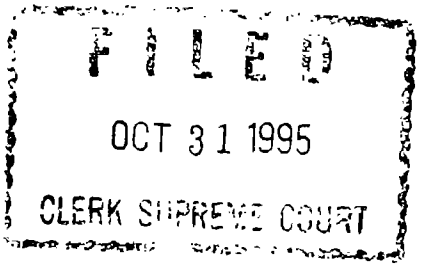
IN THE COURT OF APPEALS OF IOWA

No. 5-423 / 94-871

IN RE THE MARRIAGE OF LINDA SUE VAN HECKE AND ROBERT MICHAEL VAN HECKE



Upon the Petition of

LINDA SUE VAN HECKE,

Petitioner-Appellant,

And Concerning

ROBERT MICHAEL VAN HECKE,

Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Linda appeals from certain economic provisions in the parties' dissolution of marriage decree. **AFFIRMED AND REMANDED.**

Stephen P. Wing of Dwyer, Wing, Zamora, Taylor & Walters, Davenport, for appellant.

Robert M. Van Hecke, Davenport, pro se, appellee.

Considered by Hayden, P.J., Huitink, J., and Perkins, S.J.*

* Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Linda and Robert Van Hecke were married on October 13, 1973. They have one child, Joseph, who was born on November 21, 1980.

Linda was thirty-eight years old at the time of the dissolution hearing. She was employed as a customer service representative for Davenport Citibus. In 1993 she had annual income of about $13,700 and net monthly income of $884. Linda has one year of college education and is in good health.

Robert was thirty-nine years old at the time of the hearing. He was employed at Alcoa as a polyethylene extrusion operator. His annual base pay is about $31,650 and his net monthly income is $1,810. Robert testified he had previously worked some overtime, when it was available. After the parties separated he was hospitalized for depression. He stated psychiatrists and health care professionals advised him not to work as many hours in the future. He also stated he did not expect as many overtime hours to be available from Alcoa.

The district court entered a dissolution decree for the parties on March 30, 1994. The court granted the parties joint legal custody of Joseph, with Linda having primary physical care. The court based Robert's child support obligation on his base pay, and ordered him to pay child support of $419 per month. In addition, Robert is to pay 23.2% of any net amount received for overtime as child support. Robert was ordered to maintain medical insurance for Joseph.

The court awarded Linda alimony of $10 per year. The court divided the parties' property to award Linda a rental house, her IPERS account, one-half of Robert's pension account, her car, her savings bonds, household goods in her possession, and her coin collection. Robert was awarded the proceeds from the sale of the marital residence, his 401K account, one-half of his pension account, his car, his gun collection, and household goods in his possession. Robert was ordered to pay the parties' debts of $5,075.

Linda filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). While this motion was pending, she filed a motion pursuant to rule 252, in which she stated she had lost her job, and asked the court to reconsider the economic aspects of the decree. The district court filed a joint ruling on these motions. The court determined relief under rule 252 was not appropriate because Linda sought to introduce evidence which was not in existence at the time of the decree. Under the rule 179(b) motion, the court granted Linda's request for mandatory withholding of 23.2% of Robert's overtime pay, if Alcoa agreed to make the necessary computations. Linda appealed.

I. Scope of Review

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. Child Support

A. Linda contends the district court improperly calculated Robert's child support obligation. She believes the child support obligation should be based on Robert's base pay and overtime pay. Linda states Robert liked to work, and would sometimes work overtime of sixteen hours on Saturday and sixteen hours on Sunday, in addition to his regular forty hour week. She states Robert has not shown sufficient health reasons for reducing the amount of overtime hours he works.

In applying the child support guidelines, the district court must determine the parents' current monthly income from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parents' income. *Id.* Generally, overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. *Brown*, 487 N.W.2d at 333. In circumstances where overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the child support guidelines may be appropriate. *Id.*

In the present case, the district court found Robert's health prevented him from working the overtime hours he once did. Linda admitted Robert had been in the hospital and that Robert's mother had told her Robert had been advised to cut down on the hours he worked. The district court also found that overtime pay here was uncertain or speculative because any overtime was up to Alcoa and was entirely dependent on market factors.

We note that the district court was able to observe the parties' demeanors, and the court determined Robert's testimony concerning his health was credible. We affirm Robert's child support obligation.

B. Linda has raised a separate issue in which she claims that the amount of Robert's overtime he is required to pay as child support should be subject to mandatory income withholding. In ruling on the rule 179(b) motion, the court agreed to modify the previous order to "provide for withholding of overtime child support from wages if Alcoa will do so and make the necessary computations."

Linda interprets this order to mean that the amount of Robert's overtime pay which is earmarked as child support will not necessary be withheld. We interpret the order to mean that Alcoa will compute Robert's net overtime pay and withhold 23.2% as his child support obligation.

III. Property Division

Linda claims the property division was inequitable to her. She believes the district court failed to properly value all of the parties' property. She also believes the court should not have required the division of debts incurred after the parties separated. Linda asks to receive most of the proceeds from the sale of the marital residence.

The partners in 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). The Iowa courts do not require an equal division

or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*

Although the district court did not set forth a specific value for each asset, the court did state it was attempting to divide the assets nearly equally. According to our calculations, and excluding each party's share of Robert's pension, Linda received assets worth $10,074 and Robert received assets worth $10,440. Additionally, Robert was ordered to pay debts of $5,075. Thus, Linda received a greater portion of the parties' net assets. We find this to be an equitable distribution of the parties' assets.

IV. Alimony

A. Linda contends the award of alimony should be increased. She asks to be awarded alimony of $125 per month. She states that considering child support and her rental house income, Robert ends up with an additional $256 more per month than she does.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. *In re Marriage of Oler*, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. *Id.* We consider property division and alimony together in evaluating their individual sufficiency. *Whelchel*, 476 N.W.2d at 110.

We find the amount of the alimony awarded is sufficient. In giving Linda a token amount of alimony, the court noted Robert was ordered to pay all of the parties' debts and Linda was awarded the tax exemption. The court recognized the need to keep the door open in case Linda has a greater need for alimony at some point in the future.

B. Linda asks to be named as a surviving spouse for purposes of Robert's pension plan. The district court refused Linda's request to be named as the sole surviving spouse. In his brief, Robert states he has no objection to naming Linda as a sharing surviving spouse. We therefore remand the case on this issue and direct the district court to include a provision in the parties' dissolution decree ordering Robert to name Linda as a sharing surviving spouse in his pension plan.

IV. Attorney Fees

A. Linda claims the district court abused its discretion in refusing to award her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that the trial court abused its discretion. *Id.* We find no abuse of discretion in the trial court's decision. Linda was awarded more of the parties' net assets, and should be able to pay her own trial attorney fees.

B. Linda seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Id.* We determine each party should pay his or her own attorney fees.

We affirm the district court on each issue presented in this appeal. However, we remand with directions to the district court to include a provision ordering Robert to list Linda as a sharing surviving spouse in his pension plan. Costs of this appeal are assessed one-half to each party.

AFFIRMED AND REMANDED.