

IN THE COURT OF APPEALS OF IOWA

No. 9-597 / 89-248

FILED

DEC 21 1989

CLERK SUPREME COURT

IN RE THE MARRIAGE OF TERRY L. MOLGAARD
AND JULIE A. MOLGAARD

266

Upon the Petition of
TERRY L. MOLGAARD,

Appellant/Cross-Appellee,

And Concerning
JULIE A. MOLGAARD,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Pottawattamie
County, James M. Richardson, Judge.

Both parties appeal from the district court's decree of
dissolution of marriage. **AFFIRMED IN PART AND MODIFIED IN
PART.**

Marvin L. Vannier of Sciortino, Vannier & Eveloff,
Council Bluffs, for appellant.

Joseph J. Hrvol, Council Bluffs, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab,
JJ.

HAYDEN, J.

This is a second marriage for both parties. They were married to each other July 22, 1986. Julie had three children from her prior marriage. At trial time she was pregnant again. Her delivery date was approximately March 27, 1989. She had been pregnant once before during this marriage, but it ended in a miscarriage.

Terry graduated from Northwest Missouri State University with a degree in marketing in 1971. He worked for two years for Mobil Oil Corporation in Omaha, Nebraska. Following that he started his own auto salvage business. This was his means of livelihood at time of trial. Julie had nearly completed a paralegal training program. After the birth of their child in March 1989, she expected to obtain employment as a paralegal. Julie worked during the marriage cleaning houses and offices and in retail clothes sales. She receives \$450 per month child support from her former husband. Terry testified at trial his auto salvage business was losing money. The trial court found he earned \$1,700 net per month.

The parties executed an antenuptial agreement before they married. Among other assets, Terry brought the auto salvage business and his home into the marriage.

He denied the unborn child Julie was carrying was his. However, at trial he admitted to having had intercourse with Julie in July of 1988. The trial court found Terry to

be the father and established this unborn child's paternity in him.

The trial court ordered Terry to retain health insurance on Julie and the unborn child until sixty days after the child's birth. He was also ordered to maintain health insurance on the child so long as he was obligated to pay child support for it. In addition, he is to pay the deductible and any medical costs for the child not covered by insurance. Julie was ordered to pay for any dental costs and dental insurance on the child. Julie was awarded custody, care, and control of the child, upon birth, with Terry having reasonable rights of visitation. He was ordered to pay \$250 per month child support for the duration contemplated by the Iowa Code. He was also ordered to maintain a \$100,000 term life insurance policy with the child as beneficiary for so long as his child support obligation continued.

Terry was ordered by the trial court to pay Julie \$200 per month spousal support commencing December 1, 1988, and continue for one year. Julie was awarded her 1984 Pontiac automobile. The parties were given their own bank accounts. Terry was given the child for income tax purposes so long as he remained current on his child support obligation. Terry was awarded his business and his home he brought into the marriage. No attorney fees were awarded and Terry was assessed the court costs.

On appeal Terry contends the district court erred in: (1) determining Terry was the father of Julie's unborn child; (2) awarding excessive child and spousal support; (3) requiring Terry to maintain life insurance for the unborn child; and (4) failing to grant a new trial concerning paternity since no blood test for paternity was done. Julie cross-appeals, contending the district court should have awarded her more spousal support and the tax exemption for the child upon birth. Julie also seeks attorney fees for this appeal. We affirm the trial court except for the provision requiring Terry to maintain a \$100,000 life insurance policy.

I.

Our scope of review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

II.

On the issue of paternity, Terry claims Julie failed to carry the burden of proof he is the father of their unborn child at trial. He claims no exclusionary blood grouping tests were made, therefore there is no showing by a preponderance of evidence he is the father.

The record reveals the parties were married at time of conception. Terry admitted to having intercourse with

Julie during the appropriate period of conception. This goes against the grain of his "no access" argument. The parties were able to have children. Their first baby resulted in a miscarriage.

The burden of proof on this issue has been established by our supreme court as follows:

Paternity must be shown by a preponderance of the evidence. . . . The law, however, presumes the legitimacy of a child born in wedlock. The presumption is rebuttable by clear, strong, and satisfactory evidence. . . . Although it is theoretically merely an aid to the party with the burden to prove paternity, its practical effects is to place the burden of proving nonpaternity on the putative father. (Citations omitted.)

In re Marriage of Scheneckloth, 320 N.W.2d 535, 536 (Iowa 1981).

We hold Julie has shown by a preponderance of the evidence Terry is the father of the unborn child in question here. We affirm the trial court on this issue. A new trial is not required.

III.

Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). In making an award of alimony the courts are to consider those factors listed in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968),

as modified by In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972), and now codified in Iowa Code section 598.21(3). See In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983); In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). The partners in the marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). We hold the trial court's alimony award to Julie in the amount of \$200 per month for a period of one year is fair and reasonable in this case. The duration of this marriage was two years and three months. It is a short term. We do not disturb the trial court's award of alimony. We affirm on this issue.

IV.

The trial court required Terry to maintain a \$100,000 term life insurance policy with Julie as beneficiary until birth of the child to secure the child support obligation and, thereafter, to maintain such policy for so long as his child support obligation continues.

Terry claims in this appeal the requirement for him to maintain this life insurance policy is not necessary as his

wages are subject to FICA withholding. We agree, as the financial situation of the parties does not allow additional insurance expense. In the event of Terry's death or disability, social security benefits will be available to the child during its minority. See In re Marriage of Lovetinsky, 418 N.W.2d 88, 89 (Iowa App. 1987). The requirement for Terry to maintain term life insurance on himself is deleted from the district court's decree. The decree is modified accordingly.

V.

Julie argues in her cross-appeal she should have been awarded more spousal support over the designated period and she should have been given the child for income tax exemption purposes. We have addressed and decided the amount of alimony (spousal support) in division III. We affirmed the trial court on this issue.

On Julie's claim she should have the child for tax exemption, we are guided by our court's acknowledgment in Lovetinsky at page 90. We recite it as follows:

The provisions of a dissolution decree dealing with dependency deductions are connected directly with the requirements of a noncustodial parent to provide support and the allocation of the allowance has a direct effect on the financial resources available to the child.

Here the trial court was asked to decide child support and the income tax exemption was part of that issue. We do not disturb the trial court's ruling on this issue.

VI.

Julie requests attorney fees on appeal.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 389, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Julie's attorney has submitted an affidavit showing 19.8 hours expended on this appeal. We order Terry to pay Julie \$500 to apply upon her appellate attorney fees. Costs of this appeal are assessed to Terry.

AFFIRMED IN PART AND MODIFIED IN PART.