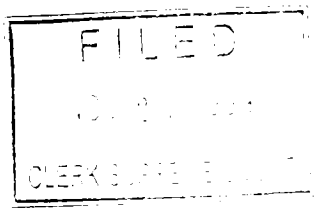
IN THE COURT OF APPEALS OF IOWA

No. 1999-380 (9-633) / 98-2061
Filed November 23, 1999

IN RE THE MARRIAGE OF JERILYN S. NUMELIN AND WILBUR J. NUMELIN



Upon the Petition of
JERILYN S. NUMELIN,
Petitioner-Appellant,

And Concerning
WILBUR J. NUMELIN,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

Petitioner appeals several provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Jay M. Shriver and Kristen N. Ollenburg of Pappajohn, Shriver, Eide & Nicholas P.C., Mason City, for appellant.

Kerry A. Finley of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, and Roberta M. Anderson of Schroeder & Anderson, Mason City, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUITINK, J.

I. Background Facts and Proceedings.

The Numelins were married in September 1972. They have three children: Tye, born November 24, 1977; Troy, born November 29, 1982; and Todd, born November 25, 1985. Tye is a full-time college student.

At the time of trial Wilbur was fifty-eight, and Jerilyn was fifty-two. Wilbur is a self-employed real estate agent. Although Wilbur owns no farming assets, he farms 400 acres of rented farmland by contracting with others to do the required work. Jerilyn has no recent or significant full-time employment experience. She is, however, a registered nurse and has worked part-time during the marriage.

The disputed issues at trial included property division, alimony, child support, and Tye's postsecondary education subsidy. After considering the conflicting evidence on these issues, the district court determined the Numelins' net worth was a negative $73,190 ($255,000 debts and $182,250 assets). This determination included a finding that the Numelin's home equity was $120,000. Jerilyn's recent $200,000 inheritance was excluded and set off to her.

The district court determined Wilbur's annual net income was $52,041, based on a three-year average net income from Wilbur's real estate business. After subtracting allowable deductions, the district court found Wilbur's net monthly income was $2459.63. The court's determination that Jerilyn's annual income was $26,760 was premised on an attributed $15,000 earning capacity as a nurse and

$11,760 passive earnings from her inheritance. After subtracting allowable deductions, the court found Jerilyn's net monthly income was $1825.61.

Based on its findings concerning the parties' net income, the court ordered Wilbur to pay $733 monthly child support. The court rejected Wilbur's proposed payment of the children's college expenses because it was interrelated to alternative financial arrangements that were rejected. The court also noted Wilbur's proposal to pay all college expenses "would be contrary to current applicable Iowa law with respect to post high school education." Both parties were accordingly ordered to contribute $2000 per year to Tye's expenses as a student at the University of Iowa. Jerilyn's demands for alimony were denied.

In its property division, the court noted the parties' conceded sale of the family home and anticipated $120,000 sale proceeds remaining after payment of the mortgage balance. The court's division provided application of the net sale proceeds to payment of $30,590 in joint consumer debt with thirty percent of the remaining proceeds awarded to Jerilyn and seventy percent to Wilbur. With the exception of Jerilyn's $9500 automobile, Wilbur was awarded the remainder of the parties' disputed property valued at $52,750. One of the court's reasons for awarding more property to Wilbur was Wilbur's attendant obligation to pay all of the parties' remaining liabilities, including farm and tax liabilities totaling $224,824.

On appeal Jerilyn disputes the equity of the district court's property division. She demands more child support and permanent alimony. Jerilyn also argues Wilbur

should pay all college expenses in accordance with his proposed allocation of these expenses.

II. Standard of Review.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 4. 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).

III. Property Division.

The principles guiding division of property are well settled. The parties to 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, 246 (Iowa App. 1991). Iowa courts do not require equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* When distributing property, we take into account the criteria codified in Iowa Code section 598.21(1) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). Among the many factors to consider are: length of marriage; property brought to the marriage by each party; the contributions of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking; and the earning capacity of each party. Iowa Code § 598.21.

We initially note the absence of any dispute concerning the court's determination of asset values or set off of Jerilyn's inheritance. The gist of Jerilyn's

complaint is the district court's decision to award Wilbur seventy-six percent of the parties' assets. Although we share the district court's concerns for Wilbur's ability to service the debt assigned to him, this consideration does not justify the resulting disparity in division of the parties' property. We accordingly modify the property division by awarding Jerilyn one-half of the net home equity remaining after payment of debts and expenses allowed by the district court. In all other respects the district court's property division is affirmed.

IV. Alimony.

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 O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996) (citations omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

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) (1997). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Pursuant to Iowa Code section 598.21(3), a court may grant support payments after considering the following: (1) length of marriage, (2) age and physical and emotional health of the parties; (3) educational level of each party at the

time of marriage and at the time action is commenced; and (4) earning capacity of the party seeking maintenance including educational background, training, employment skills, work experience, length of absence from the job market, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

In its decree the court stated:

> Considering the economic crisis of the parties, the fact that Wilbur is assuming the lion's share of the debt, the inheritance which Jerilyn enjoys, Jerilyn's ability to re-enter the work force, plus a positive cash flow between earnings and child support, the Court finds that alimony is not appropriate in this case.

The record includes abundant evidence supporting these findings of fact, and we adopt them as our own. Neither Jerilyn's needs or Wilbur's ability to pay justifies an award of alimony. Our decision to modify the property division will reduce both Jerilyn's needs and Wilbur's ability to pay alimony. We, like the district court, find an award of alimony under these circumstances would not be equitable.

V. Child Support.

Both parents have a legal obligation to support their children. *In re Marriage of Fleener*, 247 N.W.2d at 221. The amount of child support a parent is ordered to pay is determined by application of the supreme court's child support guidelines. Iowa Code § 598.21(4)(a). The court must enter its findings concerning the parties' net monthly income as defined in the child support guidelines. *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). The court must make this determination

based on the most reliable evidence presented. *In re Marriage of Krone*, 530 N.W.2d 468, 471 (Iowa App. 1995). All income that is not anomalous, uncertain, and speculative should be included. *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997).

Where a parent's income is subject to substantial fluctuation, it may be necessary to average the income over a reasonable period when determining current monthly income. *In re Marriage of Powell*, 474 N.W.2d at 534. Child support may be based on a parent's earning capacity as opposed to his or her actual earnings. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). Reliance on earning capacity rather than actual earnings requires a predicate finding that the latter would result in a substantial injustice. *Id.*

Jerilyn contends the amount of the district court's child support ordered is based on erroneous net income figures. She argues Wilbur's net farm losses should be excluded from the child support calculations because these were improvidently incurred without her knowledge. We disagree.

Jerilyn's factual premise is not supported by the evidence. Wilbur testified a substantial portion of unpaid farm debt was attributable to borrowing to cover expenses of the family's leveraged lifestyle and Tye's college expenses. Jerilyn's conflicting testimony is irreconcilable with her claimed lack of familiarity with Wilbur's use of his farm line of credit. The district court's finding that the amount of outstanding farm debt included money borrowed for family expenses is additionally

supported by a simple comparison of the parties' means and accustomed standard of living. We therefore decline Jerilyn's invitation to exclude farming losses in computing Wilbur's average annual income.

Jerilyn also contends the district court's attribution of her earning capacity is excessive and ignores her preference to spend working hours caring for the parties' children. In *Moore v. Kriegle*, 551 N.W.2d 887, 889 (Iowa App. 1996), we said: "While we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity. . . ." In making this statement we rejected earlier statements that a parent's primary care preferences were dispositive. *Id.*

Here, the parties' minor children are seventeen and fifteen years of age. The record fails to disclose that one or the other of the children have any particular needs requiring Jerilyn's availability for the primary care during working hours. In the absence of other compelling evidence we fail to see how the primary care needs of fifteen- and seventeen-year-old children precludes Jerilyn from seeking substantial employment.

We also reject Jerilyn's claims concerning the reasonableness of the district court's earnings attributions. The court's determination of her earning capacity was based on a conventional forty-hour work week and an earnings rate of $7.22 per hour. These figures are consistent with evidence of comparable employment in the area where Jerilyn lives, her part-time employment experience, and qualifications as a

registered nurse. Because our de novo review confirms the equity of the district court's income determinations, the child support awarded below is affirmed.

VI. Postsecondary Education.

Iowa Code section 598.21(5A) provides:

> The court may order a postsecondary education subsidy if good cause is shown.
>
> a. In determining whether good cause exists for ordering a postsecondary education subsidy, the court shall consider the age of the child, the ability of the child relative to postsecondary education, the child's financial resources, whether the child is self-sustaining, and the financial condition of each parent. If the court determines that good cause is shown for ordering a postsecondary education subsidy, the court shall determine the amount of subsidy as follows:
>
> (1) The court shall determine the cost of postsecondary education based upon the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary postsecondary education expense.
>
> (2) The court shall then determine the amount, if any, which the child may reasonably be expected to contribute, considering the child's financial resources, including but not limited to the availability of financial aid whether in the form of scholarships, grants, or student loans, and the ability of the child to earn income while attending school.
>
> (3) The child's expected contribution shall be deducted from the cost of postsecondary education and the court shall apportion responsibility for the remaining cost of postsecondary education to each parent. The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education.
>
> . . .

The district court decree states:

> From the information received, the Court would conclude that the total cost of [Tye's] education is approximately $8,600, with $2,600 being available through loans. The remaining amount, $6,000, is therefore pursuant to statute apportioned to the parents, whose share shall not exceed 33-1/3 percent of the total cost, and therefore, Wilbur's legal obligation shall be $2,000 per year. If Wilbur elects to pay more

> for his son's education, that is Wilbur's moral prerogative, but pursuant to [illegible] statutory change, the Court cannot bind him by his proposal [to continue to fully pay for Tye's college education expenses].
>
> As to Jerilyn's obligation for Tye's support, the Court also finds that she shall be obligated to pay Tye $2,000 per year for college support. Said obligation shall continue so long as Tye is not married and has not reached the age of 22 years.

Jerilyn contends the district court ignored the parties' express agreement requiring Wilbur to pay all of the children's college expenses. She also argues the court's resulting order requiring her to subsidize Tye's education is not supported by good cause. We disagree.

A stipulation of settlement in a dissolution proceeding is a contract between the parties. *In re Marriage of Bries*, 499 N.W.2d 319, 327 (Iowa App. 1993). The stipulation becomes final when accepted by the court. *In re Marriage of Butterfield*, 500 N.W.2d 95, 98 (Iowa App. 1993). A stipulated settlement should be approved and enforced only if the court determines the settlement will not adversely affect the interest of the children. *Id.*

Even if we were to conclude the parties stipulated as claimed, any agreement excusing Jerilyn from contributing to the cost of Tye's college expenses would adversely affect his interest in receipt of a subsidy from her. *See, e.g., In re Marriage of Vrban*, 293 N.W.2d 198, 203 (Iowa 1980). We, like the district court, find the claimed agreement insufficient reason to excuse Jerilyn's payment of postsecondary education subsidy.

The record also fails to support Jerilyn's good cause argument. In its discussion of this issue, the district court expressly noted each of the statutorily specified factors. We expressly reject the notion that one parent's willingness to contribute more than his or her statutory share of these expenses should be considered a financial resource of the child in making this determination. Lastly, we note that the provisions of Iowa Code section 598.21 (5A)(a)(3) are limitations on the amount of a parent's court-imposed obligation to subsidize these expenses and do not preclude a parent from making a greater contribution. *See, e.g., In re Marriage of Vrban*, 293 N.W.2d at 202. We affirm on this issue.

VII. Appellate Attorney Fees.

Jerilyn requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). We are to consider the needs of the pa y 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) (citations omitted). After considering the financial condition of the parties, we deny Jerilyn's request. Each party shall be responsible for her or her own attorney fees. Costs are assessed equally to the parties.

The district court's decree is affirmed as modified.

AFFIRMED AS MODIFIED.