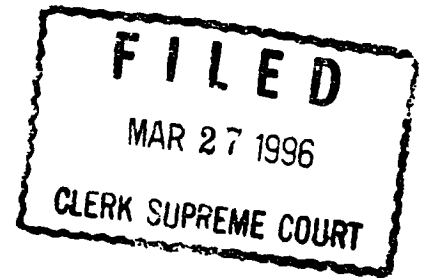


IN THE COURT OF APPEALS OF IOWA

No. 5-512 / 94-0694



IN RE THE MARRIAGE OF PAMELA LARUE CARROLL
AND FRANCIS ROBERT CARROLL

Upon the Petition of
PAMELA LARUE CARROLL,
Petitioner-Appellant,

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And Concerning
FRANCIS ROBERT CARROLL,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

Appeal from economic provisions of dissolution decree. **AFFIRMED AS
MODIFIED.**

Robert A. Wright, Sr., Des Moines, for appellant.

Patricia M. Hulting of Roehrick, Hulting & Moisan, Des Moines, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

STREIT, J.

Pamela and Francis (Frank) Carroll were married on October 2, 1971. They have three children, two of whom are minors affected by this action. Tanya, born June 11, 1977, and Tiffany, born May 8, 1979. A decree of dissolution was filed on February 9, 1994, and Pamela was awarded the primary physical care of the children. She appeals the economic provisions of the decree. She argues: 1) Frank's child support obligation is not equitable; 2) the property division was not equitable; 3) Frank should have been ordered to pay alimony; 4) Frank should have been ordered to pay one-half of her trial attorney fees; 5) Frank should pay one-half of her appellate attorney fees; and 6) equity requires this case be remanded for the receipt of additional evidence.

In an equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.* Upon our de novo review of the record, we affirm the trial court's decree as modified and find no remand is warranted.

I. Child Support.

The trial court ordered Frank to pay \$995 a month for child support for the two minor children, and \$726 a month when only one child remains subject to a support obligation. Pamela does not dispute these amounts are accurate given the application

of the child support guidelines to the parties' net monthly incomes. However, she argues the trial court should have deviated from the guidelines and ordered Frank to pay additional support to cover the entire cost of the children's education at Dowling High School.

The trial court ordered the parties to divide equally the expense of the private school for the pending 1993-94 school year, but it left to the parties' discretion the issue of whether they would pay for part or all of the cost of sending their children to Dowling in subsequent years. Pamela argues Frank should be ordered to pay the entire cost of completing the children's high school education at Dowling (including all of the costs of the 1993-94 school year) since it was at his insistence the children began school at Dowling. Pamela contends the children now wish to finish high school with their friends and classmates, and she believes Frank has greater resources available to enable the children to do this.

There is a rebuttable presumption the amount of child support which results from the application of the child support guidelines is the correct amount to be awarded. *State ex rel. Schaaf v. Jones*, 515 N.W.2d 568, 570 (Iowa App. 1994). In order to vary from the guidelines, the court must make a written finding application of the guidelines would be unjust or inappropriate. *Id.* Deviation from the uniform application of the guidelines is discouraged. *Id.*

The record reflects Frank has a net monthly income of approximately \$3077 which will leave him \$2082 for living expenses after he pays his monthly child support obligation. Pamela will receive \$896 a month in employment income and \$995 a month in child support. In addition to this monthly income of \$1891, Pamela will also have income from her farm which the trial court estimated would net at least \$9000 annually.

We cannot find this case presents special circumstances which warrant a deviation from the child support guidelines. After considering all of their resources, there is no significant disparity in the parties' incomes, and the desire to continue the children's private education is not alone sufficient to warrant deviation from the guidelines. We will not modify the child support award nor will we modify the trial court's order requiring the parents to divide the costs of the 1993-94 school year.

II. Property Settlement.

Pamela challenges six aspects of the property division. She contends: 1) she should have been awarded use of the family home until the youngest child completed her education; 2) she should have been awarded an interest in Frank's retirement account; 3) the parties' debt should have been more equitably divided; 4) the decree should not have addressed the disposition of a vehicle owned by Pamela's parents; 5) the parties' tax liability as estimated by the trial court is not supported by the facts; and 6) the CRP payments should have been set off to Pamela.

The distribution of property in a dissolution action should be equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Wertz*, 492 N.W.2d 711, 713 (Iowa App. 1992). What constitutes an equitable division of marital property must be determined under the specific facts of each case. *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa App. 1984).

The parties' most valuable assets include the family home, a 200-acre farm, and Frank's retirement account. At the time of trial the home was subject to foreclosure proceedings due to the nonpayment of mortgage payments during the parties' separation. The home had a serious title problem in that it extended over the boundary into the adjacent owners' property. The trial court estimated the net value of the home was \$70,511.48. Given the foreclosure and title problems, the value of the house determined by the trial court was well within the permissible range of the evidence, and will not be disturbed on appeal. *See In re Marriage of Huisman*, 532 N.W.2d 157, 160 (Iowa App. 1995).

The trial court found the net value of the farm to be \$93,460. The value of Frank's retirement account is \$21,500. The trial court awarded Frank the home and retirement account, and Pamela was awarded the farm. The court fashioned a division of property and debts which gave Pamela an approximate net value of \$85,000 and gave Frank \$68,000.

We find the award of the home to Frank was equitable. The adjacent landowners are Frank's parents, and it is reasonable to assume he, rather than Pamela, could be more successful in correcting the serious title problems which affect the value of this property. The benefits inherent in allowing children to remain in the family home do not overcome the practical benefits in this case of awarding the home to Frank.

It was also equitable to award Frank his retirement account. While Pamela presently has no similar retirement fund, she did receive the parties' only income producing asset. The farm has substantial value, and Frank was ordered to pay the remaining encumbrance owed against it. During the next few years Pamela will receive the remainder of the CRP contract proceeds. After the CRP contract expires, she will have unencumbered land which she can sell or rent. The farm proceeds can enable Pamela to fund a retirement plan.

We find the trial court equitably divided the parties' debt. It directed Frank to pay the farm encumbrance and the September 1993 farm taxes. Pamela was primarily left with responsibility for the farm operating debt, personal expenses she had incurred after the parties' separation, and a debt she owed her parents. We find nothing inequitable in the division of debts.

To the extent the decree purported to dispose of property not owned by the parties, such as a vehicle owned by Pamela's parents, the decree does not bind the

nonparty owners and is without affect on their decisions regarding the future use or disposition of the vehicle.

Pamela objects to the amount of tax liability the court estimated the parties would have in 1993. Frank was ordered to pay the parties' 1993 income taxes. Even if the trial court overestimated the potential tax liability, the parties would still receive a roughly equal net value of assets with Pamela receiving \$85,000 and Frank receiving \$83,000. This would result in an equitable division of assets and debts.

Pamela wants the CRP payments due since November 1993. In his brief Frank concedes Pamela is entitled to postdecree CRP payments and he is willing to execute the necessary documents to facilitate the transfer of such payments. Accordingly, it is ordered that the parties execute the necessary documents to facilitate the CRP payments being received by Pamela after the filing of the original decree.

We have reviewed all of Pamela's arguments regarding the valuation and division of the parties' assets and debts. We find the trial court's valuations to be within the range of permissible evidence and its division of property and debts equitable.

III. Alimony.

Pamela argues Frank should have been ordered to pay her \$500 in monthly alimony. She cites the length of the marriage, her roles as primary caretaker and

homemaker, and the disparity in the parties' incomes as factors supporting an award of alimony. *See* Iowa Code § 598.21(3)(a) (e) (1993).

When determining the appropriateness of alimony we consider the earning capacity, standard of living, the ability to pay, and the needs of each party. *See In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa App. 1994). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *Id.*

Pamela was forty-one years of age at the time of trial, in good health, and employed. The trial court correctly estimated she would earn approximately \$15,000 a year from her employment. In addition, she would receive child support and income from the parties' 200-acre farm. Given her employment and receipt of income producing property, an award of alimony was not warranted.

IV. Trial Attorney Fees.

An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay, and the fees must be fair and reasonable. *Id.* Pamela must establish the trial court abused its discretion in denying her request for fees. *Id.* We find the decision of the trial court was equitable and not an abuse of discretion.

V. Appellate Attorney Fees.

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An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppelle*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the relative circumstances of the parties in this action, we find equity does not warrant an award of appellate attorney fees.

VI. Remand.

Pamela requests this case be remanded for the receipt of further evidence on the issues of property distribution and alimony. We find the record contains sufficient evidence of the value of the parties' property as well as their relative levels of income. The request for remand is denied.

The costs of this appeal are to be equally divided between the parties.

AFFIRMED AS MODIFIED.