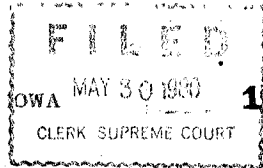


IN THE COURT OF APPEALS OF IOWA



In re the Marriage of)

JANEAN T. ALLEN,)

Filed May 30, 1980

Petitioner-Appellee,)

and Concerning)

ROLLAND L. ALLEN,)

0-166

Respondent-Appellant.)

2-65867

Appeal from Polk District Court - A. B. Crouch, Judge.

Respondent-husband appeals from alimony and child support provisions of dissolution decree alleging trial court abused its discretion in awarding alimony to petitioner-wife. AFFIRMED WITH MODIFICATION.

Thomas R. Isaac of Slack & Isaac, Des Moines, Iowa, for respondent-appellant.

Gerald Crawford of Conley, Conley & Crawford, Des Moines, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent-husband, Rolland L. Allen, appeals economic provisions of dissolution decree terminating his marriage to petitioner-wife, Janean L. Allen. He alleges trial court abused its discretion in awarding petitioner alimony in light of the property division. We affirm with modification.

The parties' marriage of approximately twelve and one-half years was dissolved on June 18, 1979. One son was born of the marriage on September 24, 1967. Both parties were in good health and employed throughout duration of the marriage. In 1977, respondent, age 47, earned gross wages of \$27,300 as a truck driver; petitioner, age 44, received approximately \$14,000 for her work in a grocery store.

Trial court granted custody of the parties' minor son to petitioner. Respondent was awarded a house valued at approximately \$27,000 subject to a \$2,000 mortgage, a 1969 Mercury automobile, a \$2,500 half-interest in a mobile home, hand tools, and personal effects. Petitioner received a home valued at approximately \$33,000 subject to a mortgage of \$7,750, a 1972 Ford automobile, a boat and trailer valued at \$8,000 subject to a mortgage of \$2,472, and household goods. Trial court further decreed petitioner was entitled to \$60 per week alimony and \$60 per week child support, the latter to continue until the son is eighteen or completes high school. In the event the child desires higher education, respondent was ordered to pay support for four additional years.

I. Scope of Review. Appellate review of a dissolution proceeding is *de novo*. Iowa R. App. P. 4; Zinger v. Zinger, 243 N.W.2d 639, 645 (Iowa 1976). Our review is guided by section 598.21, The Code 1979, which directs the court to make orders relating to children, property, parties, and their maintenance as is justified and by section 598.17, The Code 1979, which directs the court to provide reasonable support for dependent children or either spouse.

II. Support Awards. Respondent complains trial court's awards of alimony and child support are unjust and inequitable when considered in light of trial court's property settlement and petitioner's earning capacities. Applying the criteria of Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault, In re Williams' Marriage, 199 N.W.2d 339, 344 (Iowa 1972), we agree.

It is well settled payment of alimony or child support is not an absolute right, but instead, is dependent on the circumstances of each particular case. In re Marriage of

Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Where proper evidence is presented, we may consider the education, skill or talent of each party in assessing their future earning capacities and the need for an award of alimony. In re Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978). Although both parents have an obligation to support their children, their duties will be apportioned according to the fair ability of each to contribute. Fleener, 247 N.W.2d at 221.

The facts of the instant case reveal petitioner's financial needs to support her son and herself are greater than her present earning capacity. We do not conclude, however, these needs warrant an award of alimony. Rather, justice would be better served by awarding a greater amount of child support.

In reaching this conclusion, we note this is not a case where petitioner has given up career opportunities to stay at home and care for the children. She is earning an adequate income to support herself and is not in need of rehabilitative alimony. See In re Marriage of Schissel, No. 63240 (Iowa May 21, 1980). Considering, however, it is both parties' duty to support their son, we increase trial court's award of child support to petitioner to \$75 each week until the minor son reaches eighteen or graduates from high school. In the event the parties' son desires to pursue higher education, this obligation on respondent shall continue so long as the conditions in section 598.1(2), The Code 1979, relating to education, are met.

Judgment of trial court is accordingly modified. Costs of this appeal shall be assessed equally between the parties.

AFFIRMED AS MODIFIED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from the majority's modification of the dissolution decree. The majority's increase in respondent's child support obligation is not permissible under the posture of this case since it grants petitioner a more favorable result here than she received below, even though she has not appealed or cross-appealed from that award; she did not even file a brief. The Iowa Supreme Court has stated:

It is well settled that one who does not appeal may not have a more favorable result in the appellate court than he secured below. A party who does not appeal or who has not sought to have the judgment or decree reviewed by a cross-appeal or assignment of cross-errors may not have greater relief than that afforded in the trial court.

Randolph Foods, Inc. v. McLaughlin, 253 Iowa 1258, 1277, 115 N.W.2d 863, 879 (1962) (citation omitted).

With the possible exception of child custody and visitation, the supreme court has refused to grant an appellee more favorable relief than was received in the trial court. See McCarthy v. McCarthy, 178 N.W.2d 308, 312-13 (Iowa 1970) (Stuart, J., specially concurring). While respondent was appealing the economic provisions of the dissolution decree, he argued his alimony and child support obligations were too high. The majority agrees the alimony award was not justified, but then increases to respondent's detriment the child support award. Such a result exceeds the scope of our de novo review by awarding petitioner greater relief on this issue than she received before at trial, even though she does not appeal from that award. Bartels v. Hennessey Brothers, Inc., 164 N.W.2d 87, 92 (Iowa 1969). Accordingly, the extent of relief we may grant is limited to reduction of the alimony or child support.