

IN THE COURT OF APPEALS OF IOWA

No. 1999-573 (9-834) / 99-292
Filed January 26, 2000

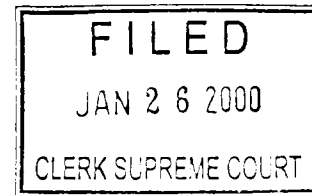
**IN RE THE MARRIAGE OF BARBARA
JEAN BARNA AND TERRY JAMES BARNA**

Upon the Petition of
BARBARA JEAN BARNA,

Petitioner-Appellant,

And Concerning
TERRY JAMES BARNA,

Respondent-Appellee.



Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,
Judge.

The petitioner appeals various economic provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

Kellyann M. Lekar of Roberts & Stevens, P.L.C., Waterloo, for appellant.

David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro,
P.L.C., Cedar Falls, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

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HUTINK, P.J.

I. Background Facts and Proceedings.

The Bamas were married in September 1972. Barbara initiated these proceedings by filing a dissolution petition on July 28, 1998. Barbara claimed Terry retaliated by threatening and stalking her. She requested and received an ex parte temporary protective order limiting Terry's contact with her.

At the time of the dissolution proceedings Barbara was forty-six years old, and Terry was forty-seven years old. Barbara has a bachelor of arts in education and has been a full-time schoolteacher at St. Mary's Catholic School in Waterloo for the past seven years. She earns \$19,200 per year but is not provided medical or retirement benefits. Terry has worked at John Deere since 1972. His hourly pay rate is \$20.30, or \$42,224 annually based on a forty-hour workweek. Terry's earnings vary depending on available overtime and temporary plant closings necessitated by adverse market conditions. He earned \$59,700 in 1997 and by November 1998 grossed approximately \$51,000.

The disputed issues at trial included alimony, property division, attorney fees, and continuation of the temporary protective order. After considering the evidence on these issues, the district court denied Barbara's alimony request. Barbara was awarded her personal effects, furniture and appliances in her possession, and the parties' Buick Century and 1988 Grand Prix. The court also awarded her an interest in Terry's pension benefits from Deere & Company and \$34,000 as her share of the parties' home equity.

Terry was awarded the marital residence, his personal effects, and all personal property in his possession including his 1992 Ford truck. He was also

ordered to pay the balance of the home mortgage loan and any debts he incurred since the parties separated.

The trial court terminated the temporary protective order previously issued noting "the temporary protective order should not have been issued and that there is no basis for its continuation." Each party was ordered to pay his or her own attorney's fees and one-half of the court costs.

On appeal, Barbara challenges the equity of the district court's property division and failure to award alimony and attorney fees. Barbara also argues the trial court should have issued a permanent injunction extending the terms of the ex parte temporary protective order issued earlier.

II. Standard of Review.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 4. See *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Alimony.

When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996) (citations omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Kurtt*, 561 N.W.2d

385, 387 (Iowa App. 1997). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21 (3). See *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998).

We find an award of alimony is warranted in this case. This is a twenty-six-year marriage. During their marriage, the parties enjoyed a comfortable standard of living. Although each was awarded an equitable share of marital property, Barbara's ability to support her predissolution lifestyle is limited by virtue of her lower earning capacity and lack of health and retirement benefits. Terry's income is sufficient to pay alimony without a disproportionate reduction in his accustomed standard of living. The alimony awarded here reflects the disparity in the parties' relative needs and earning capacities upon the dissolution of their marriage. *Smith*, 573 N.W.2d at 927.

Under these circumstances, we find an award of \$400 monthly alimony is equitable. We accordingly modify the decree by ordering Terry to pay Barbara alimony in the amount of \$400 per month until Terry retires or for three and one-half years, whichever occurs later, or until Barbara remarries or either party dies. Payment shall commence on the first day of the month following issuance of procedendo in this case.

IV. Property Division.

The principles guiding division of property are well settled. The parties 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 equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.*

When distributing property, we take into account the criteria codified in Iowa Code section 598.21(1). Among the many factors to consider are: length of marriage, property brought to the marriage by each party, the contributions of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking, and the earning capacity of each party. *Id.*

The parties' primary assets are their home and Terry's pension benefits. Both were equally divided.

According to Terry's financial statement the personal property in his possession was worth \$900 and the personal property in Barbara's possession was worth \$3700. Barbara contends Terry undervalued the property in his possession. The district court resolved this issue against Barbara stating:

Although Petitioner claims that Respondent has personal property worth approximately \$16,000 more than the personal property in her possession and is asking for that amount, the Court has previously noted that her estimates of value are unreliable. Moreover, because she helped herself to all of the personal property, furniture, and appliances without Respondent's knowledge and consent when she and her family broke into the marital residence and took what they pleased, the Court must presume that she was satisfied with the division she unilaterally made at that time. There is also, no realistic way for the Court to consider the washer, dryer, and CD player requested by Respondent separate from the entire division of personal property without knowing how their value fits into the entire division.

Because these findings implicate the trial court's assessment of Barbara's credibility and its considerable discretion in the resolution of disputed asset values, we are not inclined to interfere. See Iowa R. Civ. Proc. 14(f)(7); *In re Marriage of Ball*, 205 N.W.2d 551, 554 (Iowa 1973). Moreover, the equity of the

~~district court's property~~ division is enhanced by our decision to award Barbara \$400 ~~monthly~~ alimony.

~~We affirm~~ on this issue.

V. Attorney Fees.

Barbara argues the district court erred in refusing to award trial attorney fees. Barbara requested an award of \$1500. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). An award of attorney fees is based on the parties' respective needs and ability to pay. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). The district court has considerable discretion in awarding trial attorney fees. *Id.* We will not interfere unless there is a manifest abuse of discretion. Barbara was awarded a substantial cash payment as part of the property division and monthly alimony. Under these circumstances we are unable to say the district court abused its discretion and see no reason to disturb the district court's ruling.

In determining an award of appellate attorney fees, 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 district court's decision ~~on appeal~~. *Garst*, 573 N.W.2d at 608. We award Barbara \$1000 in appellate fees.

VI. Protective Order.

Barbara contends the trial court erred by vacating the temporary protective order. As the district court noted, the origin of the temporary protective order is problematic. As stated in her petition, Barbara requested the order indicating

Terry had a violent temper. In addition she stated Terry stalked her and made death threats against her. She alleged no prior physical abuse in the petition or affidavit. Nonetheless, the order was granted, and Terry was immediately arrested. The district court's decree provides:

Had Petitioner specifically alleged domestic abuse and requested a protective order, rather than a temporary injunction, the Court would have been required to schedule a hearing not less than 5 and not more than 15 days after the filing of Petitioner's petition. The order presented to the Court by Petitioner provided for no such hearing.

....
In any event, Respondent denied paragraph 14 of Petitioner's petition and, while Petitioner's affidavit might support the issuance of a temporary injunction without notice and hearing, it did not justify the issuance of a temporary protective order for domestic abuse without notice and hearing. For these reasons and because no evidence in support of the continuance of the temporary order or the issuance of a permanent protective order was introduced at trial, the temporary order will be canceled. By making this determination, the Court expresses no opinion concerning the disposition of Respondent's alleged violation of the temporary protective order prior to its cancellation.

We have carefully considered Barbara's request for a permanent protective order and, like the district court, find insufficient evidence supports the relief requested.

Costs of appeal are assessed to Terry.

AFFIRMED AS MODIFIED.