IN THE COURT OF APPEALS OF IOWA

No. 2-494 / 91-1806

IN RE THE MARRIAGE OF SANDRA L. PERRY AND MICHAEL F. PERRY

Upon the Petition of

SANDRA L. PERRY,

Petitioner-Appellee/Cross-Appellant,

And Concerning

MICHAEL F. PERRY,

Respondent-Appellant/Cross-Appellee.

FILED
FEB 23 1993
CLERK SUPREME COURT

Appeal from the Iowa District Court for Des Moines County, John C. Miller, Judge.

The respondent appeals from the district court's decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Steven R. Hahn of Bauer, Schulte, Hahn, Swanson & Crowley, Burlington, for appellant.

Michael J. Schilling of Cahill, Dieterich & Schilling, Burlington, for appellee.

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

OXBERGER, C.J.

This appeal addresses the economic provisions of a decree dissolving a short-term marriage. Michael F. Perry challenges the trial court division of property and the trial court decision awarding Sandra L. Perry attorney fees. Sandra cross-appeals challenging the trial court division of property and requests attorney fees on appeal. We affirm as modified.

Michael and Sandra were married in October 1987. No children were born to this marriage. Sandra has two minor children from a previous marriage. The children lived with Sandra and Michael. Michael provided substantial support for Sandra's children.

Before marriage, Michael and Sandra executed a prenuptial agreement which provided, in applicable part, each knew the property the other brought to the marriage and neither would acquire any rights in the other's property.

Michael filed for a dissolution of marriage in May 1989. The parties agreed to a settlement and a dissolution decree approving the settlement was signed by a district court judge. The decree was never filed in the office of the clerk of court.

Michael and Sandra were involved in an automobile accident in December 1987. Michael, in the 1989

dissolution settlement, waived any right to the personal injury settlement from this accident.

In early July 1989, Sandra, believing the decree of dissolution of her marriage to Michael final on June 13, 1989, moved to Cedar Falls. After moving to Cedar Falls, Sandra received $39,500 as settlement for the injuries she had received. Three thousand dollars of the amount Sandra received was for Michael's injuries.

In October 1989, Sandra learned the dissolution decree had not been filed[1]. In October 1990, Sandra filed another dissolution petition.

The matter proceeded to trial. Michael and Sandra agreed to the division of the majority of their assets and allocation of certain debts.

The trial court addressed the valuation and distribution of some assets, the existence of certain liabilities, and Sandra's claim for a money judgment.

The trial court ordered alimony to Sandra of $5 per year, valued the assets, ordered a cash payment to Sandra of $11,500, and fixed attorney fees.

Michael contends the provisions made by the trial court were not equitable.

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1. Both parties have proceeded as though the failure to file the dissolution decree that had been signed by the judge meant the marriage was not dissolved. For purposes of this appeal, we accept the parties' position. Our doing so should not be construed as a finding on our part that the failure to file the decree resulted in the marriage not being dissolved.

Sandra cross-appeals contending the provisions made by the trial court were not equitable and requests attorney fees on appeal.

We consider the challenges both parties have made to the economic provisions of the decree.

The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). An equal division is not necessary. See In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991).

We find the values placed on the assets by the trial court to be within the permissible range of evidence. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973).

Our review of the record causes us to agree with the trial court division and find the trial court division equitable, both as to property division and alimony. However, in this case, the only purpose of the alimony award is to act as a secutity device to prevent Michael from discharging in bankruptcy the amount he owes Sandra. Therefore, we modify the alimony award to terminate upon Michael's full payment of $11,500.

Michael challenges the trial court decision awarding Sandra's attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. See In

re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). 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, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. See In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We have considered all issues and affirm.

Sandra 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. See In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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. See In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Sandra $500 for attorney fees.

AFFIRMED AS MODIFIED.

Habhab, J., Concurs specially. Sackett, J., Concurs in part and dissents in part.

HABHAB, J. (specially concurring)

The parties were married in October of 1987. This is Michael's third marriage and Sandra's second. Sandra has two children by her previous marriage, and those children lived with her and Michael. The parties separated in 1989 and their marriage was dissolved in June of 1989. The petitioner and respondent reunited and continued their marital relationship until late 1989 when the petitioner moved out.

The court found that Sandra's net weekly income was $220.60, which gives her an annual income of $11,471.00. Michael's net annual income, according to the trial court, equals $19,000.00.

When I couple the short duration of this marriage with the fact that each party has a prior marriage and Sandra has annual earnings of $11,471.00 as against Michael's annual earnings of $19,000.00, I do not believe either party is entitled to alimony.

This was a difficult case for the trial court to resolve. The distribution of the marital assets was of great concern. The credibility of the witnesses was at stake. The trial court tested the credibility of those witnesses and was able to observe their conduct and demeanor on the witness stand. I am convinced the credibility of witnesses played a major role in determining the distribution of marital assets.

The trial court awarded the petitioner judgment in the amount of $11,500.00. As I read that part of the decretal portion of the trial court's decree that relates to the $11,500.00 judgment, there is concern the respondent might seek to avoid payment of this amount through bankruptcy proceedings. The trial judge wanted to be certain that if somehow the payment of the $11,500.00 judgment was discharged, the alimony award was there for the benefit of the petitioner whereby she could seek an increase in the amount awarded since the respondent no longer had the obligation to pay the $11,500.00 judgment. I have a concern with the employment of alimony for this purpose, but I vote with the majority for it is clear that the alimony award is granted only to insure payment of the $11,500.00 and that the obligation to pay alimony will terminate at the time the $11,500.00 judgment is satisfied.

In this respect, I note that Sandra's attorney suggested in his brief to us that the alimony should terminate at such time as the $11,500.00 is paid. I assume this concession is made for the reason that in the trial briefs each party suggested to the court that neither party should be awarded alimony. I believe when the trial court's decision is considered in its entirety, this also was the intent of the trial judge.

SACKETT, J. (concurring in part and dissenting in part)

I would affirm the trial court on all counts. This case presented an extremely complex factual situation. The trial court had a difficult job and handled it well. I find no reason to modify the trial court decision.