IN THE COURT OF APPEALS OF IOWA

No. 1-462 / 00-1525
Filed September 26, 2001

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEAN E. WICKS AND STEVEN M. WICKS

Upon the Petition of
JEAN E. WICKS,
Petitioner-Appellant,

And Concerning
STEVEN M. WICKS,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, K.D. Briner, Judge.

The petitioner appeals the spousal support provisions of the parties' dissolution decree. **AFFIRMED.**

Lori L. Klockau and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellant.

Martha L. Quint of Faches, Gloe & Quint, Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

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MILLER, J.

Jean E. Wicks appeals the spousal support provisions of the parties' dissolution decree. She contends the trial court erred in awarding Steven M. Wicks spousal support because he does not need such support and she does not have the ability to pay it. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

Steven and Jean Wicks were married in October 1988. Steven and Jean have three children together, Eric, born October 8, 1988, Gregory, born September 26, 1990, and Jacquelyn, born October 14, 1992. Jean filed a petition for dissolution of marriage on April 1, 1999. During the pendency of the action the court entered a consent order regarding temporary custody and visitation. The case was tried to the court on May 2, 2000.

Jean was thirty-eight years old at the time of the dissolution trial and was in good physical and mental health. She has an Associate's degree in applied science and worked as a computer programmer at Oakdale Systems Incorporated (Oakdale). At the time of trial Jean had a net monthly income of $3111.

Steven was forty-three years of age at the time of trial. He has a high school education and had worked at North Star Steel (Cargill) from 1983 until February 1998. Steven has a degenerative disk condition in the upper part of his neck which has caused vertebrae to disintegrate and has prevented him from performing his job with Cargill as a straightener operator since October 1997. Steven underwent surgery for his condition and returned to work on light duty for approximately two months at which point his employment was terminated in

February, 1998 because his employer no longer had any light duties for him to perform. Steven continues to be listed as an employee at Cargill in order to be eligible for medical insurance but he has not received any wages from Cargill since February of 1998. Steven applied for Social Security Disability benefits in March 1998 and started receiving monthly benefits in March 1999. The Social Security Administration has classified him as permanently disabled from work. At the time of trial Steven was receiving $1184 per month in net Social Security Disability benefits. He also received a dependent's allowance of $214 per month for each of the parties' three children, which was paid to Jean as payee.

Jean claimed at trial that she has monthly expenses for herself and her three children of $3195. Steven claimed he had monthly expenses of $1439 and sought $1000 per month in spousal support. The district court entered a dissolution decree August 30, 2000 awarding the parties joint legal custody of the three children and placing physical care with Jean. The court found that because of the Social Security dependent benefits Jean received for the children as a result of Steven's disability, he was not required to pay any additional amount in child support.

The court awarded Jean property of approximately $54,841 and Steven property of approximately $60,868. The court found Steven's health problems made him permanently disabled from work and that "[a]bsent medical evidence that Steven could work, the court cannot make such a finding and does not do so." The court also noted that Steven had cashed in his 401(k) account, worth $98,000, and used it to buy the house he was currently residing in, to make substantial improvements to that residence, and to acquire a vehicle. The court

found that approximately eighty percent of the value of that account was accumulated during the marriage and was a marital asset when converted. The court then went on to find,

> Considering all the circumstances, including the fact that Steven has no house payment to make, the court concludes that Jean should pay Steven spousal support of $600 per month payable for life so long as Steven is incapable of self-support at a level which reasonably approximates the standard of living enjoyed by the parties during the marriage. This award of traditional alimony should be reduced to $250 per month if when he attains the age of 55 Steven receives a pension from Cargill of $345.60 per month. . . . This award of alimony should terminate if Steven remarries or otherwise becomes financially independent of Jean.

Jean appeals from the spousal support provisions of the district court's decree. She claims that Steven has no need for alimony because he dissipated marital assets in the amount of $110,000 (the $98,000 amount of the 401(k) plus $12,500 he received as a lump sum from Social Security) and had a defined benefit pension plan worth $67,000. Therefore, Jean claims Steven in fact received a property award of $193,516, much larger than the $60,868 property award stated by the trial court. Jean further contends Steven does not need any alimony because he has the ability to work and earn additional income but is simply choosing not to. Finally, Jean argues the court erred in awarding Steven spousal support because she does not have the ability to pay such support and because her position at Oakdale is not completely secure.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of

witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. MERITS

"Alimony is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Any form of spousal support is discretionary with the court. *In re Marriage of Ask,* 551 N.W.2d 643, 645 (Iowa 1996). Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21(3) (1999). *Id.* "Property division and alimony should be considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

When determining the appropriateness of spousal support, a court must consider, among other things, (1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against relative needs of each other. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997)

An equitable division of property must be made according to the criteria set forth in Iowa Code section 598.21(1) (1999), as qualified by section 598.21(2). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). 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 Ct. App. 1991). Iowa courts do not require an equal division or

percentage distribution. *Id.* The ultimate question is whether the distribution of property is equitable under the specific facts of the particular case. *Id.*

We agree with the trial court's determination regarding Jean's claim that Steven dissipated marital assets by cashing in his 401(k) account. Initially we note the court was correct in finding only about eighty percent, or approximately $78,400, of the $98,000 in the 401(k) account was acquired during the marriage and therefore only that portion would be considered in effecting property division. It appears Jean does not dispute this aspect of the property division. It is also true that the 401(k) account lost value because of the tax consequences of early conversion. Furthermore, the record shows it was necessary for Steven to cash in the 401(k) account in order to purchase a home for himself and the parties' children after the separation, make repairs to that house, purchase a vehicle and pay living expenses.

The trial court found,

> [I]t is clear that several times during the marriage Jean cashed pension accounts to pay family expenses. The court is inclined to regard Steven's cashing of his pension account in order to buy a house as being a similar transaction, especially given the evidence that his disability requires him to live on a substantially reduced income. Rather than assess a separate value for the account, the court has considered Steven's ownership of the house as a factor to reduce the amount of spousal support it would otherwise award.

We agree with the trial court's analysis and adopt it as our own. Steven did not dissipate marital assets by cashing in his 401(k) account, but used part of the proceeds to pay family expenses, as Jean had done with her pension accounts in the past. He used the remainder of the money to purchase a house, make repairs on that house, purchase a vehicle, pay his living expenses, and pay

income taxes. The money was not squandered on unnecessary luxuries so as to be a wrongful dissipation of a marital asset.

Jean further argues the amount of Steven's property award stated by the trial court was low because it did not include his defined benefit pension plan. Jean estimated the value of Steven's pension to be approximately $67,000. She testified that she believed Steven's pension would be approximately $400 per month beginning in two years, and the $67,000 amount was reached by taking $400 per month for twenty years and then reducing it to present value. However, Jean admitted that she had no documentation as to what the pension plan was in fact worth. We conclude there was inadequate evidence to make a reasonable estimate of the present value of Steven's pension plan.

Steven did file a supplemental exhibit, a letter from his employer regarding his pension. It showed he would in fact not be eligible to receive pension benefits until age fifty-five, which was twelve years away, and then would receive only $345.60 per month. The trial court did take this asset into account by ordering that the $600 monthly spousal support should be reduced to $250, a decrease of approximately the amount of the monthly pension benefits, if Steven began to receive this pension at age fifty-five.

Jean further argues that Steven has the ability to work and earn any additional money he needs, and thus spousal support is unwarranted. However the trial court found,

> [T]he undisputed evidence is that Steven's spinal problems and other health problems have rendered him entirely incapable of doing the heavy physical labor he used to do as a steel worker, have made it impossible for him to take sedentary employment and have qualified him for permanent disability benefits from social

> security. Absent medical evidence that Steven could work, the court cannot make such a finding and does not do so.

The trial court's findings on this matter are supported by Steven's testimony. There is nothing in the record to indicate Steven is not being truthful about his condition and the trial court clearly found his testimony on this issue to be credible. We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *See Will*, 489 N.W.2d at 397. As there was no expert medical testimony, the determination as to the extent of Steven's physical incapacity and its effect on his ability to work was based on the trial court's assessment of the credibility of the parties. We find nothing in the record which would cause us to vary from the trial court's determination. We agree with the court's findings regarding Steven's inability to work, despite Jean's claims to the contrary.

We note there is some confusion in the record regarding the disposition of a debt to Steven's mother. Initially Steven stated in his deposition that Jean was "off the hook" as to any of the money owed to his mother and the amount he owed to her had "no bearing" on determining the property award because it was his "responsibility." Steven did not include this amount as part of his "Total Debts" in the "Requested Relief" proposal he submitted to the court. However, in Court's Exhibit 1-B, in which Jean set forth her requested asset and liability disposition, she proposed that the debt to Steven's mother be "equally divided" between herself and Steven. It is unclear what the exact amount of the debt was at the time of trial. The $105,000 was only an estimate as to what was owed as of 1992. Although it was unclear whether any of the $105,000 had been repaid,

the evidence seems to indicate that only a small portion, if any, had been. It was also unclear how much of the debt was incurred by Steven alone and how much of the debt was money Steven and Jean borrowed together.

During trial Jean stipulated that "both the parties will assume one-half of the debt to Steven's mother, if any, and to be settled in terms between the parties and Steven's mother." However, in its decree the trial court assigned the entire debt to Steven. It is unclear why the trial court did so when Jean had requested that the debt be divided equally between the parties, and had later stipulated to such a division. Regardless of the confusion in the record concerning this matter, the trial court did assign Steven the entire amount of a debt that may approach $105,000. This aspect of the property division further supports the $600 per month spousal support award.

Based on the parties relative earning capacities and incomes, the length of the marriage, the physical health of the parties, Steven's conversion of his retirement account, and other economic circumstances of the parties, including pension benefits and assignment of debts, we conclude that the trial court's property division is equitable and that its award of $600 per month in spousal support is justified. The trial court acted equitably in awarding Steven traditional alimony and equity does not require the amount be reduced.

As a final matter, Jean argues that her current job at Oakdale is "not completely secure" as Oakdale is cutting positions, reducing hours, and because her work is very specialized she is not very "marketable." Based upon the uncertainty of her future employment Jean argues she does not have the ability to pay Steven alimony. In determining the necessity, amount, and length of

alimony we consider the earning capacity of each party, their present living standards, and ability to pay balanced against the relative needs of the other spouse. *In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998).

Jean currently is in good health, has a good income, and has some ability to establish a retirement account. Steven is disabled and unable to work now or in the foreseeable future. He will need Jean's continued support, although at a lower amount, even after he reaches age fifty-five and begins to draw his pension benefits. After considering the parties' present earning capacities and abilities to pay as well as their relative needs we conclude the award and amount of spousal support ordered by the trial court were appropriate. If Jean's circumstances at some point in the future render her unable to continue support at that level, she may petition the court for a modification of the decree. *See Bell*, 576 N.W.2d at 623.

IV. CONCLUSION

Based on our de novo review of the entire record we conclude the trial court's property division and award of traditional spousal support to Steven in the amount of $600 per month are appropriate and equitable, as is its order that when Steven later begins to receive his pension from Cargill the monthly amount of spousal support will be decreased to $250 per month.

AFFIRMED.