

IN THE COURT OF APPEALS OF IOWA

No. 7-016 / 96-10

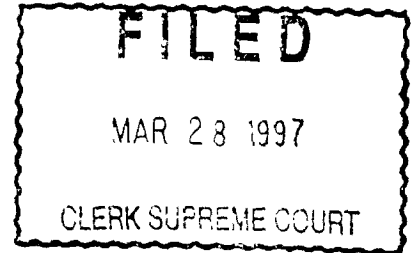
**IN RE THE MARRIAGE OF DENYCE MARIE ALEXANDER
AND ROBERT LAVERNE ALEXANDER**

Upon the Petition of
DENYCE MARIE ALEXANDER,

Appellee,

And Concerning
ROBERT LAVERNE ALEXANDER,

Appellant.



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

Robert appeals from certain economic provisions in the parties' dissolution of
marriage decree. **AFFIRMED AS MODIFIED.**

Richard O. McConville of Coppola, Sandre & McConville, P.C., Des Moines,
for appellant.

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., Cady, and Streit, JJ.

CADY, J.

This is an appeal from a decree for dissolution of marriage entered by the district court. We affirm with modification.

Robert and Denyce Alexander dissolved their eight-year marriage in December 1995. The parties have two children from the marriage: Thomas, born February 17, 1989; and Ashley, born October 24, 1992. Robert also has three children from his previous marriage.

In calculating child support, the district court found Robert earned \$40,826 per year as a truck driver and \$6000 per year from farming. The court also determined Denyce's earning capacity was \$11,372. This was based on her 1994 earnings. The court noted Robert's child support obligation to his youngest child from his previous marriage would terminate upon her graduation from high school in June 1996. It ordered Robert to pay child support in the amount of \$711.67 until June 1996, and \$872.67 after that time.

The court determined Robert had an "undefined but unmistakable and actual interest" in the marital residence which was presently owned by his parents. To offset this interest Robert was ordered to pay a \$20,000 property settlement to Denyce. The court provided the settlement was in the nature of support and alimony and was not dischargeable in bankruptcy.

Robert was also ordered to pay Denyce alimony in the amount of \$250 per month until September 1998 or the death of either party. He was ordered to pay

attorney fees in the amount of \$3000, in addition to \$500 for attorney fees he had been previously ordered to pay.

Robert appeals. He argues the court erred in finding he had an actual interest in the marital residence. He further argues the court erred in calculating the parties' incomes for purposes of child support. Specifically, Robert contends the court erred in attributing to him \$6000 income from farming activities, in failing adjust his income by the amount he is ordered to pay for alimony, in finding his child support for his youngest child from his prior marriage would automatically terminate upon her graduation from high school, and in failing to consider Denyce's earnings for an entire year rather than the seven and one-half months she was employed. Lastly, Robert argues the court erred in awarding Denyce alimony and attorney fees, and in providing the property settlement was not dischargeable in bankruptcy.

I. Property Division

Courts divide property between divorcing spouses in an equitable manner after considering all relevant circumstances. Iowa Code § 598.21(1) (1995). Inherited and gifted property, however, is excluded from the division process unless it would be inequitable to the other spouse or children. Iowa Code § 598.21(2).

The evidence in this case does not support a finding Robert received the house during the marriage as a gift from his parents, or that he had any present or future interest in the home. To the contrary, Robert's parents purposely refrained from transferring any interest in the house to Robert because they were not fond of Denyce.

They did not want her to acquire an interest in the property by virtue of her marriage to Robert. Clearly, there was no donative intent. Furthermore, permissive use and possession of land is not evidence of a gift. *See Simonsen v. Todd*, 261 Iowa 485, 496, 154 N.W.2d 730, 736 (Iowa 1967).

Even if the property had been clandestinely gifted to Robert, there are no circumstances which make it inequitable to set it aside to Robert. *See In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982) (factors to consider in determining whether gifted property should be divided). Although Robert and Denyce spent approximately \$10,000 in maintenance and improvements over the eight years they resided in the house, the rental agreement with Robert's parents provided they would be responsible for any maintenance and improvement.

The trial court found Denyce was entitled to a \$20,000 property settlement because Robert's parents would most likely transfer ownership of the house to Robert after the divorce was completed. We do recognize it is proper to consider the economic circumstance of each spouse in dividing property, including future interests in property. Iowa Code § 598.21(1)(i). A future interest, however, is an existing interest in property which is postponed. In this case, Robert has no recognized future interest in the house. Moreover, gifts contemplated in the future should be treated no differently than gifts made during the marriage. We find no compelling economic circumstances to support a cash settlement to offset a future gift.

II. Child Support

We conclude the trial court correctly computed Robert's net income for purposes of determining his support obligation. The actual amount of Robert's net farm income rested largely on his credibility. We defer to the trial judge on this issue. *See Iowa R. App. P. 14(f)(7)*. We also conclude the trial court correctly determined the earning capacity of Denyce.

We reject Robert's claim the trial court was required to deduct his monthly alimony obligation to Denyce in determining net income. Under the guidelines, only prior court ordered obligations for spousal support are deducted in determining net income. *In re Marriage of LaLone*, 469 N.W.2d 695, 697 (Iowa 1991). Furthermore, there are no circumstances to support a deviation from the guidelines based on the alimony payments.

Finally, the trial court properly considered that Robert's child support obligation from a prior marriage would terminate when the child graduated from high school. There was no evidence presented to show otherwise. In any event, we recognize Robert's obligation could be modified in the future if circumstances change which make it equitable to do so.

III. Alimony

The trial court correctly imposed an obligation to pay alimony for a limited period of time. Denyce leaves the marriage at a financial disadvantage. Robert has a greater earning capacity and a greater level of income. He continues to live in the marital residence and will maintain the same standard of living for the most part.

Denyce begins under different circumstances. She has left the marital residence and is the primary caretaker of the young children. She must purchase health care coverage for herself and is in need of a new vehicle. Alimony is necessary and Robert has the ability to contribute to Denyce's support. *See* Iowa Code § 598.21(3).

IV. Attorney Fees

An award of attorney fees in a dissolution is not a matter of right, but is within the discretion of the court based on the needs and abilities of the parties. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). Considering all the circumstances, the trial court properly awarded attorney fees to Denyce. We award Denyce appellate attorney fees of \$750.

V. Bankruptcy

The trial court indicated the property settlement was actually intended to be in the nature of spousal support and ordered it was not dischargeable in the event Robert filed for bankruptcy. It is well settled that alimony payments are not dischargeable in bankruptcy while a cash property settlement is dischargeable. *Ziegenhorn v. Iowa Dist. Court*, 510 N.W.2d 894, 898 (Iowa App. 1993). Since the label placed on an obligation arising from a divorce decree is not dispositive on whether it is dischargeable, many factors are considered in deciding the issue including the intent of the debt. *Id.* Thus, we find nothing wrong with the trial court expressing its intention in awarding a debt. It is inappropriate, however, to enter an

order on the issue. Courts should refrain from deciding a controversy until it arises and has been properly presented.

VI. Conclusion

We modify the decree to reduce the property settlement amount from \$25,000 to \$5,000. We also strike that portion of the decree which “ordered” the property settlement and other debts could not be discharged in the event of bankruptcy. We affirm the attorney fee award, and award appellate attorney fees of \$750. We affirm the other provisions of the decree. Costs on appeal divided equally.

AFFIRMED AS MODIFIED.