

FILED

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DEC 27 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF GERALD HUBERT ESTAL AND ~~JOYCE V. ESTAL~~

Upon the Petition of

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GERALD HUBERT ESTAL,

)

Filed December 27, 1983

Petitioner-Appellant,

)

And Concerning

)

3-360

JOYCE V. ESTAL,

)

83-547

Respondent-Appellee.

)

Appeal from Mahaska District Court - James D. Jenkins, Judge.

Petitioner appeals the alimony and child support awards of the decree dissolving his marriage to respondent. **AFFIRMED AS MODIFIED.**

M. H. Pothoven and Randal C. Stravers of Clements, Blomgren, & Pothoven, Oskaloosa, Iowa, for petitioner-appellant.

Richard D. Carlson of Fairall, Fairall, Kaplan & Condon, Marshalltown, Iowa, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Petitioner appeals the alimony and child support awards of the decree dissolving his marriage to respondent.

Petitioner, Gerald Estal, and respondent, Joyce Estal, were married in 1961. They have three children, born in 1965, 1966, and 1971. The dissolution decree placed the two older children in Gerald's custody and the youngest child in Joyce's custody. These custody awards fulfilled the wishes of the parties and the children, and are not challenged in this appeal.

Gerald is a certified public accountant who has invested heavily but disastrously in business ventures. He draws a salary of \$24,000 per year from his professional corporation. He also receives real estate rent of \$11,770 per year. Joyce is a teacher who earns \$19,450 per year. The parties possess assets valued at over \$750,000; these assets include a farm where they lived, Gerald's professional corporation, and various business properties. However, virtually all of the assets are very heavily encumbered; the parties' debts are estimated at \$834,000, more than the value of their assets.

The trial court awarded Joyce an unencumbered automobile and household furnishings; Gerald was awarded all other assets but was directed to assume all of the very substantial debts. Joyce was awarded alimony of \$600 per month and child support of \$50 per week for the one child in her custody. She was not directed to pay any support for the two children in Gerald's custody. The court provided that Joyce's alimony award would continue until she reaches the age of 65, regardless of whether she remarries or cohabits with another man.

In explaining its alimony and child support awards, the trial court noted that it had awarded Joyce virtually no property in an attempt to protect her from Gerald's creditors. The court also noted Gerald's higher earning capacity and his potential wealth if he can resolve his present financial problems without resorting to bankruptcy.

Gerald has appealed from the dissolution decree. He contends the alimony and child support awards are excessive, and he also complains about the duration of the alimony award. Joyce has applied for attorney fees on appeal.

Our review of this equitable proceeding is *de novo*. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially where credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I.

Alimony. The trial court made an award of \$600 per month to Joyce until she reaches the age of sixty-five in lieu of an interest in the heavily encumbered property of the parties. Although property rights and alimony are closely related, they are distinguishable and have differing purposes. Division of property is made according to the parties' rights to an equitable share of property accumulated as a result of their joint efforts. Alimony is an allowance in satisfaction of the other party's legal obligation of support. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981).

The majority of the parties' property in this case consists of business ventures in which Joyce did not participate. The trial court correctly awarded all interest in this property to Gerald and ordered him to pay the indebtedness on it which is more than the estimated value of the property. As the trial court noted, Gerald may lose everything or he may, by extremely hard work, be able to salvage some of his assets. Joyce, on the other hand, is protected from his creditors. The trial court concluded that Joyce should receive alimony in lieu of an interest in the heavily encumbered property. We do not agree that this is justifiable. Since Gerald was actively involved in managing the assets, he is required to assume the risk of losing them. Joyce is in a more stable position free from debt and earning \$19,450

per year. The dissolution decree is modified to eliminate the award of alimony to her.

II.

Child Support. The factors to be considered in determining child support awards are found in Iowa Code section 598.21(4) (1981). Although both parents have a duty to support the children, the obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). Gerald's income is higher than Joyce's and he should contribute to the support of the youngest child. The amount awarded by the trial court, \$50 per week, is not burdensome.

III.

Attorney Fees. Allowance of attorney fees in a dissolution is not a matter of right, but depends upon the financial condition of the parties and their respective ability to pay. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). Considering the financial positions of Gerald and Joyce, including Gerald's obligation to pay child support, there is not a sufficient disparity in this case to justify an award of attorney fees to Joyce. Her application is denied.

AFFIRMED AS MODIFIED.