



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROGER LEE MILLER AND DEE ANN MILLER

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Upon the Petition of	)	
ROGER LEE MILLER,	)	
Petitioner-Appellee,	)	Filed May 28, 1987
And Concerning	)	
DEE ANN MILLER,	)	<u>7-119</u>
Respondent-Appellant.	)	86-820

Appeal from the Iowa District Court for Polk County (No. CD 51-30134),
Dick Strickler, Judge.

Respondent wife appeals and petitioner husband cross-appeals from the decree dissolving their marriage. Appellant contends property division is inequitable and alimony should be awarded; cross-appellant maintains interest should be given on homestead equity, portions of decree should be recognized and designated as alimony, and that his obligations for appellant's attorney fees in the district court should be reduced. **AFFIRMED.**

Bruce Washburn of Harding, Berger, Campbell & Washburn, Des Moines,
for respondent-appellant/cross-appellee.

James A. Pugh of Morain, Burlingame, Pugh & Juhl, Des Moines, for petitioner-appellee/cross-appellant.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

PER CURIAM

The parties to this appeal, Roger and Dee Ann Miller, were granted a dissolution of their marriage by the District Court for Polk County on May 9, 1986. The district court, in those parts of the dissolution decree pertinent to the present appeal, divided the marital property, expressly provided that "no alimony shall be awarded to either party," and held Roger accountable for Dee Ann's attorney's fees. Dee Ann has appealed from these provisions of the decree and alleges both that the property distribution is inequitable and that she should be awarded alimony. Roger has cross-appealed and maintains that: (1) he should be awarded interest on his award of equity in the homestead; (2) the district court, notwithstanding its express statements to the contrary, did award alimony to Dee Ann and we should accordingly modify the decree so as to acknowledge that award; and (3) he should not be held accountable for all of Dee Ann's attorney's fees. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's findings of fact, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I.

We deal first with those claims raised by appeal and cross-appeal which challenge portions of the decree's property division. Dee Ann requests that she be given a larger share of the homestead equity, and Roger seeks an award of interest on his equity share. In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property is based upon each marital partner's right to

a just and equitable share of the property accumulated as a result of the efforts of both parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981).

The sole provision of the property division which Dee Ann asks us to modify is the division of the homestead equity. The family home is the principal asset of the parties and is valued at \$100,000.00. After deducting a \$57,000.00 mortgage and a \$7,000.00 real estate commission, the district court found a net distributable equity of \$36,000.00. The court awarded Roger a \$23,000.00 lien, as his equitable share, to be paid when the first of the following three events occurs: (1) the house is sold; (2) Dee Ann remarries or cohabitates; or (3) ten years passes from the date of the decree. The court expressly provided that Roger's judgment lien shall bear no interest.

We reject Dee Ann's claim for a greater share of the homestead equity. The remainder of the property division imposes substantial liabilities upon Roger both for the payment of the parties' indebtedness and for future insurance, property tax, and educational expenses which will accrue to the benefit of Dee Ann and the parties' children. In light of both these obligations and the remainder of the property settlement, we think the district court's division of the household equity was within the bounds of equity. We accordingly affirm.

Likewise we reject Roger's request that we provide for interest on his equitable share. The district court's express disallowance of such interest makes it apparent that the court considered the issue in light of the entire property division. In similar cases, our courts have affirmed the denial of interest where made in order to reach an equitable property division. In re Marriage of Briggs,

225 N.W.2d 911, 913 (Iowa 1975); see also In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981).

We note parenthetically our belief that such cases do not violate Iowa Code section 535.3 (1987), which provides that

[i]nterest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which cases the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

Sheer Construction, Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328, 334 (Iowa 1982), interpreted section 535.3 as stripping the district court of any discretion to withhold interest on judgments. Section 535.3 clearly relates, however, only to money due on judgments and decrees. This is consistent with the general rule that interest runs from the time money becomes due and payable. Lemrick v. Grinnell Mutual Reinsurance Company, 263 N.W.2d 714, 720 (Iowa 1978); 47 C.J.S. Interest & Usury § 46 (1982). Roger's equity share is not due him until some time in the future. We do not think, therefore, that the district court violated the mandate of section 535.3 as interpreted by Sheer Construction when it refused Roger interest on his homestead equity. See Arnold v. Arnold, 258 Iowa 850, 859, 140 N.W.2d 874, 877 (1966) (alimony award to draw interest only from and after the date each payment becomes due and owing).

The district court's property division is both equitable and affirmed.

II.

Both parties raise questions concerning alimony. Dee Ann contends the district court erred in failing to award alimony; Roger maintains that, notwithstanding the district court's express statement to the contrary, the substance of the decree includes an award of alimony. Roger asks us to modify the decree

and explicitly acknowledge a portion of the property settlement and child support provisions as alimony so as to allow him the benefits of such payments. See Peters v. Peters, 214 N.W.2d 151, 157-58 (Iowa 1974) (deductibility of alimony payments from income); In re Marriage of Woodward, 229 N.W.2d 274, 280 (Iowa 1975) (remarriage creates prima facie case for termination). Logic dictates that a determination as to whether the decree in fact denied an award of alimony should be made prior to an inquiry as to whether such a denial was appropriate.

Our supreme court was presented with an analogous issue in In re Marriage of Woodward. There, the issue was whether a modified decree's provision which ostensibly awarded "alimony" was, in fact, part of the property settlement. Id. at 276-77. In resolving this issue, the Woodward court referred extensively to the earlier case of Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966).

Because pertinent to our purposes, we quote the following from both cases:

[T]he trial court's employment of the term "alimony" is not conclusive. It is not what the arrangement is called but what it is that fixes its legal status. It is the substance not the form which is controlling. If an order constitutes a property settlement as distinguished from alimony, its character is not affected by the name given it.

In re Marriage of Woodward, 229 N.W.2d at 278 (quoting Knipfer, 259 Iowa at 351, 144 N.W.2d at 142-43) (citations omitted). The court in Woodward went on to state that

[n]o single factor is controlling in determining whether a particular award constitutes alimony or a property division. All relevant factors must be taken into consideration including the extent and nature of the property accumulated by the parties which the court is called upon to distribute in a just and equitable manner, [and] the provisions of the decree terminating the marital relationship,

Woodward, 229 N.W.2d at 278-79.

The Woodward court concluded that the alimony provision of the district court's decree was, in fact, just that. Id. at 279. Critical to this conclusion were the supreme court's determinations that "at the time of the dissolution

[the wife] was unemployed and had no special skills," id., and that "[o]bviously, the [dissolution] court felt some provision should be made for [the wife's] maintenance and support." Id. The record discloses that the situation in the case at bar is quite different. On the date the decree was entered Dee Ann was forty-one years old. She was then—and, according to her brief, remains—in good health. She is a college graduate with a bachelor of science degree in elementary education. The district court unambiguously stated its determination that no alimony was to be awarded either party. When considered in light of the complete record, we think the district court's denial of alimony was, in fact, just that. Although the decree does obligate Roger to pay for Dee Ann's tuition and books required in order to regain her teaching certification, Roger is under no obligation to pay these expenses, which may not exceed \$1,000.00, until Dee Ann presents him with appropriate proof of the necessary amounts. In Knipfer, our supreme court noted that a dissolution decree's monetary provisions made in favor of a divorced wife do not necessarily come within the category of alimony. Knipfer, 259 Iowa at 353, 144 N.W.2d at 143-44. In many cases, such an allowance may properly be considered an adjustment of property rights. Id., 259 Iowa at 353, 144 N.W.2d at 144; see also Iowa Code § 598.21(1)(f) (1987). We conclude the district court denied Dee Ann alimony.

In addition, we think the denial of alimony was neither inappropriate nor inequitable. We are informed by both the cases and Iowa Code section 598.21(3) that the payment of alimony is not an absolute right; it is awarded out of fairness, according to the particular facts of the case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976); Iowa Code 598.21(3) (1985). One factor to be given great weight in such a determination is the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972); Iowa Code § 598.21(a), (e) (1985). When determining the appro-

priateness of alimony, the trial court must consider the earning capacity of each party, present standards of living, and ability to pay balanced against the relative needs of the other. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). In light of Dee Ann's capacity to obtain gainful employment in the near future, Iowa Code § 598.21(3)(f) (1987), the equitable property settlement, Iowa Code § 598.21(3)(c) (1987), the considerable discretion granted the district courts in this matter, Yansky v. Yansky, 172 N.W.2d 114, 117 (Iowa 1969), and the remainder of the appropriate criteria, see Iowa Code § 598.21(3) (1987), we are not persuaded that the district court's denial of alimony should be disturbed. Cf. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980) (denial of rehabilitative alimony appropriate where wife's doctoral work could be financed through property division).

III.

Finally, Roger argues the district court erred in awarding Dee Ann attorney's fees. The court, in the dissolution decree, ordered Roger to pay \$1,500.00 towards Dee Ann's attorney's fees in addition to monies that had previously been ordered for temporary fees. Recognizing that the district court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution decrees, In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983), we think the allowance of attorney's fees here is reasonable and should not be disturbed. See In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984). Costs are assessed to Roger.

AFFIRMED.

Snell, P.J., and Hayden, J., concur; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I agree with the majority in its decision to uphold the dissolution decree with regard to alimony and award of attorney's fees. I also agree with its decision to award Roger a \$23,000 lien on the parties' residence as his equitable share and to deny Roger's request for interest on his equitable share.

I cannot, however, concur with its decision that the \$23,000 lien should accelerate and become due if Dee Ann remarries or cohabitates within the next 10 years. I would modify the decree to strike the remarriage and cohabitation clause for the following reasons. First, Roger was awarded a lien on the family residence as part of the decree's property division, not as part of alimony. Remarriage and cohabitation are not part of the statutory factors the court must consider when making the property division. See Iowa Code §598.21 (1987). Roger was given a lien on the family residence totalling almost two-thirds of the parties' equity. It appears that in return the trial court did not order interest to be paid upon the lien. To prematurely accelerate payment on the lien due to remarriage or cohabitation would render inequitable Dee Ann's property division.

Second, the trial court in the decree permitted Dee Ann to remain in the parties' home for a maximum of 10 years. Dee Ann is being allowed to live in the family residence because she has physical care of the minor children. See Iowa Code §598.21(1)(g) (1987). Basically, the 10-year provision permits Dee Ann to remain in the home until the youngest child, now 10 years old, reaches majority.

The need for the parties' minor children to have a stable and decent home will not change just because of remarriage or cohabitation. In addition, as physical custodian of the three minor children, Dee Ann will have the same obligations to the children regardless of whether she marries.