

IN THE COURT OF APPEALS OF IOWA

No. 2-615 / 92-511

FILED

AUG 06 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DENNIS N. EDEN AND KIM M. EDEN

Upon the Petition of
DENNIS N. EDEN,

Appellant,

And Concerning
KIM M. EDEN,

Appellee.

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Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Husband appeals the economic provisions of the parties'
dissolution decree. **AFFIRMED.**

John P. Loughlin of Loughlin Law Firm, Cherokee, for
appellant.

Jill S. Rolek, Des Moines, for appellee.

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

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HAYDEN, J.

Dennis N. Eden and Kim M. Eden were married on March 10, 1984. The district court dissolved the parties' marriage on September 20, 1991. The parties have no children. This appeal involves a dispute over distribution of marital assets and an award of alimony.

Kim was born on January 29, 1955, and Dennis was born on October 18, 1955. Prior to the marriage, Kim obtained a liberal arts degree from Oral Roberts University. Kim's home has a fair market value of less than \$25,000. She estimated her equity in the house to be approximately \$3500. She also owned a 1979 Buick automobile with a \$1200 encumbrance. Kim was then employed.

Prior to the marriage, Dennis had worked for his father at the Saylorville Marina. Dennis later left that job. In the fall of 1983 Dennis was enrolled in an undergraduate finance program at Drake University. When Dennis entered the marriage, he had more than \$17,000 in consumer loans accrued on various charge cards. In addition, he had incurred various student loans. Dennis owned a few assets, including a 1979 van with a value of about \$1200, an AMC Concord with an undetermined value, various insurance policies with an approximate cash value of \$3700, and a \$1200 IRA. Because of Dennis's debts, the parties signed a document before a financial planner which Kim termed an antenuptial agreement. The parties both promised not to charge anything on charge accounts or credit cards and

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agreed to split any taxes owed or refund received for the year 1984.

After their marriage, the parties lived in Kim's home. For a time, Kim worked and Dennis fixed up the house. During the second year of their marriage, Dennis and Kim moved to Dallas, Texas. Dennis changed employment several times and ultimately secured a job selling oil partnerships. Kim was also employed. They were able to purchase a home with no down payment and rented out Kim's house in Des Moines.

While in Texas, Dennis embarked on a business venture to buy coffee from Mexico and sell it to Korea. Dennis advanced himself \$13,000 on a signature line of credit and lost all the funds. He also acquired an American Express card and utilized it for a \$5000 cash advance. Dennis then signed Kim's name to a credit card solicitation for Citibank and advanced himself another \$3000. All of these transactions occurred without Kim's knowledge.

One year after moving to Texas Kim enrolled at the University of Texas. She obtained a \$6000 school loan, but used most of it to pay off the parties' other debts. She attended school part-time and worked part-time.

In fall or winter of 1988 the parties moved back to Iowa. They rented their Dallas home. Kim began work for Integrated Management Resources, and Dennis returned to work for his father at the Saylorville Marina. Dennis earned \$30,000, and Kim earned \$19,000 annually.

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Shortly after returning to Iowa, Kim received a scholarship and began to work toward a masters degree at the American University in Cairo, Egypt. She took the scholarship in an attempt to gain employment in the diplomatic corps or some foreign service. While Kim was abroad, Dennis stopped paying the mortgage on their Dallas home, and eventually the lender foreclosed upon it. There is now a deficiency judgment against both Dennis and Kim for approximately \$20,000. Other creditors also began contacting Dennis about arrearages on accounts. Dennis sold Kim's 1979 Buick and applied the proceeds to the parties' debts. He also used the parties' 1989 tax refund to pay debts.

When Kim returned from Egypt, she had not completed her degree. Dennis initiated dissolution proceedings, and Kim went to live with her parents. During their separation, Dennis settled \$20,960 of the parties' consumer debts for \$8304. Dennis filed his petition for dissolution on April 12, 1991. Kim was served the following day. On May 16, 1991, Kim's attorney mailed a copy of Kim's answer to Dennis's attorney. The answer was filed on May 17, 1991. On May 16, 1991, Dennis had filed a demand for default judgment. On July 26, 1991, Dennis moved for a default judgment entry which the district set for hearing. Kim filed a resistance to the motion for judgment entry. A hearing on the motion for judgment entry was held on September 20, 1991. The district court dissolved the

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marriage but retained jurisdiction to determine all issues regarding distribution of property.

On September 23, 1991, Kim filed a motion to set aside the decree of dissolution. The district refused to set aside the dissolution decree. The court ordered a hearing be held on December 6, 1991, addressing the issues surrounding the division of marital assets

After the hearing, the court filed its order on December 27, 1991. The court divided equally between the parties the \$1400 held in trust in a savings account and the 1990 tax refund. It found Dennis's gross annual earning capacity to be \$30,000 and Kim's to be \$19,000. The court ordered Dennis to pay Kim \$300 per month in rehabilitative alimony for three years and to pay \$250 towards Kim's attorney fees. Because Dennis brought more debts into the marriage, the court ordered Dennis to pay the parties' outstanding debts with the exception of Kim's school loans and the Texas deficiency judgment. Dennis received the \$1400 certificate of deposit his mother had given to him.

Dennis filed a 179(b) motion. The district court denied the motion but commented on some of the items raised in the motion. Dennis appeals.

Our review of this equity action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992); 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

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district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d at 332.

I. Default. Dennis contends the district court erred in (1) failing to grant default judgment and (2) allowing Kim to submit evidence because she was in default.

Iowa Rule of Civil Procedure 230 sets forth the circumstances that place a party in default. Even though a party is in default under rule 230, the rules do not mandate the court enter a default judgment. Johnson v. Gib's W. Kitchen, Inc., 338 N.W.2d 872, 874 (Iowa 1983). In addition, when the trial court refuses to grant a default judgment, it is not required to find oversight, mistake, or inadvertence to exist which causes the defendant's failure to answer. Id. The decision to grant a default rests in the sound discretion of the trial court. Kohorst v. Iowa State Commerce Comm'n, 348 N.W.2d 619, 622 (Iowa 1984). "The policy of the law is to allow trial of actions on the merits." Id. (citations omitted).

We determine the district court's denial of the demand for default judgment was proper. The court did not abuse its discretion. We affirm the district court on this issue.

II. Property Division. Dennis claims the property distribution as set forth by the district court is inequitable. The court equally divided funds remaining in the parties' accounts. The court concluded Kim was

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responsible for her student loan, and Dennis was responsible for the other debts, most of which he brought into the marriage.

The partners to 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). Iowa courts do not require an equal division or percentage division. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

We determine the property division set forth by the district court is equitable under the circumstances of this case. Dennis has not shown the property division is inequitable to him. We affirm the district court on this issue.

III. Alimony. Dennis argues the district court erred in awarding alimony to Kim in the amount of \$300 per month for three years. The court deemed the award rehabilitative alimony. The purpose of rehabilitative alimony is to support an economically dependent spouse through a limited period of reeducation following a divorce. In re Marriage of Grauer, 478 N.W.2d 83, 85 (Iowa App. 1991) (citation omitted). At the time of trial Kim had been out of work for approximately three years. She wants to obtain an upper level graduate degree and pursue a career in the foreign services.

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). Alimony is not an absolute right; an award depends on the circumstances of each particular case. Id. The circumstances of this case justify an award of alimony. Dennis entered this marriage with substantial consumer debt and educational loans. He continued to incur more debt upon the parties during the marriage through a business venture and substantial cash advances on credit cards. Dennis's earning capacity is greater than Kim's, he owns an unencumbered automobile, and he is employed.

We hold the alimony awarded to Kim is just and equitable. We affirm the district court on this issue.

IV. Attorney Fees. On appeal Dennis claims the district court abused its discretion in awarding \$250 in attorney fees to Kim. Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974). The district court did not abuse its discretion in awarding \$250 in trial attorney fees to Kim. We affirm on this issue.

Both parties request 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. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine each party shall pay his or her own attorney fees.

Costs of this appeal are assessed one-half to Dennis and one-half to Kim.

AFFIRMED.