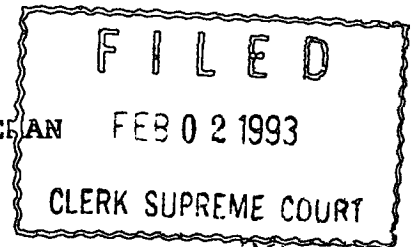


IN THE COURT OF APPEALS OF IOWA

No. 2-358 / 91-1909

IN RE THE MARRIAGE OF KENNETH A. MIDDLEMAN
AND MARCELLA J. MIDDLEMAN



Upon the Petition of

KENNETH A. MIDDLEMAN,

Appellant,

And Concerning

MARCELLA J. MIDDLEMAN,

Appellee.

Appeal from the Iowa District Court for Dubuque County,
Lawrence H. Fautsch, Judge.

The husband appeals the spousal support provision of
the parties' dissolution decree. **AFFIRMED.**

James Roth of Roth & Schumacher Law Offices, Dubuque,
for appellant.

G.T. Reilly of Kintzinger, Van Etten, Setter, Pearce &
Scott Law Firm, Dubuque, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

OXBERGER, C.J.

Kenneth and Marcella Middleman were married on May 25, 1963. Their children are all now adults. The parties lived in Dubuque, Iowa, during the marriage.

Kenneth was born in 1938 and was fifty-three at the time of the trial. He is employed by the Dubuque Fire Department where he earns about \$35,180. He has net monthly income of about \$2,330 per month. Kenneth also receives \$150 per month from a loan he made to Ann Geesey. The evidence showed Kenneth's pension plan had a present value of \$179,567 and that he would receive approximately \$1,400 per month if he retired at age fifty-five.

Marcella was born in 1926 and was sixty-five at the time of trial. She was employed as a waitress before the marriage, but by the agreement of the parties quit after the marriage. Marcella receives social security benefits of \$248 per month. She also receives about \$35 per month for work she performs at her church. She testified that after the divorce she will have to pay \$63 per month for health insurance.

The parties separated in 1985. A decree of separate maintenance was entered by the district court on May 28, 1985, which incorporated the parties' stipulation. Under that decree, Kenneth paid spousal support of \$200 every two weeks, which is \$433 per month.

Kenneth filed a petition for dissolution of marriage in January 1991. In the dissolution decree, the court ordered Kenneth to pay spousal support of \$200 per week until his retirement or until Marcella dies or remarries, whichever occurs first. When Kenneth retires, Marcella will be entitled to five-twelfths of his retirement benefits. Kenneth was ordered to purchase a \$25,000 life insurance policy naming Marcella as the beneficiary.

The district court awarded Kenneth the marital residence, which had no equity. Each party was awarded a vehicle and the personal property in his or her possession. Kenneth was ordered to pay \$1,000 toward Marcella's attorney fees.

Kenneth has appealed. He claims the amount of alimony awarded by the district court is excessive and is not supported by the evidence. He states that at the time the decree of separate maintenance was entered he earned about \$30,000 per year and was ordered to pay \$433 per month in alimony. Kenneth points out that the dissolution decree doubled his alimony obligation to \$866 per month, while he has had only a modest increase in income to about \$35,000 per year. He also states there is no evidence to show Marcella's expenses have increased since the decree of separate maintenance was entered.

Our review of this equitable action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). We are

not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. Id.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id. We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991).

We first note that at the dissolution hearing, Kenneth's counsel admitted the separate maintenance decree provided no basis for a decision in the dissolution action. We determine that in fashioning the dissolution decree, the district court was under no obligation to follow the provisions of the separate maintenance decree.

The evidence in this case clearly shows Marcella does not have any earning capacity other than the \$35 per month she receives for church work. This income, plus her social security benefits give her \$283 per month to live on. In contrast, Kenneth has net income of \$2,330 per month from

his employment, plus \$150 per month from Ann Geesey, which gives him \$2,480 every month. We find the award of \$200 per week in spousal support is not excessive. We affirm the district court's award.

Marcella has asked for attorney fees for this appeal. 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We order Kenneth to pay \$500 toward Marcella's attorney fees for this appeal. Costs of this appeal are assessed to Kenneth.

AFFIRMED.