltered and disturbing it with any court-ordered distribution of all or any part of the fund would result in unfavorable income tax consequences. We deem it advisable and equitable, as apparently did trial court, to leave these assets in Robert's hands.

We conclude that it was appropriate for the court to have accepted valuations of these properties that took into account the tax consequences of their forced liquidation or discounted them to present values.

IV. Valuation of Holmes Murphy Stock

Among the assets the trial court considered in arriving at the present property settlement were shares in Holmes, Murphy & Associates which were owned by Dan. At trial, experts for each party gave four different opinions

concerning the value of that stock, ranging from \$213,998 to \$769,051. The trial court valued the stock at \$491,561. The court made no explanation of how it arrived at that figure; however, it appears that what the trial court did was to take the average of the values submitted by all the parties' experts. Both Dan and Sallie cite error in that valuation, Dan alleging that it is unreasonably high and Sallie alleging that it is unreasonably low. To decide this issue, we must evaluate the reasonableness of the valuations given by each party's experts.

At the outset we note that certain restrictions affect the value of Dan's stock. Under the terms of his stock purchase agreement with Holmes, Murphy, Dan may not transfer these shares (i.e., dispose of them by "sale, pledge, hypothecation, disposition, gifts, in voluntary transfer [or] transfer by operation of law") unless he obtained the consent of 70 percent of the holders of issues and outstanding shares of the stock. There are numerous other restrictions on disposition of the stock, including complex procedure for determining the purchase price of the shares, provisions which shareholders are required to include in their will, and others. One such restriction requires any party purchasing stock to deliver negotiable promissory notes to the selling shareholder or his estate. The terms of these notes (which are to be for the purchase price of the shares after the down payment) require, among other things, payment over a period not exceeding 180 months at 8 percent interest. Holmes, Murphy is obligated to purchase the stock of a retiring, deceased, or terminated employee-stockholder.

The experts on both sides agreed that this Buy-Sell Agreement controls the evaluation of the stock. The problem with which the court was confronted was the value to be placed upon the stock as controlled by this Buy-Sell Agreement.

"[M]arket value for the stock in closed corporation can rarely be ascertained. Thus its intrinsic value should be determined. A broad range of

evidence is admissible to prove any fact calculated to affect its value." In re Marriage of Moffatt, 279 N.W.2d 15, 19 (Iowa 1979). In this case, unrelated shareholders have entered into a bona fide stock purchase agreement that is binding upon all of the parties. The sole issue is the present value of the stock as controlled by the promissory.

Dan's expert witness employed two methods to arrive at the value of the contract price of the stock. The first was based upon the assumption that Holmes, Murphy would exercise its contract rights to buy the stock from him and he would retain the note. This resulted in a figure which the witness called the "retention value."

Under the second approach, it was assumed that Holmes, Murphy would exercise its contract rights to buy the stock from Dan and that Dan would sell the note that he received for the stock at its fair market value. This was called the "sale value " of the stock.

The first approach involved amortization of principal and interest to be received over the term of years and deduction of the corresponding tax liabilities resulting from the capital gains and ordinary income taxes that would have to be paid as a result of the transaction. The total net principal and interest received over the 15-year period of the note was then discounted to present value, the associated debt was deducted from that total, and the net retention value was then determined. Under this approach, the calculation was as follows:

<u>Retention Value</u>	
Total principal received	\$1,337,375
Less: total capital gain tax (less original cost)	(-270,644)
Net principal proceeds	1,066,411
Total interest income	953,066

Less: related income tax	(-705,264)
Net interest proceeds	247,796
Total net principal and interest received over 15 years	1,314,207
Discounted present value	553,748
Associated Debt	(-339,750)
Net Value	213,998

The sale value of the stock was calculated by assuming that the stock was sold for the contractual amount and then discounted at 12 percent to present value. The associated net long-term capital gains tax liability was then subtracted, as was the associated debt, in the following manner:

<u>Sale Value</u>	
Contractual sales price	\$1,337,375
Discounted present value (15%)	917,618
Net long term capital gain tax liability	-145,037
Net Proceeds	772,581
Associated Debt	-339,750
Net Value	432,831

The 12 percent discount rate was employed in view of the then-prevailing interest rates, the lack of collateral, the lack of personal guarantees, and other factors which made the note a rather speculative holding. Dan's expert witness testified that 12 percent was the minimum discount for which Dan could expect to sell the note. He believed that a willing buyer would be more likely to demand 25 percent.

In calculating the retention value, Sallie's expert assumed a 10 percent discount rate, as opposed to Dan's expert's assumption of a discount rate of 12 percent. However, he conceded that any discount factor between 8 and

12 percent was reasonable, and testified that his use of 10 percent was a "subjective determination." He did not take into account the tax effect of the interest income that Dan would receive. He also subjected Dan's debt of \$339,750 to present valuation based upon an assumption of 10 percent discount resulting in Dan's owing a debt of approximately \$302,000. This resulted in an evaluation of \$769,051.

Sallie's expert was asked the following question: "If he were just a willing seller and there was a willing buyer that he could find today approximately what kind of a discount would that willing buyer expect to receive in order to have a current yield on his investment?" The expert witness: "I don't know where he would sell it." He was then asked what yield people expect on investments of this sort, and responded, "I just can't answer that. I just don't know."

In light of the foregoing, and our examination of the record, we conclude that Sallie's expert ignored certain crucial factors in arriving at his valuation of this property. Therefore, we give his valuation no credit, contrary to the apparent credit given by the trial court. We find that either the retention value or the sale value as calculated by Dan's expert, represents a reasonable valuation of the property. We are not bound to accept one or the other. We therefore conclude that the most reasonable valuation of the property is a compromise between the retention value and the sale value arrived at by Dan's expert. Averaging the two, we arrive at a figure of \$323,415, and hold that this is the value of Dan's interest in Holmes, Murphy.

V. Division of the Property

In determining the values of the property distributed to each of the parties herein, we take into account the following factors:

1. The value Sallie's interest in the J. W. Cownie Trust in the amount \$250,000 will not be considered. (See Division II, supra).

2. The Holmes, Murphy stock is valued at \$323,415. (See Division IV, supra.)
3. The partnership at 11th and Grand has a negative value of \$2250.
4. The parties have an income tax liability of \$32,138.
5. Dan has accounts payable of \$5000.

6. Dan has incurred liabilities in regard to the dissolution for his own accountant's fees and attorney fees in the amount of \$30,000 and \$16,000 awarded by the trial court to Sallie's attorneys and accountant.

Taking all of these factors into account, we conclude that the marital assets had a total value of \$864,103. The trial court's award to Dan amounts, under these conditions, to \$451,249, or 52 percent of the whole. Sallie's share, \$412,854, amounts to 48 percent of the whole.

Under all of the circumstances, we do not find that this was an inequitable award.

VI. Alimony and Child Support.

Sallie was awarded \$2600 per month, or \$31,200 per year for her own support. In addition, she was awarded \$866 per month for child support, for a total \$41,600 per year. The trial court ordered alimony to be terminated at the respondent's death, remarriage, cohabitation with an adult male, or the expiration of 15 years from the date of the decree, whichever occurred first. The trial court also ordered termination or reduction of alimony payments when Sallie begins to receive income from the J. W. Cownie Trust.

Sallie argues that the alimony award is insufficient and that Dan can well afford to pay additional alimony. She argues further that the record is void of any evidence that would show that she could ever rehabilitate herself financially to the point where she could maintain herself in the life-style to which she grew accustomed while she was married to Dan. She believes, therefore, that she is

entitled to more alimony and that this court should extend Dan's obligation to support her for the remainder of her life. She also argues that Dan's responsibility to pay her alimony should not be conditioned in any way upon her receipt of income from her father's trust.

Sallie is in good physical health. Her children are eighteen and thirteen years of age. She has a degree and teaching credentials. There is no reason to believe that she could not fulfill the requirements for renewal of her teaching certificate. At the time of trial, Sallie was thirty-nine years old.

In In re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981), the supreme court stated, with regard to a petitioner who had been in poor health and had virtually no employment skills:

"We believe two years is a reasonable time to determine her employment potential. At the end of that period Petitioner may show circumstances which will justify an extension of her alimony payments. The decree places the burden on her to do so to avoid automatic termination. We do not disturb this provision."

We believe that 15 years is a reasonable length of time to then place the burden on Sallie to avoid automatic termination.

Applying the factors to be considered in making a determination as to the payment of alimony support under Iowa Code section 598.21 and Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1969). We conclude that the court's award of alimony should not be disturbed. In re Marriage of Callenius, 309 N.W.2d 510, 511 (Iowa 1981) the court used the interest income the wife received from the property settlement in determining whether the alimony was fair and equitable. In this case Sallie received \$268,000 of liquid assets. Assuming a 10 percent investment income, she will receive an additional \$26,800 annually.

Sallie also argues that Dan ought to be required to pay greater child support in view of the fact one of the children has been ill, and because she contends that

the amount of support she is presently receiving is not sufficient to enable her to provide the standard of living to which the children have become accustomed. She argues further that the children need to have their mother at home, and that she should not be forced to return to the job market. The trial court's award is sufficient to enable the children and Sallie to live comfortably. The children are now 18 and 15 and do not need the same time and attention as they did when they were younger. Fortunately Kerry has recovered from leukemia. Sallie at age of thirty-nine has many productive years ahead of her. Considering Sallie's alimony, her earnings from her property settlement and the child support award itself we find the award is equitable. See Callenius, supra 516.

Sallie objects to the trial court's order adjusting her alimony award in the event she receives funds from her trust funds.

The purpose of alimony is to continue the respective obligation each of the spouses has to support each other. In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981). Alimony is not a right that accumulates with service over a period of years. Thus, when the need for support is not there, there is no need for support. If Sallie receives funds from her trust fund, her needs are reduced to that amount. The trial court was correct in providing for such an adjustment.

VII. Attorneys Fees, Costs, and Suit Money

The trial court ordered Dan to pay \$15,000 toward Sallie's attorneys fees and \$1000 toward the fees of her expert witness. Dan argues that the court received no evidence concerning seven factors enumerated in In re Marriage Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972), and therefore lacked the necessary basis for determining the reasonableness of the request by Sallie's counsel for his fees. On the ground that much of her expert witness's testimony was redundant, he argues that he should not be required to pay this \$1000 sum in addition to money he already paid for this purpose.

In determining whether attorneys fees are justified in a particular case, a trial court need not hold a formal hearing to "receive evidence" in any formal sense. The court may draw upon its broad experience and upon observations made during the trial in determining the extent to which the Jennerjohn criteria have been met.

Given the relative financial situations in which the parties found themselves at the time of the decree, we do not find that the court's award to Sallie was inequitable. Indeed, Dan's argument in favor of affirming the court's division of property is partially based upon the \$16,000 that he was ordered by the trial court to pay. By counting that obligation, we arrive at the conclusion that the division of assets and liabilities leave Dan with 52 percent of the whole and Sallie with 48 percent. See Division IV above. We therefore affirm the trial court's award of attorney fees and suit money.

In view of the property division and alimony award, we conclude that Sallie is now capable of paying her own fees on appeal. See In re Marriage of Hitchcock, 309 N.W.2d 432, 438 (Iowa 1981); Kraft v. Kraft, 226 N.W.2d 6, 9 (Iowa 1975). Her request for fees on appeal is therefore denied.

AFFIRMED.