IN THE COURT OF APPEALS OF IOWA

No. 7-026 / 96-0288

IN RE THE MARRIAGE OF WILLIAM J. MINKS AND LAURA JEAN MINKS

Upon the Petition of
WILLIAM J. MINKS,
Petitioner-Appellant/Cross-Appellee,

And Concerning
LAURA JEAN MINKS,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Petitioner appeals, and Respondent cross-appeals, from various provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

William J. Minks, Johnston, pro se.

Joseph G. Bertogli, Des Moines, for appellee.

Heard by Habhab, C.J., and Huitink and Vogel, JJ. Streit, J., takes no part.

HUITINK, J.

William Minks appeals and Laura Minks cross-appeals from the economic provisions of the decree dissolving their marriage. William also requests increased visitation.

I. Background Facts and Proceedings.

William and Laura were married in December 1987. They have one child, Katherine, age seven. The family resided at their home in Johnston until William and Laura separated in November 1994. These proceedings were initiated on December 1, 1994. A temporary order awarding the parties joint custody of Katherine was entered December 27, 1994. The temporary order also awarded Laura temporary physical care of Katherine subject to William's right to visitation on alternating weekends and overnight visits every Wednesday evening. William was ordered to pay $587 per month temporary child support and $500 per month temporary alimony. Laura was awarded $1000 temporary attorney fees.

The record indicates that William is forty-five years of age. He has a history of mental illness. William's doctor testified that his symptoms have been successfully controlled with medication. William's license to practice medicine was suspended in 1995 because of his mental illness. The suspension is indefinite and the record does not indicate when or on what conditions William's license will be reinstated.

William is also a lawyer. He is a sole practitioner in Johnston. The district court determined William's net monthly income is $2961 per month.

Laura is thirty-two. Her employment history includes five years of work for SSI disability services. During the marriage, Laura divided her time between the family home and William's law office. Her present employer is Starr Litigation Services. The district court found her net monthly income was $620.

The disputed issues at trial included William's income, division of property, alimony, visitation, and attorney fees. As already noted, the district court determined William's income was $2981, and set his child support obligation at $678 per month. Laura was awarded nominal alimony ($50 per month) to preserve this entitlement in the event William's earnings increased. William was awarded the family home valued at $121,000 subject to a $75,000 mortgage and lien to secure the equity interest awarded to Laura ($11,740).[1] Laura was awarded the seller's interest in a real estate contract ($5000), a 1987 Cadillac ($800), one-half of William's IRA ($5000), and a camper ($2000). In addition to the remaining equity ($11,740), William was awarded three automobiles ($12,100), one-half of his IRA ($5000), a life insurance policy ($20,000), and an unliquidated personal injury claim. Each party was awarded the personal property in their respective possession. The court ordered William to pay

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[1] The record indicates that one-half of the equity ($121,000 - $75,000) $46,000 belonged to another investor who contributed to the purchase of the family home.

$2000 of Laura's attorney fees. William was also ordered to pay the debt to his parents ($39,500), and the balance of the mortgage on the home ($75,000).

William was awarded visitation including every Wednesday evening until 8:00 p.m., every other weekend from after school on Friday until 6:30 p.m. on Sunday, holidays, and four weeks during the summer. The weekly Wednesday overnight visits included in the temporary order were discontinued.

On appeal William contends the district court's property division was inequitable because it included property he brought to the marriage and also because he was assigned a disproportionate amount of debt. He also argues that his income is less than the amount determined by the district court and that Laura is not entitled to alimony or attorney fees. Lastly, William seeks resumption of Wednesday overnight visits. In her cross-appeal Laura argues she is entitled to more property, more alimony, and more attorney fees.

II. Scope of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Property Division.

The parties to 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). 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); *see In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). We reject precise percentage divisions because "[t]he question is always what is an equitable and just award in a given set of circumstances." *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975).

William argues the property division is inequitable because he is required to pay a disproportionate share of the parties' debts. He cites a $10,000 loan from his parents for the down payment on the Johnston home and the pre-separation bills he paid after the parties separated.

William's mother testified the $10,000 she advanced for the purchase of the home was a loan. Although no definitive time for repayment was established, she testified she expected to be repaid.

Although William was assigned responsibility for *all* debts to his parents, the $10,000 advanced for the down payment on the family home was not considered in

the computation of the Minks' home equity. We are unable to reconcile the implicit recognition of this debt with the district court's computation of the home equity. The $10,000 obligation to William's parents should have been included and the home equity reduced accordingly. To hold otherwise requires William to pay both Laura and his parents. The result is a windfall for Laura and the loss of essentially all of William's home equity share.

The record also indicates William paid a substantial amount of pre-separation bills after the parties separated. Those of concern to us include income taxes ($5017), property taxes ($1418), and automobile repairs ($3100). Other expenses include William's substantial medical expenses ($11,212) and legal bills ($1,575) incurred in the defense of his medical license. William borrowed money from his parents to pay these expenses as well as his temporary alimony and child support. The district court's property division does not account for these expenditures. We hold it was inequitable to ignore them and the property division should be modified by crediting William for a portion of these expenses.

After reviewing the property division in its entirety, we find the most practical and equitable accommodation of the $19,535 total of the downpayment loan, taxes, and repair obligations is to reduce Laura's share of the home equity by one-half of this amount ($9768). We modify the judgment by reducing Laura's home equity share from $11,740 to $1972. We also order William to pay Laura this amount within

thirty days of the date procedendo issues in this case. The remaining provisions of the property division are affirmed.

IV. Alimony.

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). When determining the appropriateness of alimony, the court must consider: "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Miller,* 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis,* 442 N.W.2d 59, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse through a limited period of retraining. *Id.* The duration of this type of award depends on the particular needs of the dependent spouse. *Id.* at 63. Traditional or permanent alimony in contrast is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Id.* at 62. The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to that he or she would receive if the marriage continued.

The district court's stated reason for awarding nominal alimony was William's potential increased earnings should his license to practice medicine be restored. This conclusion presumes this occurrence and that William's earnings will resultingly increase. The record, however, indicates that William's earning history during the years his medical license was in good standing was no greater than the district court's determination of his present earning capacity. In the absence of any indication that an alimony award will advance one of the foregoing purposes, such an award is not equitable.

There is nothing in the record that supports an award of reimbursement alimony. The record indicates that Laura's employment is consistent with her education and ability and provides her the means for self support. Accordingly, an award of rehabilitative alimony is also unnecessary.

We are also unable to justify an award of permanent or traditional alimony. This is an eight-year marriage during which the parties enjoyed no more than a modest lifestyle. To the extent the Minks's accumulated any wealth, it is attributable to the substantial debts incurred in its acquisition. As already noted, all of these debts are now William's responsibility. The record indicates that William, because of his modest income potential, child support, and debt obligations, lacks the capacity to pay alimony. Moreover, an award of permanent alimony is unnecessary to advance its

intended purpose because Laura has demonstrated her self sufficiency. Accordingly, we modify the district court's judgment by eliminating the alimony award.

V. William's Income and Child Support.

We initially acknowledge that William does not dispute his duty to contribute to the support of his child. He does, however, take issue with the district court's determination of his net monthly income for purposes of computing his support obligation.

The district court found William's annual net income was $35,532 or $2961 per month. Laura's child support guidelines worksheet indicates William's net income is $2248. We have carefully examined William's tax returns and are unable to reconcile either result with his reported income.

The tax returns indicate that William's adjusted gross income in 1993 was $44,025, in 1994, his adjusted gross income was $24,065, and in 1995 his adjusted gross income was $(25,350). The district court's figure appears to be an estimate of William's average income in 1993 and 1994 without regard for 1995. Laura's numbers are suspect because they presume a net income of $60,000 from William's law practice during the years covered by tax returns reporting lesser earnings. We are also concerned about the reliability of these income figures because Mark's 1995 loss reflects the economic consequences of his illness and suspension of his medical license. The record amply supports his claim that his income from practicing law was

dependent on his medical expertise. His inability to apply that expertise to his law practice has for all practicable purposes required him to redirect his law practice to other areas with unknown economic results.

While we acknowledge William's medical and legal problems have significantly damaged his earning capacity, we reject his contention that he is unable to earn sufficient income to pay more than nominal child support. His earning history combined with the resolution of his legal and medical problems lead us to conclude he has an earning capacity of $2000 net per month. Should his earnings increase, his support obligation can be modified accordingly.

We also note the court's finding that Laura's net monthly income is $620 per month. The child support guidelines worksheet she filed stated her net monthly income was $1120. Examination of her child support worksheet indicates that all of her income and allowable deductions have been included. In the absence of any explanation for this discrepancy, we find her net monthly income to be $1120.

Applying these figures to the guidelines indicates William should pay 22.5% of his net monthly income for the support of one child. This results in a $450.00 per month obligation. ($2000 x 22.5% = $450). The decree is accordingly modified to reduce William's child support obligation from $678 to $450 per month.

VI. Visitation.

William's first complaint on this issue is the termination of the weekly Wednesday overnight visits allowed by the temporary order. The record indicates that Katherine enjoyed these visits and they were accomplished without undue disruption. We find no compelling reason for discontinuing these visits particularly in view of Katherine's preferences. This judgment is accordingly modified to restore weekly Wednesday overnight visits as provided in the temporary order.

William also seeks increased summer visits. The decree awarded four weeks summer visitation in two-week intervals. William wants six weeks. The restoration of weekly overnight visitation eliminates the need to disturb this arrangement.

VII. Attorney Fees.

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that 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 Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977); *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982).

We find no abuse of discretion resulting from the district court's award of $2000 for Laura's trial attorney fees.

An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *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. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We find each party is capable of paying the fees incurred as a result of this appeal. Each party should pay their own fees and Laura shall pay the costs.

AFFIRMED AS MODIFIED.