

IN THE COURT OF APPEALS OF IOWA

No. 5-071 / 93-1337

**IN RE THE MARRIAGE OF DAGMER TATIANA LORENZ
AND PAUL MARK LORENZ**

Upon the Petition of

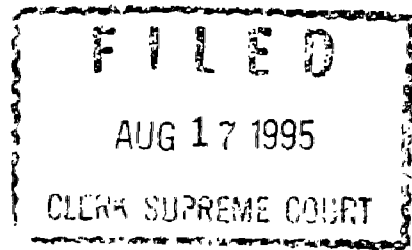
DAGMER TATIANA LORENZ,

Petitioner-Appellee,

And Concerning

PAUL MARK LORENZ,

Respondent-Appellant.



Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Paul Lorenz appeals from the provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Paul Lorenz, Benkelman, Nebraska, pro se.

Allison M. Heffern and Sherry L. Schulte of White and Johnson, P.C., Cedar Rapids, for appellee.

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

SACKETT, J.

Respondent-appellant Paul Mark Lorenz appeals from the provisions of a decree dissolving his marriage to petitioner-appellee Dagmar Tatiana Lorenz and from temporary orders entered prior to the dissolution. We affirm as modified.

Dagmar, sixty-five at the time of trial, and Paul, sixty-six, were married in 1961. They have two children who are now adults.

Paul has a master's degree in mechanical engineering. Paul had been employed with the Defense Logistics Agency in Cedar Rapids, at an annual salary of \$49,699. He retired a month before the dissolution hearing. At the time of the hearing, Paul was receiving about \$1000 per month in social security and \$353.42 per month from a Boeing retirement account. He is entitled to receive civil service retirement benefits, but did not know how much he would receive.

Dagmar did not work outside the home during most of the marriage. While the dissolution was pending, Dagmar moved to Oklahoma where her daughter lives. She receives social security of \$398 per month.

Paul first contends the trial court should not have awarded Dagmar temporary attorney fees and held him in contempt for failing to pay them. He also contends the trial court should not have ordered a wage assignment.

Dagmar filed a petition for dissolution of marriage on June 18, 1992, and sought temporary alimony and attorney fees. On August 26, 1992, the district court ordered Paul to pay her temporary alimony of \$1000 per month and temporary

attorney fees of \$500. Paul failed to pay these amounts. On October 9, 1992, the district court entered an order for the mandatory assignment of his wages. The court ordered Paul's employer to deduct \$1000 per month for current support and \$200 per month for delinquent support. One week after this order was entered, Paul retired.

On February 16, 1993, Dagmar filed an application seeking to have Paul found in contempt of court for failure to pay the temporary attorney fees of \$500. Paul filed a motion to quash the mandatory wage assignment. The district court overruled the motion to quash. The court determined Paul was in contempt for failing to pay the court-ordered attorney fees. He was given thirty days to pay the fees or face sentencing. In addition, Paul was ordered to pay an additional \$300 for Dagmar's legal fees incurred in connection with the contempt action.

Paul claims his wages were unlawfully assigned or garnished for the payment of temporary alimony. He advances Iowa law only permits the court to order a wage assignment where a person has been delinquent in paying child support, and the law does not permit this procedure to be used to collect delinquent alimony. Paul also claims the court improperly added the award for temporary attorney fees to the award for temporary alimony.

Paul did not appeal the order for temporary support or the wage assignment within thirty days. Temporary orders are final judgments and are appealable as a matter of right. *In re Marriage of Campbell*, 451 N.W.2d 192, 195 (Iowa App. 1989). The failure to take a timely appeal from temporary orders results in a waiver of the

right to review. *Id.*

Paul also contends he should not have been found in contempt of court because he did not have sufficient funds to pay the awards of temporary alimony and attorney fees. He states the jail sentence for failure to pay the temporary attorney fees was not proper and there is no Iowa authority supporting the trial court's order.

Dagmar claims Paul's appeal on this issue is untimely because he failed to appeal within thirty days of the March 19, 1993 ruling finding him in contempt.

The proper challenge to a contempt order is a petition for writ of certiorari. *In re Marriage of Welsher*, 274 N.W.2d 369, 371 (Iowa 1979). An error in form is not fatal error, and the case may proceed as though the proper form of relief was requested. *State v. Lipcamon*, 483 N.W.2d 605, 606 (Iowa 1992).

A petition for writ of certiorari must be filed within thirty days of the district court's contempt order. *Hutcheson v. Iowa Dist. Court*, 480 N.W.2d 260, 264 (Iowa 1992). A contempt order which gives the contemnor the opportunity to purge the contempt may not be a final order for purposes of appeal. *City of Masonville v. Schmitt*, 477 N.W.2d 874, 875 n.1 (Iowa App. 1991).

The contempt order gave Paul the opportunity to purge the contempt if he paid the temporary attorney fees within thirty days. The contempt order was filed March 19, 1993. Notice of appeal was filed September 7, 1993. The trial court sentenced Paul to jail October 7, 1993. No further appeal was taken from the October 7th sentence.

The March 19th order was final as to the issue of Paul being in contempt for not paying attorney fees. We determine a person can be found in contempt for failure to pay attorney fees. We affirm on this issue.

Paul next contends the trial court should have ordered conciliation. Paul did not request conciliation. Dagmar asked in her petition it be waived.

Iowa Code section 598.16¹ provides generally conciliation is required only if requested in petitioner's petition or respondent's responsive pleading or by an attorney for a child or children within twenty days of appointment. Dagmar waived

¹ A majority of the judges in any judicial district, with the cooperation of any county board of supervisors in the district, may establish a domestic relations division of the district court of the county where the board is located. The division shall offer counseling and related services to persons before the court.

Upon the application of the petitioner in the petition or by the respondent in the responsive pleading thereto or, within twenty days of appointment, of an attorney appointed under section 598.12, the court shall require the parties to participate in conciliation efforts for a period of sixty days from the issuance of an order setting forth the conciliation procedure and the conciliator.

At any time upon its own motion or upon the application of a party the court may require the parties to participate in conciliation efforts for sixty days or less following the issuance of such an order.

Every order for conciliation shall require the conciliator to file a written report by a date certain which shall state the conciliation procedures undertaken and such other matters as may have been required by the court. The report shall be a part of the record unless otherwise ordered by the court. Such conciliation procedure may include, but is not limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community health centers, physicians and clergy.

The costs of conciliation procedures shall be paid in full or in part by the parties and taxed as court costs; however, if the court determines that the parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor children with economic necessities, the costs may be paid in full or in part by the county.

Persons providing counseling and other services pursuant to this section are not court employees, but are subject to court supervision.

conciliation in her petition and testified at trial it would not save the marriage. Paul did not request conciliation in his answer. The trial court was not required to order it, nor did the trial court abuse its discretion in not ordering it on its own motion. We affirm on this issue.

Paul claims there was insufficient evidence of a breakdown of the marriage relationship. Dagmar testified there was a breakdown of the marriage relationship. Dagmar's testimony, coupled with the other testimony, clearly meets the requisite to find a breakdown of the marriage relationship. We affirm on this issue.

Paul's next contention is he should have been granted a continuance when his attorney withdrew. Trial was set for April 15, 1993. On March 19, 1993, Paul's attorney filed a motion to withdraw, citing conflicts with his client. On March 31, 1993, the district court granted the attorney's motion to withdraw. Paul did not obtain another attorney prior to the hearing date. At the hearing, Paul requested a continuance to allow him to obtain an attorney. This request was denied. Paul proceeded without an attorney.

A district court has broad discretion to grant or deny continuances, and the district court will be reversed only when that discretion is abused. *Hawkeye Bank & Trust v. Baugh*, 463 N.W.2d 22, 26 (Iowa 1990). The court may weigh the relative impact of a continuance on the nonmoving party against the likely prejudice to the moving party. *Id.* We affirm on this issue.

Paul next claims the district court abused its discretion by requiring him to take the stand. Paul originally objected but then agreed to testify because he wanted to clarify some matters. We will find an abuse of discretion when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Schettler v. Iowa Dist. Court*, 509 N.W.2d 459, 464 (Iowa 1993). "Unreasonable" in this context means not based on substantial evidence. *Id.* The trial court did not abuse its discretion in either case. We affirm on this issue.

Paul filed a motion for new trial. He contends his request for new trial should have been granted. In ruling upon a motion for new trial, broad but not unlimited discretion is vested in the trial court. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990). An appellate court will not find an abuse of discretion unless it is shown the trial court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. *Id.* We affirm on this issue.

Paul contends the economic provisions of the decree were not equitable to him.

The trial court heard the evidence and issued a decree awarding each party the personal **property** in his or her possession, but refusing to consider, in assessing the equities, **property** Paul alleged Dagmar had given their daughter.

Dagmar was awarded one-half of Paul's Boeing retirement benefits and one-half of his civil service retirement benefits. The court awarded Dagmar one-half of any net proceeds Paul receives from a pending wrongful discharge suit in Colorado.

Each party was ordered to pay his or her own attorney fees except for those temporary fees already ordered.

The court ordered Paul to pay Dagmar alimony of \$200 per month for a period of twenty-one months, commencing January 1, 1994. In addition, she was awarded his back pay of \$4,969.53 as lump sum alimony.

Paul claims the property award is not equitable, and he should not be required to pay alimony.

We review de novo. *In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa App. 1990). 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. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

The partners in 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 App. 1991). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *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). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3) (1989). *Id.* at 110-11. 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.*

The trial court is required to consider pension benefits. Iowa Code § 598.21(1)(i) (1993); see *In re Marriage of Johnston*, 492 N.W.2d 206, 208 (Iowa App. 1992).

Paul claims the court improperly awarded Dagmar one-half of his Boeing pension and one-half of his civil service pension. He states he was only married to Dagmar in ten of the sixteen years he worked at Boeing. He believes, at most, Dagmar is entitled to 10/16 of fifty percent of his Boeing pension.

Pension benefits are subject to equitable distribution. *In re Marriage of Huffman*, 453 N.W.2d 246, 248 (Iowa App. 1990). We agree with Paul that the decree should be modified to give Dagmar 10/16 of fifty percent of his Boeing pension. See *In re Marriage of Hornung*, 480 N.W.2d 91, 95 (Iowa App. 1991); *In re Marriage of Oler*, 451 N.W.2d at 12; *In re Marriage of Woodward*, 426 N.W.2d 668, 670 (Iowa App. 1988). We modify the decree accordingly.

Paul contends the district court should not have awarded Dagmar one-half of any net proceeds he receives from a wrongful discharge suit against his former employer, Martin Marietta. He believes his recovery is too speculative to be divided

in the dissolution action. We affirm the trial court on this issue. *See In re Marriage of McNerney*, 417 N.W.2d 205, 207-08 (Iowa 1987).

Paul also contends his civil service retirement benefits and unused vacation back pay are too speculative and should not have been divided with Dagmar. We disagree and affirm the trial court on this issue.

Paul contends personal property shipped by Dagmar to their daughter in Oklahoma should be considered in the property division. The district court determined because the children were not a party to the action, it could not determine this issue. Dagmar shipped the property to her daughter during the pendency of this action. The value of the property should be assessed to her in assessing the equities. Dagmar admitted transferring the property. The record is far from clear as to its value. We consider the transfer together with Paul's claim the alimony is too high. We modify to award Dagmar one-half of Paul's back pay of \$4969.53 as alimony and award the other one-half to him. We affirm the alimony award of \$200 per month for twenty-one months.

Paul contends the trial court did not properly consider the debts it ordered him to pay. We find no reason to depart from the trial court's decision on this issue.

Dagmar 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).

Each party shall pay their own attorneys fees. Paul's appellate brief and the appendix are printed on one side of the paper only in violation of Iowa Rule of Appellate Procedure 16(a). We tax the cost of the appellate brief and appendix to Paul, and the balance of the appellate costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.