

IN THE COURT OF APPEALS OF IOWA

No. 9-611 / 89-456

FILED

JAN 25 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF LaVONNA MARIE CHRISTENSEN 64
and FRANK M. CHRISTENSEN

Upon the Petition of
LaVONNA MARIE CHRISTENSEN,
Petitioner-Appellee,

And Concerning
FRANK M. CHRISTENSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Palo Alto
County, Frank B. Nelson,, Judge.

Appeal from a district court decree of dissolution
awarding alimony and attorney fees. **AFFIRMED AS MODIFIED.**

Gregg A. Buchanan of Buchanan, Dotson, Buchanan, Bibler
& Buchanan, Algona, for appellant.

R. Thomas Price of Price and Breen, Fort Dodge, for
appellee.

Considered by Schlegel, P.J., and Hayden and Habhab,
JJ.

PER CURIAM

Appellant, Frank Christensen, appeals from provisions of the dissolution decree entered by the district court. He contends: 1) the trial court erred in granting appellee, LaVonna Christensen, a lump sum alimony award; and 2) the trial court erred in awarding LaVonna attorney fees. LaVonna also seeks attorney fees for this appeal. We affirm as modified.

Frank Christensen and LaVonna Christensen were married on December 24, 1981. Frank was born in 1915 and LaVonna was born in 1927. No children were born of this marriage but both parties had adult children from previous marriages. Both parties have been involved in farming during most of their respective lives.

Prior to their marriage, Frank and LaVonna executed an antenuptial agreement. The agreement provided that each person's property remain separate from the other during the marriage and free from any claim by the other. The district court enforced this property division in its decree of dissolution.

On April 1, 1987, LaVonna filed a petition for dissolution of marriage. On July 28, 1987, an order for temporary support and attorney fees was entered. Frank was obligated to pay \$500 per month spousal support from May 1987 and to pay \$1000 of attorney fees to LaVonna. LaVonna has had to initiate subsequent garnishment actions in order to enforce this order.

On February 28, 1989, the district court entered its judgment and decree concerning this dissolution action. The court noted that Frank's financial statements indicated a current net worth of \$685,497 with an average adjusted gross income of approximately \$71,149 per year. LaVonna's financial statements indicated a net worth of \$256,437 and a net income of approximately \$800 per month. LaVonna calculated her monthly expenditures at approximately \$1447. The court noted that LaVonna is allowing her daughter and son-in-law to live in her farm residence and has made substantial advancements of money to her two children in the past. Frank contends that the court failed to give proper weight to this information in its award of alimony.

Based on this information, the district court concluded that an award of alimony at the rate of \$650 per month for twenty years was appropriate. The court calculated the total payments, discounted them, and ordered a lump sum payment to LaVonna in lieu of alimony of \$79,345. The district court also required Frank to pay an additional \$5000 in attorney fees. Frank has filed this appeal.

I. Scope of Review. To resolve the issues presented by the parties we turn to well-established principles. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them,

especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. Alimony. Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). In making an award of alimony the courts are to consider those factors listed in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), as modified by In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) and now codified in Iowa Code section 598.21(3). See In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983); In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

Upon review of the record, several facts lead us to conclude that the alimony award is excessive. This was a marriage of short duration in which both parties entered with substantial assets after having already raised families. Prior to marriage, the parties entered into an antenuptial agreement which precluded claims against their respective properties by the other. Iowa Code section

598.21(3)(i) provides that such an agreement is to be considered by a court awarding alimony.. While the antenuptial agreement involved here does not specifically prohibit alimony payments, the spirit of that document is violated by the award of almost \$80,000 in lump sum alimony.

We also note the trial court presumed in calculating the amount of alimony LaVonna needed that her income and expenses would remain constant throughout the remainder of her life. This presumption ignores many financial aspects of LaVonna's economic future. First, LaVonna is currently eligible to receive \$395 a month in social security payments. She, however, has elected to wait until she is sixty-five before commencing to receive such payments. As a result, when LaVonna is sixty-five, she will be eligible for monthly social security payments of \$513 per month. Second, closely related, when LaVonna commences receiving social security, she will be able to significantly reduce her current expenditures for insurance and medical care. Third, over a quarter of her current monthly expenditures go to make a payment on her farm. As the principal on this note is diminished, so too will the amount of the monthly payments. Finally, LaVonna has a high-yield savings plan which produces tax-free interest of approximately \$100 per month. LaVonna has been allowing the interest on this plan to accumulate and has not touched the corpus. These funds are available for her support if she should so choose. The

aforementioned facts lead us to conclude that alimony should be in monthly installments and that their length should be limited to a period of four years.

In assessing the amount these monthly payments should be, we consider not only LaVonna's current income, but also the income potential of LaVonna's assets. Cf. In re Marriage of Wegner, 434 N.W.2d 397, 399 (Iowa 1988) (court to look at earning capacity of payee spouse in ascertaining appropriate level of alimony). Significantly, LaVonna currently does not collect rent from her daughter and son-in-law who reside on her farm. At the same time, LaVonna is paying \$200 a month in rent. While LaVonna's largess to her daughter and son-in-law in providing them with a rent-free abode may be commended, Frank should not be forced to pick up the tab for LaVonna's generosity. Similarly, while it may be frugal to allow the interest on her tax-free savings plan to accumulate, that income must be factored into the equation. Based on these facts, we deem LaVonna is entitled to alimony payments of \$400 per month for a period of four years.

III. Attorneys Fees. 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. 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).

Guided by these general legal principles, we find no abuse of discretion on the part of the trial court in awarding LaVonna attorney fees.

IV. **Attorneys 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 Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Each party shall pay his or her own attorney fees for this appeal. Costs of this appeal are assessed equally between the parties.

AFFIRMED AS MODIFIED.

Schlegel, P.J., and Habhab, J., concur; Hayden, J. dissents.

HAYDEN, J. (dissenting)

I respectfully dissent to that portion of the majority's opinion that awards LaVonna alimony. I would modify the trial court and not award any alimony to LaVonna. This is a short-term marriage and LaVonna has substantial assets and financial means available for her future support.