IN THE COURT OF APPEALS OF IOWA

No. 4-418 / 93-1363

FILED
FEB 28 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JAMIE SUE HUGHET AND WILLIAM NEAL HUGHET

Upon the Petition of
JAMIE SUE HUGHET,

Petitioner-Appellant/Cross-Appellee,

And Concerning
WILLIAM NEAL HUGHET,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Petitioner appeals, and respondent cross-appeals, various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Roger J. Hudson and Michael E. Marshall of Smith, Schneider, Stiles, Wimer, Hudson, Serangeli, Robinson, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellant.

Harlan W. Hockett and Joseph G. Bertogli, Des Moines, for appellee.

Considered en banc.

HAYDEN, J.

William and Jamie Hughet were married on September 4, 1971. They had three children, Pamela, born November 8, 1981, and twin sons, James and John, born February 25, 1985. William graduated from Iowa State University in 1970 with a bachelor of science degree in computer science. Jamie graduated from Iowa State in 1972 with a bachelor of science degree in elementary education. William began working for an insurance company in Des Moines shortly after graduation. Jamie obtained a teaching job with the Des Moines school system.

In 1972 William was hired by R.H. Donnelly and Company in Nevada, Iowa. William and Jamie moved to Nevada and purchased an older home there. Jamie began a teaching position with the Nevada school system. They later purchased another home for $55,000. When Pamela was born in 1981, Jamie took a short leave from her employment. However, at the time of the twins' birth in 1985, William and Jamie decided she should remain at home to raise the children.

William was eventually promoted to the management staff at Donnelly. However, in 1988 William received notice his position was being eliminated. At the time his job was eliminated, William was earning $38,000 per year. Donnelly provided him with a severance package equal to two weeks salary for every year of employment with Donnelly. William also received pay for his accrued vacation and was

permitted to keep his company health insurance and to continue profit sharing through the time covered by his severance pay. William received his profit participation funds and remained entitled to receive a Donnelly pension when he reached age sixty-five. William received over $70,000 from his profit participation plan.

Shortly after his termination, William discussed with Jamie the possibility of his entering law school. They agreed it would be in the family's long-term interests if William obtained a law degree. Jamie agreed to return to full-time teaching in Nevada to support the family while William was in school. William and Jamie agreed he would take out student loans to cover most of the costs of attending the University of Iowa law school.

William graduated from law school in May 1992. Shortly thereafter, William told Jamie he wanted a divorce. William was not employed from the date of graduation until April 1993. During this period of time William accumulated $16,000 in credit card debt. At trial, William testified he had accepted employment with a law firm in Rock Island, Illinois, at a salary of $27,000 per year, or $1683.98 net per month.

The trial court entered its decree on August 26, 1993. Jamie was awarded physical custody of the children. William was ordered to pay $582 per month for the support of three children. When there were only two children to support, his payments would be lowered to $499 per month,

and when there was only one child, the payments would be $474 per month. The trial court awarded Jamie one dollar per year in alimony, holding if William begins to earn a greater income in the ensuing years, she could seek a modification. Jamie was awarded the marital home and the furniture therein. She was ordered to assume the two mortgages on the property. She was also awarded a 1984 Chevrolet. Jamie was additionally awarded her life insurance policies. The trial court also awarded her one-half of William's Donnelly pension plan. William was awarded the property in his possession at the time of trial and was ordered to assume all the credit card debt. Each party was responsible for his or her own attorney fees. Jamie appeals, and William cross-appeals. We affirm the trial court.

I. **Issues on Appeal**.

Jamie raises four issues on appeal. First, she contends the trial court should have determined child support using William's earning capacity of $45,000, rather than the reduced income from the law firm. Second, she asserts the trial court should have awarded her more alimony. Third, she claims the trial court erred in its distribution of the parties' debts. Jamie lastly maintains William should be ordered to contribute towards her attorney fees.

William cross-appeals. He argues his net income should be reduced by $238.65 per month, the cost of adding the children to his health insurance program.

II. Scope of Review.

Our review in equity actions is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Child Support.

Jamie contends the trial court erred in its award of child support. She argues the court should have used an earning capacity of $45,000 as opposed to William's actual income of $27,000. She claims William chose to reduce his actual income to a level far below his earning capacity. William contends his "net monthly income" for purposes of determining child support is less than the amount determined by the trial court.

Each parent has a duty to provide support according to his or her ability to pay. Iowa Dep't of Human Serv. ex rel. Gonzales v. Gable, 474 N.W.2d 581, 582-83 (Iowa App. 1991). We recognize William failed to provide any support to his children during his one-year search for permanent employment in his chosen field. However, we do not find it inequitable to use his actual earnings to calculate the amount of support owed. William's net monthly income for child support purposes is $1662. Jamie's net monthly income is $1479. According to the guidelines, William's obligation is $581.70 per month in child support.

We do not consider William's contention the trial court erred in determining his "net monthly income" for child

support purposes. On September 7, 1993, William's counsel filed a combined motion to reopen and to enlarge the trial court's findings of fact and conclusions of law entered on August 26, 1993. Before the trial court could rule on it, he withdrew the combined motion.

This combined motion was in substance a rule 179(b) motion. It is well settled a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted for adjudication. Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided on appeal. State Farm Mut. Auto Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206-07 (Iowa 1984). William failed to allow the trial court opportunity to rule on his combined motion. Consequently, the issues in his combined motion are not properly before us for decision. We respectfully decline to rule on these issues for the first time on appeal. We affirm on this issue.

IV. Alimony.

Jamie contends the trial court erred in its alimony award and its distribution of the parties' debts. We disagree.

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 Tzortzoudakis, 507 N.W.2d 183, 185 (Iowa App. 1993). Alimony is an allowance to a

former spouse in lieu of a legal obligation for support. In re Marriage of McQueen, 496 N.W.2d 259, 261 (Iowa App. 1992). We consider the property division and the alimony award together in evaluating their individual sufficiency. In re Marriage of Coulter, 502 N.W.2d 168, 172 (Iowa App. 1993).

The trial court awarded Jamie nominal alimony. This award was traditional alimony. William's liability was to continue until Jamie remarried or until the death of either party. Our de novo review of the record leads us to conclude the trial court effected equity between the parties. The trial court correctly noted William's income is only slightly greater than Jamie's. William does not presently have the ability to contribute any greater amount of alimony. The trial court wisely left the door open for Jamie to ask for modification if and when William's income as an attorney increases. We affirm on this issue.

V. Property Division.

Jamie next argues the trial court erred when it divided the couple's property. She contends she was saddled with too much of the parties' debts. We disagree.

The partners in the 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 App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance.

Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

In this case, the trial court granted Jamie a majority of the parties' remaining assets, including the entire equity remaining in the parties' home. Jamie argues the trial court made her solely responsible for more than $40,000 in debt attributable to William's attendance in law school. The couple once had substantial assets, and they were depleted as a result of William losing his job and the parties' joint decision for him to attend law school.

Under these circumstances, the trial court's property division was equitable and attempted to compensate Jamie for any sacrifices she made during William's legal education. We affirm on this issue.

VI. Attorney Fees.

Jamie also contends the trial court erred in failing to award her attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 101 (Iowa App. 1991). To overturn an award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, and based on the parties' respective abilities to pay. In re Marriage of Benson, 495 N.W.2d 777, 783 (Iowa App. 1992). Jamie has failed to show the trial court abused its discretion by

failing to award her trial attorney fees. We affirm on this issue.

Finally, Jamie requests attorney fees on 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 Sires, 506 N.W.2d 813, 815 (Iowa App. 1993). 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 Manson, 503 N.W.2d 427, 431 (Iowa App. 1993). Based on these factors, we determine each party should pay his or her own appellate attorney fees.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. The trial court is affirmed. Costs of this appeal are to be divided evenly between the parties.

AFFIRMED.