

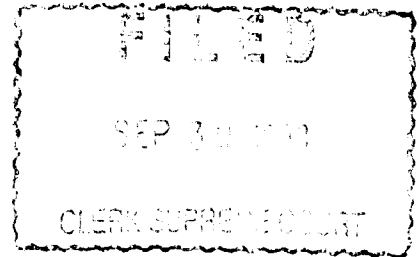
IN THE COURT OF APPEALS OF IOWA

No. 8-370 / 97-1824

IN RE THE MARRIAGE OF CAROLYN D. HOHENSEE AND KEITH A.
HOHENSEE

Upon the Petition of
CAROLYN D. HOHENSEE,
Appellee,

And Concerning
KEITH A. HOHENSEE,
Appellant.



Appeal from the Iowa District Court for Warren County, J.W. Jordan, Judge.

Keith Hohensee appeals various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Thomas J. McCann, Des Moines, for appellant.

Janice M. Herfkins of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker
& Ordway, L.L.P., Des Moines, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

VOGEL, J.

Keith Hohensee appeals various economic provisions of the parties' dissolution decree. Although we find, contrary to the trial court, that a promissory note should have been classified as a marital debt, we nevertheless affirm the property distribution and affirm the alimony award to Carolyn.

Background facts. Keith and Carolyn Hohensee were married in February of 1982. No children were born to the marriage.

Carolyn filed a petition for dissolution in February of 1997. Before trial, the parties divided most of their assets. The main issues remaining at the time of trial involved a promissory note and the question of alimony.

After trial, the court issued a decree distributing the assets and liabilities of the parties. The court found that the remaining debt on a promissory note was not marital debt and was attributable to Keith alone. The court further ordered Keith to pay alimony to Carolyn in the amount of \$500 per month for four years. Keith now appeals.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Alimony. Keith first argues the trial court erred in ordering him to pay alimony to Carolyn, contending that Carolyn continues to live a lifestyle similar to that which she enjoyed during the marriage. He alternatively asserts that the alimony award should be decreased as to the time and amount.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996). 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). 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). Before awarding alimony, the trial court must consider the factors listed in Iowa Code section 598.21(3).

Keith was thirty-five years of age at the time of trial and Carolyn was thirty-four. After graduating from high school, Carolyn worked in a family construction business. Shortly after their marriage, Keith and Carolyn moved to Des Moines when Keith was offered a job at Bork Transport. Carolyn worked in retail for a few months until she was hired as a secretary by Bork Transport. After working there for more than five years, Carolyn was terminated because of a newly adopted nepotism clause. At the time of her termination, Carolyn was earning \$19,000 per year. Carolyn subsequently attended cosmetology school and obtained her license. At the time of

trial, Carolyn was earning \$22,500 per year plus approximately \$3,000 - \$4,000 in tips.

Keith is a high school graduate and also holds a two-year degree from Hamilton Business College. Shortly after the parties' marriage, Keith began working at Bork Transport as an accountant and later as a comptroller. In 1995, Bork Transport was restructured and Keith was named president of the successor company, Iowa Tank Lines. At the time of trial, Keith earned a salary of \$82,500 per year.

Keith argues that the marital assets Carolyn received along with her income will allow her to continue to live a lifestyle similar to that which she enjoyed during the marriage. However, Keith earns almost four times that of Carolyn and has a significantly greater earning capacity. Furthermore, Keith receives numerous benefits from his employment, while Carolyn's employer does not even offer a retirement plan. Under these circumstances, we find that the award of alimony is appropriate and therefore affirm the trial court on this issue.

II. Promissory note and property division. Keith next contends the trial court erred in holding that the \$48,389 debt remaining on a promissory note was not a marital debt.

The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App. 1994). The determining factor is what is fair and equitable to both parties under each circumstance. *Id.*; Iowa Code § 598.21 (1997).

In making an equitable distribution of assets, the court must first determine what assets are available to be allocated between the spouses. *In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa App. 1997). To do this, the court must identify and value the assets of the parties, both jointly and separately. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). The equitable distribution of property should be made in consideration of the criteria codified under Iowa Code section 598.21. *Starcevic*, 522 N.W.2d at 857; *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). The allocation of marital debts between the parties is as integral a part of the property division as is the apportionment of marital assets. *See In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980); *see also In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa App. 1996).

Beginning in 1994, Keith entered into a number of transactions with his employer in which he acted as a middle man between Bork Transport and semi-tractor drivers who wished to purchase their own truck. Bork sold tractors to Keith, who in turn resold them under lease-purchase agreements to the drivers. Keith's contracts with Bork required that he make a ten percent down payment and pay eight percent interest. Keith's contracts with the drivers required a lower percentage down payment and ten percent interest. Keith therefore realized a two percent profit or "spread" on each transaction. Keith was able to make the down payments on the first few transactions, but the program expanded quickly and Keith was forced to borrow money from the company to cover down payments on the new contracts. In November

of 1994, Keith borrowed approximately \$150,000 from Bork for this purpose. Keith pledged the family stocks, bonds, and IRAs as security for the loan. The note was for five years at ten percent interest. The terms of the note allowed Keith to use money advanced from the note to purchase stocks and increase the parties' portfolio. Keith used this opportunity to purchase more stocks, but the overall value of the parties' portfolio decreased over time. Income from some stock sales as well as losses during this period were reflected on the parties' joint tax returns.

At the time of trial, the note had been paid down to \$48,389. Keith argued that this was a marital debt and should be divided equally. Carolyn asserted that she had no knowledge of the debt until trial, and argued that she should therefore not be assigned any of the debt. The trial court found that the transactions had been made for the sole benefit of Keith and his employer. Keith asserts that the court ignored the fact that Carolyn received financial benefits from the transactions during the marriage.

We agree that the remaining debt on the note should have been considered as a marital debt. Carolyn acknowledged that Keith was in charge of the family finances and she did not pay attention to the particulars. However, her lack of knowledge of the transactions and promissory note are not determinative without some evidence of fraud on Keith's part. Moreover, the benefits to Carolyn from the borrowed funds and subsequent reinvestments included paying down the mortgage on the marital home, and utilizing losses on stock investments to offset income on the joint income tax returns.

Despite our inclusion of the promissory note as marital property, we nonetheless find the trial court's division of property to be equitable. Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). Given the disparate financial circumstances of the parties and Keith's ability to service the debt, we decline to modify the trial court's assignment of this debt to Keith.

Finally, Keith contends that the trial court miscalculated the division of assets and therefore argues that the court's order that he pay Carolyn an additional \$24,500 is inequitable. However, Keith did not file a 179(b) motion to alert the trial court to his concerns on this issue and allow the trial court the opportunity to respond. Without such a motion and ruling we are unable to speculate on the trial court's rationale for the specific calculations and assignment of assets and debts made. We therefore review the entire property division based on the record as presented to us. *See Iowa R. Civ. P. 179(b)*. Having previously found the division to be equitable, we affirm the division of assets and debts.

Having considered all issues properly before us on appeal, we affirm the trial court's decree.

AFFIRMED.