IN THE COURT OF APPEALS OF IOWA

No. 4-473 / 94-630

FILED
MAR 30 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF CINDY LEA RICHARDS AND KELLY KIRK RICHARDS

Upon the Petition of
CINDY LEA RICHARDS,

Appellant,

And Concerning
KELLY KIRK RICHARDS,

Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, James P. Rielly, Judge.

Cindy Lea Richards appeals from the economic provisions of the dissolution decree. **AFFIRMED AS MODIFIED.**

James Q. Blomgren and Randall C. Stravers of Pothoven, Blomgren & Stravers, Oskaloosa, for appellant.

Garold F. Heslinga, of Heslinga, Heslinga & Dixon, Oskaloosa, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

This is an appeal from the economic provisions of the decree dissolving the marriage of Cindy and Kelly Richards. Cindy asserts the trial court erred in failing to award her spousal support, failing to award her the family home, not considering all of the Mastercard debt, and not awarding her additional attorney fees. We affirm with some modification.

Cindy and Kelly were married in 1978. Although Cindy filed a petition for dissolution of marriage in June 1993, the couple did not separate until December 1993. The Richards have two children, Desiree, born in 1988, and Dustin, born in 1990.

Cindy and Kelly were 34 years of age at the time of trial. Kelly is a truck driver for Wal-Mart and earns approximately $60,000 per year. Cindy suffers from Systematic Lupus Erythmatosus and Rheumatoid Arthritis and is unable to work. She receives social security disability benefits of $805 per month ($846.10 minus $41.10 for Medicare coverage).

For a period of time after Cindy filed the dissolution petition, Kelly paid for many of the family's living expenses including the house payment, the car payment, utilities, and food. Cindy made payments on their Visa and J.C. Penney credit cards and paid for automobile expenses. Cindy also began a Mastercard account from which she made cash withdrawals to meet additional living expenses. After a

temporary support order was entered requiring Kelly to pay child support in the amount of $1,014.61 per month, he stopped contributing directly to the family's living expenses.

The trial court granted the parties joint legal custody of the children with physical care to Cindy. The court found Kelly's net monthly income to be $3,439.45 and ordered him to pay $1,080 per month in child support. The court also determined Cindy's net annual income, with her social security payments and child support, would be $22,620, and denied her claim for alimony. The parties' property was divided equally between them. Kelly was awarded the family home and the majority of the parties' debts. Among the debts Kelly was ordered to pay was a Mastercard debt of $3,100. This amount did not include approximately $800 of the debt incurred by Cindy from the date of the petition to the date of trial. The court also ordered Kelly to pay $500 of Cindy's attorney fees.

Cindy appeals. She argues the trial court erred in not awarding her spousal support. She asserts there is a significant disparity between her income and Kelly's. She also notes that rehabilitative support would be appropriate because she would like to return to school to obtain an education degree and Kelly has the ability to pay support. Cindy also argues the court erred in not considering the entire Mastercard debt to be a joint debt. She claims that she incurred the disputed portion of the Mastercard debt in

order to provide for the children. Cindy further contends the court erred in awarding the family home to Kelly and in not ordering Kelly to pay more than $500 of her attorney fees. Cindy also seeks appellate attorney fees.

I. Scope of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew the issues presented on appeal. In re Marriage of Imhoff, 461 N.W.2d 343, 344 (Iowa App. 1990). The findings of the trial court, however are recognized and given weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Having never seen the parties or heard their voices, we recognize the favorable perspective of the trial court. See In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974).

II. Alimony

Alimony is an allowance to a former spouse in lieu of the other spouse's legal obligation for support. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). It may be used to remedy inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. In re Marriage of Geil, 509 N.W.2d 738, 742 (Iowa 1993). When determining the appropriateness of alimony, the court must consider the earning capacity of each party and their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

Rehabilitative alimony may also be awarded. It provides support to an economically dependent spouse through a limited period of additional education or training following the divorce. In re Marriage of Grauer, 478 N.W.2d 83, 85 (Iowa App. 1991).

Cindy asserts the trial court erred in not awarding her spousal support. In her appeal she requests support of $500 per month.

We believe that the circumstances of this case support an award of rehabilitative alimony. Cindy has been out of the work force for over two years. She suffers from lupus and her only current means of support are social security disability income and child support.

Despite her disability, Cindy desires to return to college and earn her elementary education degree. Although it is uncertain she will be physically capable of returning to school, we believe Cindy should be given the opportunity to try. Kelly earns net monthly income of $2,359 after payment of all taxes, child support and medical insurance. He has the financial ability to provide Cindy with some assistance in furthering her education. Furthermore, unless Cindy is able to enhance her earning capacity through education, she has little hope of becoming self-supporting or maintaining a standard of living similar to that she enjoyed during the marriage. At some point the child support payments will end and Cindy's sole means of support will be social security.

Cindy testified that tuition at Central College in Pella was $257 per credit hour and she planned to take twelve to fifteen hours per year. Kelly shall pay Cindy $200 per month to help defray these costs. The payments shall be made for five years as long as Cindy is attending school, beginning on the first day of the month following the filing of this ruling.

III. Family Home

Cindy asserts the court erred in awarding Kelly the family home since she was awarded primary custody of the children. We disagree.

Although it is normally desirable to award the family home or the right to live in the family home to the party with physical custody of the children, Iowa Code § 598.21(1)(g) (1993), under the circumstances of this case the award of the home to Kelly was equitable. The house was the parties' primary asset. They had substantial debts which would be difficult for Cindy to meet on her limited income. It would be extremely difficult to construct a workable property division if Cindy were awarded the house. Additionally, Cindy never requested the family home prior to trial and turned down several settlement offers giving her the home. Cindy also moved from the home two months before trial and into a house owned by her mother. This house is in the same community as the family home. Reaching an equitable apportionment was difficult in this case and we believe the trial court properly assigned the house and the debts to Kelly.

IV. Mastercard Debt

Cindy submitted a Mastercard debt of $3,919.22 in her financial affidavit. The trial court concluded only $3,100 of the debt was "a valid debt of the parties" and did not include the remaining $819.22 in its division of the parties assets and liabilities. Kelly was required to pay $3,100 of the debt and reduce the health care related claims included in the $819.22 by one-half of any payments he received from his insurance company. On appeal, Cindy asserts the trial court erred in excluding $819.22 of the Mastercard debt from the parties joint liabilities.

After reviewing the record, we conclude the trial court's assessment of the Mastercard debt was equitable. Kelly paid the majority of the parties bills from June to December of 1993 and subsequently paid $1,014.61 per month in temporary support payments. The dissolution decree also required Kelly to pay $43,596 of the parties' $44,381 debt.

V. Attorney Fees

Cindy asserts the trial court erred in awarding her only $500 in attorney fees. She requests this court to increase the award to $1000.

An award of attorney fees is not a matter of right. In re Marriage of Elbert, 492 N.W.2d 733, 736 (Iowa App. 1992). It rests within the discretion of the trial court and depends in a large part on the needs and resources of the parties. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). To overturn an award, the complaining

party must demonstrate the trial court abused its discretion. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983).

We find no abuse of discretion by the trial court. He properly considered the parties financial circumstances and Kelly's previous payment of $500 towards Cindy's attorney fees. The award of $500 to Cindy is affirmed. Additionally, we award Cindy $500 in appellate attorney fees. Costs of the appeal shall be divided equally.

AFFIRMED AS MODIFIED.