FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RICHARD L. WATSON
AND WANEITA F. WATSON

Upon the Petition of	)	
RICHARD L. WATSON,	)	391
Petitioner-Appellee,	)	Filed January 27, 1988
And Concerning	)	7-161 86-998
WANEITA F. WATSON,	)	
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 36187), R. K. Stohr, Judge.

The respondent wife appeals from the decree of dissolution filed in the trial court. The husband cross-appeals a portion of the decree. **AFFIRMED AS MODIFIED.**

Paul L. Macek of Ridenour & Macek, Davenport, for respondent/appellant/cross-appellee.

Marc R. Engelmann of Eldridge for petitioner/appellee/cross-appellant.

John Molyneaux of Davenport for intervenor Kimberly Watson.

Considered by Oxberger, C.J., and Donielson, Schlegel, Hayden, and Sackett, JJ. Habhab, J., takes no part.

OXBERGER, C.J. 392

In this appeal the respondent Waneita Watson appeals from the decree of dissolution filed in the trial court. She claims that the trial court erred in: (1) setting the amount and duration of alimony; (2) awarding one-half of a personal injury settlement to the husband; (3) not ordering the husband to designate the wife as a surviving spouse or awarding her a portion of the husband's retirement income or disability income; and (4) ordering the wife to pay one-half of the daughter's attorney fees, and in not ordering the husband to pay a larger share of the wife's fees. The wife also seeks fees and costs for this appeal. In his cross-appeal, Richard Watson claims that a tax business should not have been treated as a marital asset and he asks that Waneita contribute to his fees and costs on appeal. We affirm as modified.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Giles, 338 N.W.2d 544, 545 (Iowa App. 1983).

Waneita Watson first challenges the trial court's determination as to the amount and duration of alimony. The court ordered Richard to pay alimony in the amount of $750.00 per month to September 1, 1986, and then $500 per month for the next six years, and thereafter nothing. Waneita argues that to maintain her standard of living she needs permanent alimony in the amount of $1,000.

We are persuaded the trial court's alimony award was inadequate in this case. The factors to be considered in affixing an award of alimony have been set out at length in Iowa Code section 598.21(3) and need not be enumerated here. We note the parties were married for 27 years, that Richard earns $43,468

gross per year, and that Waneita's earning capacity is limited. She was not employed for eighteen years during the marriage. Waneita has completed high school and is currently employed as a bookkeeper. She is paid $4.75 per hour with a gross annual income of $9,568.00. Her financial affidavit shows monthly needs totaling $2,428.75. Richard is 50 years old and Waneita is 47. He also earns approximately $6,000 per year from a tax service he operates. He has an employee-established pension plan, and has been diagnosed as having leukemia. The marital assets have a net value of $250,000 and were equally divided.

It is clear that Waneita's needs cannot be met on $500 per month and Richard has the financial ability to pay more. We, therefore, modify the decree to provide that Richard's alimony obligation be continued past September 1, 1986, at the $750 per month rate. Upon Richard's retirement, the alimony payments will cease. These payments will cease because the trial court considered Waneita's retirement needs by awarding her additional property in lieu of a portion of Richard's pension. The alimony shall also terminate upon either party's death or Waneita's remarriage. We feel this award, combined with the income both parties can receive from the prudent investment of their property settlement, will allow both parties to maintain a comfortable standard of living.

Waneita also asserts the trial court erred in awarding one-half of a personal injury settlement to Richard. During the marriage Waneita was injured in a traffic accident and received $14,000. The trial court determined this award was for Waneita's pain and suffering. The record reveals this money was deposited in a joint certificate of deposit which the trial court included as a marital asset. Waneita argues that since the award was for her pain and suffering, it is not a marital asset and she should receive the entire amount.

We, however, do not have to determine the question of whether the personal injury award is marital property since we feel the trial court properly divided

the joint account. In Iowa a transfer of property into joint tenancy where one party furnishes all of the consideration is presumed to be a gift to the other party of one-half interest in the property. Frederick v. Shorman, 259 Iowa 1050, 1056, 147 N.W.2d 478, 482 (1966); In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). This presumption is rebuttable. Id. at 47.

Waneita has not presented any evidence that would rebut the presumption that a gift was made. The record does not reveal what amount, if any, of these funds was used to maintain the household or to purchase marital assets. The record, however, does reflect that Waneita characterized the account as a joint asset for tax purposes. We hold the trial court properly divided the joint account.

The next issue raised by Waneita concerns Richard's federal pension. Waneita argues the trial court erred in not ordering Richard to designate Waneita as a surviving spouse or awarding her a portion of Richard's retirement income or disability income. Richard argues that Waneita has already received one-half the value of the pension and to allow her additional benefits would be inequitable.

The court awarded Richard's pension to him and took Waneita's retirement needs into account in fashioning an alimony award. Richard testified at trial that it would be wise to name Waneita as the surviving spouse beneficiary. If Richard were to die, Waneita would receive $673 per month as the beneficiary. The only cost to Richard would be a $100 per month reduction in his retirement pay. Furthermore, if Richard died while receiving disability benefits, Waneita would receive $738.01 per month. We conclude that under the circumstances, particularly in light of Waneita's current inability to provide for her own retirement, that it would be wise for Richard to designate Waneita as the surviving beneficiary of his retirement and disability plans and hereby order him to do so until her remarriage or death.

The fourth issue raised by Waneita is that Richard should be ordered to pay all the attorney fees for their minor child, and should also contribute more towards her fees. Richard argues Waneita's actions were directly responsible for increasing the amount of time necessary to resolve this matter and the court's awards were proper.

The trial court decided the minor child, Kimberly, should be represented by a separate attorney since she had interests adverse to her parents. The court then ordered each party to pay one-half of the $1,200 in attorney fees. Both parties have the financial ability to pay and we conclude it is fair and appropriate that they should each pay one-half, and we will, therefore, not disturb the trial court's decision.

Addressing Waneita's claim for further attorney fees, we again conclude the trial court made an appropriate decision. The court ordered Richard to pay $2,500 of Waneita's fees. This award was made because of Richard's lack of good faith throughout the proceedings. The court, however, also noted considerable time was spent disputing the custody issue, and that a majority of this time and effort was caused by Waneita. In view of these circumstances, we hold the attorney fees award made by the court was proper.

We now address Richard's cross-appeal. Richard contends the trial court erred in treating the tax business as a marital asset. Richard claims he was given the tax business by his brother and that he now wants the business back. He argues the proper distribution of this asset would have been to ignore it as a marital asset or evenly distribute the capital value of the business. Waneita argues that Richard claimed to be the proprietor of the tax business on his income tax records. She argues that Richard's brother only entered the picture because he is experiencing financial difficulty, and because the parties are getting divorced. *We agree with Waneita.*

Richard and Waneita ran the tax business from 1973 to 1985 without any input from Richard's brother. Furthermore, Richard's brother testified that he and Richard split the final purchase price payment between themselves. The income from this tax business was used to fund the parties' children's college educations. It is clear to us that the tax business was intended to be a marital asset. It was treated as such, and the trial court properly considered it as such.

The trial court assigned the tax business a value of $5,000. It then appears, from our review of the record, that the court, in its division of assets, awarded the entire tax business to Richard. This being the case, Richard is free to dispose of the tax business as he chooses.

Finally, both parties request the other to contribute to their respective attorney fees. In dissolution actions, attorney fees are not awarded as a matter of right. In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). We examine the respective parties' ability to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Both parties have expended vast sums on this appeal, but, after considering the parties' respective abilities to pay, we conclude both parties are financially able to pay their own attorney fees. In addition, each party is ordered to pay one-half the costs of this appeal.

AFFIRMED AS MODIFIED.

Schlegel, J. concurs; Sackett, J. concurs in part and dissents in part; Donielson, J. and Hayden, J. dissent.

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

I concur with the majority in all respects except I would specifically provide the alimony not terminate on Waneita's remarriage. This was a marriage that lasted for eighteen years. Waneita was out of the job market during most of that time. This obviously was because of a joint decision of the parties. Waneita has consequently lost job security and her own social security and retirement benefits. I have considered the economic inequities she suffered during the marriage in assessing her needs for alimony. She should have the right to receive alimony to correct these inequities. I find no justification in holding she no longer needs her own economic security if she marries another man or in fact only lives with him.

DONIELSON, J. (dissenting)

This case presents an unusual but long-standing disagreement between the members of this court. The majority states that alimony in this case is to terminate upon "either party's death or upon the wife's remarriage." The rule in Iowa provides that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient spouse to show that extraordinary circumstances require the continuation of alimony payments. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985).

The specific question on which we are divided, which hopefully will be resolved and clarified upon further review of either this particular case or one similar to it, can be stated as follows: Should cohabitation of a recipient spouse be treated synonymous with remarriage insofar as shifting the burden to the recipient spouse to show that extraordinary circumstances exist which require continuation of alimony payments?

The social stigma that has historically attached to the alternative life-style of cohabitation rather than marriage has increasingly been lifted over the past few years through the significant changes in our social mores. Cohabitation is a fact of life in modern society.

As previously stated in In re Marriage of Schober, 379 N.W.2d 46 (Iowa App. 1985), the dispositive issue in a modification of alimony suit should be whether the recipient spouse needs continued alimony, not the spouse's present living arrangement; however, cohabitation is clearly a relevant factor. Id. at 47. While finding in Schober that the recipient's relationship with her cohabitant did not alter her financial needs and hence alimony should continue, we also stated at that time that we were disturbed about the fact that the recipient spouse probably did not enter into a marital relationship with her cohabitant

because of the fear of foregoing the alimony payments. Id. at 48. "It is unfortunate that the current status of Iowa law on modification of alimony precipitates the decision to engage in a meretricious relationship by cohabiting, when marriage is the desire of the parties, so as not to jeopardize alimony payments." Id.

In In re Marriage of Orgren, 375 N.W.2d 710, 713 (Iowa App. 1985), we held that like remarriage, cohabitation is not a ground for automatic denial of alimony payments; however, the recipient spouse's financial status may be altered by the addition of another person with whom to share household expenses. In Orgren, the court looked at many other factors besides the recipient spouse's cohabitation in determining that alimony was justified to continue (length of marriage, homemaking and child-rearing contributions, ability to pay, financial support of cohabitant, and the rehabilitative purpose of alimony). The court opined that the payor spouse's obligation to pay alimony shall not terminate if the recipient spouse "remarries or cohabits with a person of the opposite sex unless lack of need is established." Id. at 713.

The issue posited applies to both sexes. Because of the increasing number of women in the work force and the well-deserved progressive advancement of women attaining equality in job opportunities and in financial remuneration, women are increasingly being ordered to pay alimony. Although alimony has only occasionally been awarded to the husband, it is inevitable that this situation will continue and increase substantially in the future.

I believe that, for the purpose of alimony, cohabitation is a de facto marriage, as opposed to a traditional formal de jure marriage. To permit alimony to continue in a de facto marriage appears to be patently unfair. For example, a typical scenario could be described as follows: Ex-spouse A remarries and assumes new financial and family responsibilities in connection with his/her remarriage; ex-spouse B cohabits with another person, resulting in the same

responsibilities and privileges. Can it be fair to A if B, who elected to cohabit rather than marry, is allowed to enjoy the monthly alimony stipend awarded from the previous marriage? It appears quite obvious that recipient spouses would thus be well advised to remain "single" and cohabit with someone, rather than to formalize their living arrangement by marriage, thereby being in a position to retain the alimony benefits. It seems to me this view is contrary to sound public policy and certainly evades fairness.

I believe that cohabitation is synonymous with remarriage for purposes of deciding termination of alimony (as opposed to a property settlement). I agree there are specific situations wherein this rule should not apply; if so, those infrequent situations need to be clearly and specifically defined with particular facts enunciated in detail by the trial court. What constitutes "cohabitation" is another question not addressed in this instance. See In re Marriage of Gibson, 320 N.W.2d 822 (Iowa 1982).

Hayden, J., joins this dissent.