

IN THE COURT OF APPEALS OF IOWA

No. 6-619 / 95-2037

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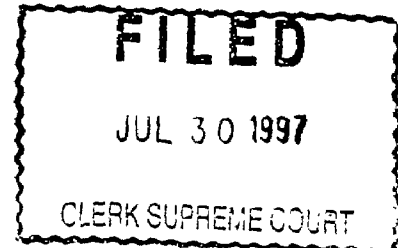
**IN RE THE MARRIAGE OF MICHELLE E. LANIGAN
AND THOMAS J. LANIGAN**

Upon the Petition of
MICHELLE E. LANIGAN,

Petitioner-Appellee\Cross-Appellant,

And Concerning
THOMAS J. LANIGAN,

Respondent-Appellant\Cross-Appellee.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch,
Judge.

Thomas J. Lanigan appeals and Michelle E. Lanigan cross-appeals from the
economic provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellant.

R. James Sheerer of Correll & Sheerer, Cedar Falls, for appellee.

Considered by Cady, P.J., Huitink, J., and Peterson, S.J.*

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

PETERSON, S.J.

On October 27, 1995, a decree was entered dissolving the marriage between Michelle E. Lanigan (Michelle) and Thomas J. Lanigan (Thomas). Thomas appeals certain provisions of that decree contending the district court erred in the way it awarded a portion of his pension fund and in making the value of his "frozen" sick leave an asset subject to distribution. Michelle, in her cross-appeal, contends the trial court erred in denying her alimony, in refusing to consider property she brought into the marriage, and in refusing to award her trial attorney fees. She also seeks an award of appellate attorney fees.

I. Standard of Review. Our review of this equitable action is de novo. Iowa R. App. P. 4; *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of facts, but we do give them deference because the district court had the opportunity to view first-hand the demeanor of the witnesses testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. Background and Proceedings. Michelle and Thomas were married on July 8, 1978; however, they had resided together since November of 1976. They have a daughter, Brook, who was born on April 8, 1980. Michelle had a daughter from a previous marriage, Shay, who was adopted by Thomas and has now achieved her majority.

At the time of the dissolution, Michelle was forty-two years old and in good health. When the parties first began living together, Michelle was working at Trans

Iowa Corporation. She then attended beauty school and completed that course in July of 1978. Since that time she has worked as a cosmetologist and at the present time owns her own business. She has two employees and has a gross monthly salary of \$1292.

At the time of the dissolution, Thomas was forty-four years old and also in good health. He was fire marshal for the Waterloo Fire Department. He had a monthly gross income of \$3510.

The parties agreed that Brook would be placed in the joint custody of Michelle and Thomas, with Michelle to have her primary care. Thomas was ordered to pay \$495 a month in child support, which was in accordance with the child support guidelines.

The trial court awarded Michelle personal property with a value of \$65,274. These assets consisted of \$40,943 in an insurance policy, certain investment accounts, and a small amount of stock. It also included \$2000 worth of jewelry and one-half the lawn and garden equipment valued at \$300. Her business was also awarded to her, and the trial court found that it had a value of \$92,000, with mortgages in the sum of \$69,968, for a net value of \$22,032. We agree with the trial court's valuation of the Michelle's business.

The trial court awarded Thomas property with a value of \$45,754. This consisted of insurance and certain investment accounts and a deferred compensation account at the John Deere Credit Union with a total value of \$16,692. He was

awarded personal property in the form of an automobile, boat, motor, and trailer, and sporting equipment with a value of \$16,900, and one-half of the lawn and garden equipment with a value of \$300. The trial court also added in his "frozen" sick leave time with a value of \$12,162.

The parties had purchased a home in Waterloo that had an outstanding mortgage of \$39,599. Michelle was allowed to remain in the home until Brook graduates from high school, at which time the property will be sold and the equity equally divided. During that time, however, Michelle was responsible for payment of the mortgage of \$754 per month.

Thomas, as a result of his employment by the Waterloo Fire Department, has a pension which is a defined benefit plan. The amount he will ultimately draw from this pension is dependent upon his last three years' earnings. Both Thomas and the City of Waterloo have contributed to this plan. The trial court found that if Thomas retired on June 1, 1995, he would be able to draw \$1769 per month when he reached age fifty-five. The trial court awarded Michelle one-half of that figure, or \$884 per month when Thomas retires.

As a result of a change by the City of Waterloo in the way sick leave is accumulated, Thomas has "frozen" sick leave time which had been previously accrued. This has a value of \$12,162. If he does not use that sick leave, he will be paid that amount at the time he retires or what amount remains.

III. Pension Benefits. Thomas initially contends the trial court erred in the way his pension was apportioned. A party's pension benefits are marital property in Iowa and are properly subject to equitable distribution. *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989). The appellate courts of this state have devised four schemes for the distribution of these benefits in a dissolution. *In re Marriage of Mott*, 444 N.W.2d 507, 510 (Iowa App. 1989). The first scheme is to award a percentage of the benefits already being received. *Id.* The second scheme is to award a lump sum percentage based on present value of the pension. *Id.* at 511. The third scheme is to award a percentage of the pension as it becomes available in the form of periodic alimony. *Id.* The fourth scheme is to award a portion of the pension benefits if and when they accrue. *Id.* Under this scheme, the pension benefits are divided based on a percentage of the accrued benefits based on the years of the marriage and the total number of years the spouse who has the pension benefits worked and accumulated these benefits. *In re Marriage of Branstetter*, 508 N.W.2d 638, 642 (Iowa 1993).

We believe in this situation that Michelle should be awarded a percentage of Thomas's pension when it becomes available. She shall receive one-half of that amount determined by multiplying the amount of Thomas's pension when it becomes available by the fraction which is composed of the number of years Thomas contributed to the pension as the denominator and the figure nineteen as the numerator.

IV. “Frozen” Sick Pay as a Marital Asset. Thomas next contends the trial court erred in determining that his “frozen” sick leave was a marital asset. It is his contention that this asset is speculative and consequently should not have been considered in arriving at a property settlement.

We do not believe this asset is speculative. He will either receive the entire amount upon his retirement or that portion that remains in the event he receives an illness or disabling injury. This “frozen” sick leave would enable him to receive full pay for a period in addition to the sick leave he has accumulated under the present policies of his employer.

V. Alimony. Michelle contends the trial court erred in failing to award her alimony. This is an allowance to a former spouse in lieu of the legal obligation to support that person. *In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). It is not an absolute right, and its award depends upon the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995). It may be used to remedy inequities in a marriage and to compensate a spouse who leaves a marriage at a financial disadvantage. *In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991). It has been awarded in marriages of a reasonably long duration and substantially equal property distribution and where the disparity in earning capacity has been great. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997).

In this situation, the trial court did not award alimony because of the disparity in the property settlement. That difference is approximately \$19,520. However, \$22,032 of that portion awarded to the petitioner is the court's determination of the equity in her business. In this situation, the marriage was of approximately nineteen years duration and there is a substantial disparity in the earning capacity between the two individuals. Michelle also brought assets into the marriage which the court found had been commingled with the other party's assets and used during their married life. We believe in this situation that Michelle should be awarded alimony in the sum of \$200 per month until such time as she remarries, cohabits with another person, or until Thomas retires and his pension becomes payable, whichever event shall first occur.

VI. Property Brought Into the Marriage. Michelle contends the trial court erred by refusing to consider the property brought into the marriage by her in arriving at the property division. Credit is not given to a party for the value of property owned prior to the marriage. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). It is only a factor to be considered together with all of the other relevant factors in determining an equitable division. *Id.* Only inherited and gifted property are set aside from the distribution scheme, and only then if it would not be inequitable to either party or the children of the marriage. *Id.* We do not believe the trial court erred in not setting aside the property Michelle brought into the marriage. We also note that we have taken this into consideration in arriving at an award of alimony.

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VII. Attorney Fees. Michelle contends the trial court erred in refusing to award her trial attorney fees and she also seeks an award of appellate attorney fees. The award of attorney fees is within the discretion of the trial court. We do not believe the trial court abused its discretion in denying Michelle attorney fees on the trial level.

Michelle also requests appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). Michelle has resources available to her through the property settlement to pay her attorney fees, and we deny her request.

In conclusion, we affirm the trial court with the exception of awarding Michelle alimony in the sum of \$200 per month until she remarries or cohabits with another person or until Thomas's pension becomes payable, whichever event first occurs, and awarding her a portion of Thomas's pension as hereinbefore set out. We deny her request for appellate attorney fees.

AFFIRMED AS MODIFIED.