

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT 151

UPON THE PETITION OF
KATHLEEN A. ZACHAR,

Petitioner-Appellee,

AND CONCERNING
JOHN J. ZACHAR, JR.,

Respondent-Appellant.)

Filed May 31, 1979

127
2-62224

Appeal from the Linn District Court - John L. Hyland, Judge.

Respondent-husband appeals from alimony and child support provisions of dissolution decree. AFFIRMED WITH MODIFICATION.

Benjamin W. Blackstock of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, Iowa for respondent-appellant.

James F. Pickens of Pickens, Barnes and Abarnathy, Cedar Rapids, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Respondent-husband, John Zachar, appeals provisions of dissolution decree requiring him to pay petitioner-wife, Kathleen Zachar, \$1200 per month alimony until her death or remarriage, \$300 per month child support for each of two minor children until they reach majority, and to maintain \$140,000 in life insurance to ensure alimony and child support payments. We affirm with modification.

John and Kathleen Zachar were married 32 years and had seven children, two of whom were minors, ages 16 and 13 in 1978, at the time of the dissolution. Through diligent efforts the parties acquired in excess of \$300,000 personal assets, the bulk of which consisted of a home, valued at \$135,000 with a \$28,000 mortgage, and a real estate business valued in excess of \$100,000, 80% of which was owned in equal shares by the parties.

In addition to the obligations set forth above,¹ trial court awarded personal property and the home, with its encumbrance, to petitioner with a resulting total value of approximately \$118,000; the court awarded to respondent assets valued at approximately \$120,000, including petitioner's 40% interest in the real estate business. Trial court based these alimony and support provisions upon the substantially greater ability of respondent, who earned in excess of \$30,000 per year,² to earn and produce income. With the exception of the years 1971-74, petitioner had not been regularly employed outside the home since the early days of this 32-year marriage.

I. Our review of equitable actions is de novo. Iowa R. App. P. 4, Behrle v. Behrle, 228 N.W.2d 25, 27 (Iowa 1975). Weight is given to the findings of the trial court, but we are not bound by them. In re Marriage of Murray, 213 N.W.2d 657, 659 (Iowa 1973).

II. The first issue we must address is whether respondent properly preserved for review the question of whether imposition of insurance premium payments was inequitable and unjustified when these payments, combined with alimony and child support payments, allegedly exceed his net income.

The issue was timely presented to the trial court by respondent's motion to enlarge and modify its decree pursuant to Iowa R. Civ. P. 173(b). However, before the lower court entered its order, respondent brought this appeal. The rule is that when the

¹ Respondent was also ordered to pay \$2,000 per school year for another son's college expenses.

² Gross income.

party making application under rule 179(b) files a notice of appeal before the lower court enters its findings, the motion is deemed waived or abandoned. Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978). On appeal we examine the record to determine if there is sufficient evidence to sustain the original judgment or decree. Iowa R. Civ. P. 179(b). Our review of the record relevant to this portion of the decree thus is limited to that permitted by our de novo review due to respondent's general challenge of the inequities of trial court's award of alimony and child support.

III. Respondent claims that payment of \$1200 per month alimony and \$300 per month support for each minor child is inequitable and unjustified when coupled with maintenance of the life insurance policies.³ In determining alimony, the court does not consider its receipt to be an absolute right but makes such order as it deems to be justified in relation to the children, property, parties and maintenance of the parties. § 598.21, The Code 1977; Kjar v. Kjar, 261 Iowa 334, 336, 154 N.W.2d 123, 125 (1967). The demands and needs of one party are not controlling but rather are balanced against the other party's ability to pay. In re Marriage of Murray, 213 N.W.2d 657, 660 (Iowa 1973).

We first note that respondent willingly indulged and encouraged a high standard of living. He cannot now insist on a more stringent life style for his former family if he has the ability to pay. Tallarico v. Tallarico, 164 N.W.2d 805, 808 (Iowa 1969).⁴ We also find the numerical manipulations offered by respondent to be shallow and unpersuasive, especially with regard to alleged corporate loans to himself and his payment of personal expenses from a business account. The evidence supports a finding that his actual income is \$10,000 per year greater than the \$29,411 average net which respondent asserts.

The alimony awarded to petitioner covers approximately fifty percent of her anticipated monthly needs.⁵ Such award is not unjustified nor inequitable upon review of the entire record. Neither do we find imposition of \$300 per month child support for each minor child to be inequitable or unjustified when the provisions relating to support

³ Respondent's testimony at trial was that he paid \$375 per month for \$168,000 face value coverage.

⁴ Tallarico involved a decree of separate maintenance; however, the controlling principles are the same. § 598.28, The Code 1979.

⁵ We note, however, that petitioner's expenses are increased substantially by her desire to remain in the parties' home.

are mandatory only until age 18. We further find that the mandatory life insurance coverage provision to insure child support obligations is equitable. However, in light of petitioner's ability to earn income, her eligibility for social security benefits shortly after respondent's child support obligations terminate, and the award of substantial assets to her, we conclude trial court erred in requiring respondent to retain life insurance having a face value of not less than \$100,000 to ensure alimony obligations beyond his death. Trial court's decree, therefore, is modified to provide for termination of respondent's obligation to pay alimony upon the remarriage of petitioner or the death of either party.

IV. Petitioner's attorney has documented 40 1/4 hours in connection with this appeal and asks that respondent be required to pay the \$2012.50 total, plus expenses. We find that respondent should be required to pay \$1000 towards petitioner's attorney fees and the costs of this appeal.

Trial court's judgment is affirmed with modification.

AFFIRMED WITH MODIFICATION.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. The trial court and the majority both conclude that respondent's actual income is greater than that shown on his tax returns and financial statements, but point to no empirical evidence to support their view. Respondent's business has recorded a loss for the past few years. Both parties rejected the trial court's suggestion of an independent audit of the business, and trial court does not explain how it arrived at the values it ascribes. I recognize that the trial court was provided confusing and unsatisfactory evidence from which to determine the assets and income of the parties, but we face the same problem on review. In re Marriage of Moffatt, No. 62017 (Iowa, filed May 30, 1979).

I do not see that there is any evidence supporting the majority view, therefore, I believe some reduction of the alimony awarded is necessary. On the basis of the record before us, I do not see where the money is going to come from to pay the total alimony and child support awarded and to allow respondent an adequate living allowance.