

IN THE COURT OF APPEALS OF IOWA

No. 4-564 / 93-1600

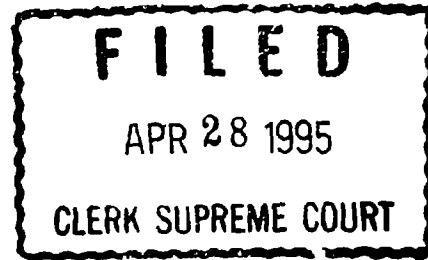
**IN RE THE MARRIAGE OF KAREN DIANE SABATKA AND
GERARD ALAN SABATKA**

Upon the Petition of
KAREN DIANE SABATKA,

Petitioner-Appellee,

And Concerning
GERARD ALAN SABATKA,

Respondent-Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Leo
F. Connolly, Judge.

Gerard appeals from the parties' decree of dissolution of marriage.
AFFIRMED AS MODIFIED.

G. Elizabeth Otte, Council Bluffs, for appellant.

Jon E. Heisterkamp of Peters Law Firm, P.C., Council Bluffs, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ., but decided en banc.

PER CURIAM

Karen and Gerard Sabatka were in married in 1972. They have four children: Amy, born September 19, 1977; Jeffrey, born August 6, 1979; Lisa, born July 15, 1981; and John, born February 14, 1984. In December 1991, Karen filed a petition for dissolution of marriage.

At the time of trial Karen was forty-one years old. She is a high school graduate and has one year of college education. When their first child was born in 1977, Karen quit her job as a bookkeeper and has since been a homemaker.

Throughout their marriage, Gerard worked for Union Pacific Railroad. His employment with Union Pacific was terminated prior to trial. Gerard has a grievance pending which challenges his termination. Almost a month before trial, and after his termination from Union Pacific, Gerard gained employment with Lozier Corporation.

After an August 1993 trial, the court granted the parties joint custody and Karen primary physical care of the children. The court ordered Gerard to pay child support to Karen in the amount of \$1074 per month and to maintain insurance for the children for all medical expenses. The court further ordered Gerard to pay alimony to Karen in the amount of \$400 per month until she dies or remarries and to pay her attorney fees in the amount of \$1000.

The court awarded Karen the family home and rental property located at 2547 Avenue "B". Gerard was awarded a rental property located at 1620 Avenue "I" and the home he lives in at 1417 Second Avenue.

Gerard appeals.

I. Scope of review. Our review in cases such as these 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. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. *Id.* Prior cases have little precedential value, and

we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

II. Property distribution. Gerard contends the district court erred in the distribution of the marital assets. Gerard argues the division was inequitable. Gerard's primary concern is with the real property. The district court awarded Karen the family home with a net value of \$75,888 and a rental property with a value of \$22,425. Gerard was awarded two properties with a joint net value of \$52,131.

The partners in the 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 an equal division of percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.*

The family home has a net value equal to the combined net value of the other three properties. Since the family home had such a large value, it made equal shares difficult to reach given the other circumstances in the case. Karen was awarded primary physical care of the children, and we find it proper in this case that she receive the family home along with the children. However, we conclude that to reach equity Gerard should be awarded the three other properties, i.e. the properties located at 2547 Avenue "B", 1620 Avenue "I", and 1417 Second Avenue with the additional provision that he is to assume and pay the mortgage indebtedness due and all other obligations due thereon and further is to hold Karen free from any liability thereon. We modify the court decree accordingly.

We also conclude that Karen is entitled to share in Gerard's Union Pacific Retirement Fund. In determining the amount to be awarded Karen, she is to receive one-half of the percentage of his pension benefits determined by a fraction, the numerator of which is the number of years he contributed to the plan during the

parties' marriage and the denominator of which is the total number of years he contributes to the plan prior to drawing benefits. Both parties shall execute those instruments necessary to place this plan into effect and Gerard shall immediately notify the proper official of this award. We modify the decree as to this additional award.

III. Alimony. Gerard was ordered to pay \$400 per month in alimony until Karen dies or remarries. Gerard contends the district court erred in awarding Karen permanent alimony. Instead, Gerard argues the alimony should have been limited in terms of amount and duration.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Brown*, 487 N.W.2d 331, 334 (Iowa 1992). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3) (1993). *See In re Marriage of Hayne*, 334 N.W.2d 347 (Iowa App. 1983). We must consider the earning capacity of the parties, their present standard of living, and balance the ability of one to pay against the relative needs of the other. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa App. 1993). Issues concerning alimony must be decided on their own facts; precedent is of little value. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976).

The parties are ending a twenty-one year marriage. Throughout their marriage, Gerard was employed by Union Pacific Railroad. Although he was terminated from Union Pacific just prior to trial and was pursuing a grievance against Union Pacific to challenge his termination, he was employed by Lozier Corporation at the time of trial. Karen has not been employed outside the home for over fifteen years. We affirm the district court's award of \$400 per month in alimony but we modify the decree so as to provide that it shall continue until Karen dies or for a period of five

years, whichever occurs first. In addition, we modify the decree to provide that alimony shall also terminate at Gerard's death.

IV. Child support. Gerard contends the district court erred in calculating the child support payments. The district court found Gerard to have a net monthly income of \$2,085,¹ and found Karen to have no monthly income. After applying a percentage of 51.5 according to the Child Support Guidelines, the district court concluded Gerard was to pay \$1074 per month in child support.

Gerard first contends the district court erred in not deducting his alimony payments from his gross monthly income. The child support guidelines do not specifically provide for such a deduction. *In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991); *In re Marriage of McKamey*, 522 N.W.2d 95, 99 (Iowa App. 1994). However, the same discretion is given in setting the amounts in order to provide for the needs of the children and to do justice between the parties under the special circumstances of the case. *Id.* In light of the permanent duration of the alimony and the substantial amount to be paid (\$4800 per year), we conclude the alimony payments should be deducted from Gerard's gross monthly income and included as income for Karen.

Gerard also urges the health insurance premiums he is required to pay under the decree should also be deducted from his gross monthly income. Dependent medical insurance which is required to be paid pursuant to a court order is deductible from gross income. *In re Marriage of Golay*, 495 N.W.2d 123, 127 (Iowa App.

¹ Although the district court does not specify, it is assumed this figure was reached in the following manner using the three pay stubs Gerard submitted into evidence from his new job with Lozier. Lozier paid Gerard weekly. His net weekly payment average is \$481.26. This amount is then multiplied by fifty-two to equal an annual net income of \$25,025.86. This number divided by twelve equals \$2085.48, which is equivalent to the amount used by the district court.

1992). We conclude this amount should also be deducted from Gerard's gross monthly income.

Due to the additional deductions, we make the following modifications in Gerard's monthly child support obligation. Using the same method employed by the district court to determine net monthly income, which neither the appellant or appellee challenge on appeal, and using the same pay stubs from Lozier, we determine Gerard's average gross monthly income is \$2535. Gerard's average monthly deductions, including the deductions for alimony and dependent medical insurance, equal \$967 which, when subtracted from his average gross monthly income, results in a average net monthly income from wages of \$1568. In addition to his salary, Gerard has rental income from two of the three properties awarded him. Gerard asserts his net monthly income from one of the rental properties is \$130 and we ascribe an amount equal to that to the other rental property. Karen does not challenge these figures on appeal. Turning then to the child support guidelines, we find that Gerard's net monthly income of \$1828 falls within the \$1001 to \$3000 net monthly income of a noncustodial parent.

From the record before us, we find that Karen's only monthly income is the \$400 alimony payment. We have not been furnished with any figures as to her income tax exposure; but even if tax exposure exists, we conclude her net monthly income as a custodial parent would still fall between the \$301 to \$400 bracket.

We now apply the percentages set forth in the child support guidelines to reach the following child support obligations: \$879.00 per month when there are four children for which he is obligated under the decree, \$749.00 per month when there are three children for which he is obligated under the decree, \$640.00 per month when there are two children for which he is obligated under the decree, and \$453.00

per month when there is one child for which he is obligated under the decree. We modify the decree accordingly.

The trial court found that Gerard is in the midst of a grievance with United Pacific Railroad concerning his prior employment. The record reveals that when he was employed by the railroad, he had in 1991 gross earnings of \$51,554 and in 1992, \$52,250. The trial court further decreed that if the Gerard is reinstated by the railroad that Karen is automatically granted a modification of the child support figure and that she does not have to prove a substantial change in circumstances nor does she need to file a modification action. We further modify the decree by striking this provision. We recognize that if George is reinstated he will realize a substantial salary increase and it may very well be grounds for modification. However, the need to file a modification action with the opportunity afforded each party to litigate the amount of child support yet remains. The decree is modified accordingly.

V. Attorney fees. Gerard contends the district court erred in requiring him to pay \$1000 of Karen's trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). To overturn such an award, the complaining party must show an abuse of discretion by the trial court. *Id.* In view of the disparity in earnings, we determine the district court did not abuse its discretion.

Karen requests appellate attorney fees for this appeal. 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 Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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). We order Gerard to pay \$500 toward Karen's appellate attorney fees.

Except as herein modified, we affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.