

FILED

DEC 27 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN RE THE MARRIAGE OF HILDEGARD RAUH AND MARTIN RAUH**

Upon the Petition of	)	
HILDEGARD RAUH,	)	Filed December 27, 1983
Petitioner/Appellant/ Cross-Appellee,	)	
	)	
And Concerning	)	<u>3-381</u>
	)	83-159
MARTIN RAUH,	)	
	)	
Respondent/Appellee/ Cross-Appellant.	)	

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

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED.**

Charles J. Davoren, Murray & Davoren, 5601 Hickman Road, Suite 4, Des Moines, Iowa, for respondent-appellee.

Frank Murray Smith and Dale T. Baker, 4215 Hubbell Avenue, Des Moines, Iowa for petitioner-appellant.

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

HAYDEN, J.

Petitioner appeals and respondent cross-appeals from the provisions of the parties' dissolution decree. We affirm.

Petitioner, Hildegard Rauh, and respondent, Martin Rauh, were married on July 4, 1959. There were three children born during the marriage. The youngest child, Heide, was ten years old at the time of trial. The two older children have reached the age of majority and are not covered by the terms of the dissolution decree.

Hildegard was forty-three years of age at the time of trial. She is in good physical health, but has had some emotional problems. She has been diagnosed as suffering from manic depressive illness, bipolar type, characterized by depression, paranoia, and episodes of psychosis. Her doctor testified that Hildegard can control her illness with medication. There was evidence that Hildegard's problems were compounded by stress resulting from marital difficulties. Hildegard is a talented seamstress. Although she was employed outside the home at times during the marriage, she was unemployed at the time of trial.

Martin is presently employed at an engineering company earning \$23,500 per year. He was forty-eight years old at the time of trial and is in good health except for a knee problem which may require surgery in the future.

During the course of the marriage the parties received numerous gifts and inheritances from their relatives. The amounts of these gifts and inheritances is disputed. Hildegard received either \$18,500 or \$28,500 from her aunt and uncle. Martin received either \$4,500 or \$7,000 from his mother and grandmother. The money was used to pay debts, purchase and improve properties, and operate service stations which Martin ran prior to obtaining his present employment.

Heide has expressed a desire to live with her father stating that her mother's mood swings scare her. There is evidence, however, that Heide has reacted

negatively to her mother's discipline and uses the parties' separation to her own advantage. It also appears that Heide has been influenced by remarks made about her mother by Martin and the two older children.

The trial court provided for joint custody of Heide with Martin having physical care of her during the school year and Hildegard having physical care of her during the summer. Martin was directed to pay \$50 per week child support for the weeks when Hildegard had physical care of Heide.

The court divided the parties' property but did not specifically set off to either party the gifts and inheritances from his or her family. Hildegard received one of the parties' houses, some household goods, and a car subject to a loan. Martin received the other two houses, some household goods, and a car. He was directed to pay the parties' debts except for the loan on the car which Hildegard received. Martin was also ordered to pay \$2,500 toward Hildegard's legal expenses.

The dissolution decree made no provision for alimony for Hildegard. However, the trial court entered a nunc pro tunc order awarding her \$60 per week alimony for eleven years. The trial court stated that the provision had been inadvertently omitted from the decree.

Hildegard appealed asserting: (1) the trial court erred in awarding physical care of Heide to Martin during the school year; (2) the court erred in failing to set aside for her benefit gifts and inheritances received from Hildegard's family; and (3) the alimony should be increased. Hildegard also requests attorney fees on appeal. Martin's cross-appeal asserts: (1) he should have been awarded physical care of Heide for the entire year; and (2) the trial court erred in entering the nunc pro tunc order concerning alimony.

Our review of this equitable proceedings 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.

Child Custody.

The primary consideration in determining custody is the best interest of the child. Iowa R. App. P. 14 (f)(15). In this case both parents appear to be capable of adequately caring for Heide. Although there have been problems between them in the past, both seem to be willing to cooperate in a joint custody situation. The expert custody investigator appointed by the trial court recommended joint custody with physical care to alternate between the parties every six months. We do not think the trial court erred in refusing to permit Heide's school year to be disrupted by a move from one home to another.

Martin claims that physical care of Heide should rest with him all year. Although Hildegard has had emotional problems, these can be effectively eliminated with medication. Heide has expressed a preference for living with her father. While this is relevant, the desires of a child of this age are not controlling nor entitled to much weight. In re Marriage of Bowen, 219 N.W. 2d 683, 689 (Iowa 1974.) Furthermore, it appears that Heide reacts negatively to Hildegard's stricter discipline and has been influenced by disparaging comments made by Martin and the two older children about Hildegard.

Hildegard maintains that she should have been given physical care of Heide for the majority of the year. It is true that Hildegard was the parent primarily responsible for the care of the children during the marriage. The evidence shows, however, that Martin is capable of caring for Heide for the greater part of the year.

The custody provisions of the trial court's decree are affirmed.

II.

Property Division.

Under Iowa Code section 598.21(2)(1981) property inherited by a party or a gift received by a party during the marriage is not subject to division upon

dissolution unless refusal to divide the property is inequitable. The case of In re Marriage of Thomas, 319 N.W. 2d 209, 211 (Iowa 1982) provides some guidelines for interpreting the statute.

Hildegard claims that the trial court erred in not setting aside for her money given to her by her aunt and uncle. These gifts were made at various times throughout the twenty-two year marriage. The letters accompanying the gifts were sometimes addressed to Hildegard alone and sometimes to the entire family. Frequently the donor expressed a desire for the money to be used for a specific family purpose or for the benefit of the family. The gifts were used to purchase properties, pay debts and run businesses. Considering these facts, the trial court correctly refused to award to Hildegard the value of all of these gifts. Instead the court made an approximately equal division of the parties' property. See In re Marriage of Wallace, 315 N.W. 2d 827, 831-32 (Iowa Ct. App. 1981).

III.

Alimony.

The trial court entered a nunc pro tunc order awarding Hildegard \$60 per week alimony for eleven years. The court stated that the provision had been inadvertently omitted from the decree. Martin challenges the validity of the order. Hildegard asserts that the amount of alimony is insufficient.

A nunc pro tunc order is properly entered to correct an evident mistake in a judgment. Iowa Code §602.17 (1981). Its purpose is to make the record accurately reflect the judgment which was actually rendered. McVay v. Kenneth E. Montz Implement Co., 287 N.W. 2d 149, 150 (Iowa 1980). The trial judge's intent is crucial to the determination of whether a nunc pro tunc order is appropriate to correct a judgment. Id. at 151.

The trial judge in this case stated that the provision for alimony was inadvertently omitted. This assertion is supported by the fact that the court had ordered temporary alimony and by the presence of alimony in a earlier findings of

fact and conclusions of law dated June 8, 1982, and withdrawn by an order dated June 15, 1982. After reviewing the record we conclude that omission of alimony was an evident mistake which can properly be corrected by a nunc pro tunc order since alimony was contemplated by the court throughout the course of the proceedings.

We find no error in the amount of alimony ordered by the trial court. Although Martin's income is greater than Hildegard's, he has the primary responsibility for supporting Heide. The court made an equitable distribution of marital property. Since Hildegard is a talented seamstress she should be able to supplement her income through employment.

IV.

Costs and Attorney Fees on Appeal.

The trial court ordered Martin to pay \$2,500 toward Hildegard's attorney fees. That order is not at issue here. Hildegard has requested attorney fees on appeal and Martin resists her application.

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). There is not a sufficient disparity between the financial condition of these parties to justify any additional award. Furthermore, we note that petitioner's attorney, for whom she seeks the award, failed to comply with Iowa Rule of Appellate Procedure 16(a) by submitting a brief and appendix duplicated on one side of the sheet only. This produced an unwieldy appendix of 452 pages at a cost of \$1,007.60. We refuse to make the respondent pay this cost. Therefore, each party should pay his or her own costs and attorney fees on appeal.

AFFIRMED.