

IN THE COURT OF APPEALS OF IOWA

No. 9-177 / 88-1246

FILED

AUG 23 1989

CLERK SUPREME COURT

IN RE THE MARRIAGE OF TONI M. CALLAGHAN
AND SCOTT A. CALLAGHAN

Upon the Petition of

TONI M. CALLAGHAN,

Appellee,

And Concerning

SCOTT A. CALLAGHAN,

Appellant.

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Appeal from the Iowa District Court for Dubuque County,
L. John Degnan, Judge.

The husband has appealed and the wife has cross-
appealed from a dissolution decree. **AFFIRMED AS MODIFIED.**

Russel A. Neuwoehner of Kaufman, Lange, Hodge &
Neuwoehner, Dubuque, for appellant.

Mary M. Schumacher and James J. Roth of Roth &
Schumacher, Dubuque, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

HABHAB, J.

Scott Callaghan appeals various economic provisions of the district court's decree dissolving his marriage to Toni. He contends: 1) the trial court erred in setting the amount of child support; 2) the trial court erred in granting Toni temporary alimony for forty-eight months; 3) the district court's division of property and debts was inequitable; and 4) the trial court erred in ordering him to pay attorney fees. Toni has cross-appealed and contends that her alimony award should be increased from \$100 to \$400 per month. We affirm as modified.

The parties, Toni and Scott Callaghan, were married in 1981. They are the parents of two children, a boy born in December 1980 and a girl born in June 1983. The dissolution decree placed the children in joint legal custody and in Toni's physical care. These custody provisions are not challenged in the present appeal.

Scott holds an associate's degree in electrical technology and is employed as an engineering technician. In 1986 and 1987 he earned a gross income of \$28,600 per year, including substantial amounts of overtime. Scott, however, has ceased to request overtime from his employer. His gross income in 1988 was \$1,906.67 per month, while his net income was \$1,465.09.

Toni has little employment experience. At trial time she was enrolled at Northeast Iowa Technical Institute, in

a course of study which would lead to an associate's degree in mechanical technology. After finishing that course of study she hopes to obtain a bachelor's degree in engineering.

Toni claims she brought \$15,000 of assets into the marriage, \$10,000 of which resulted from the settlement of a personal injury claim arising out of a premarital accident. Toni also had approximately \$5,700 in a savings account controlled by her mother. The funds in this account were accrued from social security payments Toni had received as a result of the death of her father. During the marriage these assets were expended upon family purchases and expenses.

The dissolution decree directed Scott to pay Toni child support totaling \$600 per month for both children. The decree also directed Scott to pay Toni rehabilitative alimony of \$100 per month for four years, the period Toni expects her college attendance to last.

The parties had accumulated little property. Each was awarded various personal effects. In addition, Scott was ordered to pay Toni a lump sum property distribution of \$4,000.

The decree directed Scott to contribute \$1000 toward Toni's attorney's fees, in addition to temporary fees he had already paid.

I.

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Our scope of review 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 we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value. We must base our decision primarily on the particular circumstances of the parties in each case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to consider are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4). In considering these factors, the trial court speculated as to the availability of overtime hours which might be available to Scott in the future. As this court noted in the case of In re Marriage of Heineman, 309 N.W.2d 151, 152 (Iowa App. 1981):

With regard to overtime wages, we believe that the amount of petitioner's child support obligation should be determined with reference to the amount of income he can actually expect to earn; it should not depend on the inclusion of income that is entirely speculative in nature and over which he has little if any control.

Scott testified that approximately 15% of the work force at his place of employment has been laid off and that he was no longer sure of the amount of overtime, if any, that was available. As such, these wages should not have been considered by the trial court in arriving at Scott's child support obligation. Therefore, based on these considerations, we reduce the child support award to \$550 per month (\$275 per child).

II.

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). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). When we consider those factors listed in Iowa Code section 598.21(3), we conclude, as the trial court did, that an award of temporary alimony is justified. We affirm the trial court in its alimony award. In addition, we decline to increase the amount of the award in view of Toni's pell grant and other benefits she is currently receiving.

III.

Scott also challenges the equity of the property division. Specifically, he objects to the trial court's awarding of a \$4,000 lump sum to Toni. We find merit in part of Scott's arguments.

Each partner in the marriage is "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). Here, the trial court awarded Toni virtually all of the parties' household goods. Scott was awarded the few assets in his possession and was to assume all of the parties' debts. While Toni did have considerably more assets than Scott at the commencement of the marriage, a substantial part of these assets were expended upon family purchases and expenses during the marriage. It would be inequitable to now require Scott to reimburse Toni wholly for the expenditure of these funds. Furthermore, the trial court erroneously found that Toni had received funds from her mother and grandmother to fix up her apartment. As both parties agree, these funds came from Scott's mother and grandmother and were repaid by Scott. Therefore, we modify the decree by reducing this lump sum payment to \$2,800.

IV.

Scott next contends that the trial court erred in awarding attorney fees to Toni. We disagree. Iowa trial

courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa 1982). Scott is gainfully employed and has the ability to pay Toni's attorney fees. We find no error here.

Toni also seeks appellate attorney fees. 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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). Toni's request for attorney fees is justified. We order Scott to pay \$500 of Toni's attorney fees on appeal. Costs of appeal shall be divided equally between the parties.

AFFIRMED AS MODIFIED.