IN THE COURT OF APPEALS OF IOWA

000255

No. 7-428 / 96-2172

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF TERESA A. SEIBERT AND LEE E. SEIBERT

Upon the Petition of
TERESA A. SEIBERT,
Appellee,

And Concerning
LEE E. SEIBERT,
Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Respondent appeals from the dissolution decree entered by the district court.

AFFIRMED.

Douglas Cook and Charles Deppe of Brekken, Deppe, Wynia, Cook & Hyland, P.C., Jewell, for appellant.

Thomas J. Cahill of the Cahill Law Offices, Nevada, for appellee.

Heard by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Lee Seibert appeals the property distribution and alimony provisions of the decree dissolving his marriage to Teresa Seibert. Teresa cross-appeals the alimony and attorney fees provisions of the dissolution decree. We affirm.

I. Background Facts and Proceedings.

Teresa Seibert, age thirty-nine at time of trial, and Lee Seibert, age thirty-seven at time of trial, married on October 4, 1980. They have two children, Shannon, born August 18, 1982, and Kristie, born July 17, 1985. Both Teresa and Lee have high school diplomas.

Throughout the marriage, Teresa worked part-time at the Iowa State University Foundation Office. At the time of the decree, Teresa was working four-fifths time. Her gross annual income is approximately $22,000. Teresa testified full-time employment would be available to her.

Lee has held several jobs during the marriage. For the past five years, he has worked full-time for Electronic Engineering. Lee's gross annual income is approximately $60,000.

The dissolution decree, entered on October 24, 1996, awarded Teresa use and possession of the parties' house until June 15, 1997, or until it was sold. Teresa was given first right to purchase the house, and Lee was given second. The court awarded Teresa $400 per month alimony for four years. Teresa was also awarded $500 toward her attorney fees. The court distributed personal property worth a net value of

$98,303 to Lee and property worth a net value of $89,285 to Teresa. In an effort to balance the property distribution, the court ordered Lee to pay $4500 to Teresa. Lee was also ordered to reimburse Teresa $561, one-half of the parties' income tax refund.

The only issues on appeal are alimony, property distribution, and attorney fees provisions of the decree.

II. Standard of Review.

We review this equitable action de novo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the trial court's findings of fact, but we do give them deference because the trial court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Alimony.

Lee argues the district court erred in awarding Teresa alimony of $400 per month for four years, because she does not qualify for such an award.

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). 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 the relative needs of the other." In *re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983)(citation omitted).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Miller*, 532 N.W.2d at 162; *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991); *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The factors listed in Iowa Code section 598.21(3)(1995) are considered in making the discretionary award of alimony. *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy inequities in a marriage and compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great. *In re Marriage of Geil*, 509 N.W.2d at 742; *In re Marriage of Hitchcock*, 309 N.W.2d 432, 438 (Iowa 1981).

We consider alimony and property distribution together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse

through a limited period of retraining. *Id.* The duration of this type of award depends upon the particular needs of the dependent spouse. *Id.* at 63.

This is a sixteen-year marriage. There is a great disparity between the parties' earning capacities, despite Teresa's ability to work full-time for her current employer. Although Teresa has a long employment history and is capable of supporting herself financially, we recognize her need for assistance during a transitional period. *In re Marriage of Christensen*, 543 N.W.2d 915, 919 (Iowa App. 1995). Accordingly, we find the alimony award to Teresa is appropriate and affirm the award.

IV. Cross-Appeal of Alimony.

On cross-appeal, Teresa argues the court should have granted her permanent alimony.

Traditional or permanent alimony is usually payable for life or for so long as the dependent spouse is incapable of self-support. *In re Marriage of Francis,* 442 N.W.2d at 62. The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued.

We find a permanent alimony award is not warranted in this case. As stated, Teresa has a long employment history and is capable of supporting herself financially. Any resulting reduction in the parties' standard of living is reasonably proportionate. We affirm Teresa's alimony award.

V. ***Property Distribution.***

Lee claims the district court erred in assessing the values of several pieces of property and, therefore, the resulting property distribution was inequitable. Lee cites the fact the court based its values on Teresa's estimates, which Lee disputes. Specifically, Lee argues the court erred in accepting Teresa's appraisal of Lee's gun collection and her values for several other items, including a boat and trailer, Teresa's car, and household items distributed to Lee.

The trial court is in the best position to judge the credibility of witnesses. *See* Iowa R. App. P. 14(f)(7); *In re Marriage of Hanson*, 475 N.W.2d at 662. The court stated in its ruling on Lee's rule 179(b) motion, "to the extent that this [snowmobile values] and all the other issues raised by the parties are in dispute, the [c]ourt determines that Teresa's credibility was higher and more reliable than Lee's." It was within the court's discretion to rely on Teresa's estimates of the values of the parties' personal property. Moreover, we find the values placed on the parties' assets by the court are well within the permissible range of evidence; we will not disturb them on appeal. *In re Marriage of Hanson*, 475 N.W.2d 660, 662 (Iowa App. 1991).

Lee also claims the court erred in crediting his property award for the parties' income tax refund and the value of the property secured by a second mortgage on the parties' home, but failing to reduce Lee's award by one-half of the refund Lee was ordered to pay Teresa and the mortgage debt Lee assumed.

The partners 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 an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1)(1991). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

We conclude the trial court's division of the parties' assets was equitable. Our review of the record indicates Lee received sufficient assets to meet his obligations under the decree with enough left over for his reasonable subsistence.

Finally, Lee contends the court should have awarded him the $5000 gift his grandmother gave him in 1989.

Iowa Code section 598.21(1) states "the court shall divide all property, except inherited property or gifts received by one party, equitably between the parties." However, section 598.21(2) provides an exception "upon finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." The length of the parties' marriage is a significant factor in determining whether gifts or inherited property should be divided. *In re Marriage of Tzortzoudakis*, 507 N.W.2d 183, 186 (Iowa App. 1993); *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). Other factors include the intent of the donor, the circumstances of the gift, special needs of either party, and other matters which would render it unfair to

set aside the gift or inheritance for the exclusive enjoyment of the donee or devisee. *In re Marriage of Liebich,* 547 N.W.2d 844, 850 (Iowa App. 1996).

The district court based its ruling on the fact the gift had been commingled with the parties' other assets and was not traceable, segregated, or used for a particular purpose. We note this factor is not controlling, *In re Marriage of Hoffman*, 493 N.W.2d at 89; however, we agree with the district court's conclusion. We find it would be inequitable to set aside to Lee the gift given to him. We affirm the district court's property distribution in its entirety.

VI. Attorney Fees.

On cross-appeal, Teresa argues her $500 attorney fee award should be increased. 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 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 App. 1982). Based on our review of the record, we find the court did not abuse its discretion in awarding attorney fees. We affirm the award of $500 to Teresa.

Teresa also requests the court award her appellate attorney fees. An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re*

Marriage of Eastman, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). Although Teresa successfully defended the district court's decision on appeal, she has not prevailed on her cross-appeal. We award Teresa $500 in appellate attorney fees.