FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-580 / 90-163

IN RE THE MARRIAGE OF PAULA HUBBARD AND PHILIP HUBBARD

Upon the Petition of

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PAULA HUBBARD,

Appellee,

And Concerning

PHILIP HUBBARD,

Appellant.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

The husband appeals the economic provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas S. Reavely, Des Moines, for appellant.

Bruce G. Mountain, Des Moines, and Edward Ronwin, Urbandale, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

PER CURIAM

Paula and Philip Hubbard were married in 1972. They have two children: Dustin, born in 1973; and Sean, born in 1975. The children were placed in joint legal custody and in Philip's primary physical care. These custody provisions are not challenged on appeal.

Both parties were in their early forties at the time of trial. Philip has been a military reserve officer for much of his adult life. During his reserve service he held various civilian jobs, including production planner, production foreman, and service sales engineer. Philip has three years of college credits but no degree.

In 1985 Philip was selected for a three-year Active Guard Reserve (AGR) tour. For the AGR tour he was placed on active duty as a lieutenant colonel at Ft. Des Moines, Iowa. Philip was selected for a second three-year AGR tour beginning in 1989 at Ft. Bragg, North Carolina. As an active lieutenant colonel he earns a salary of slightly over $57,000 per year, plus a housing allowance and PX privileges. He has no assurance of continued active duty after his current three-year term.

Paula held part-time secretarial employment during the marriage. Toward the end of the marriage she obtained a college degree and became certified as a teacher. At trial time she was employed as an elementary teacher in Georgia and was earning $20,820 for a nine-month school year.

The dissolution decree directed Philip to pay Paula alimony of $100 per month for five years, or until Paula remarries or dies. The decree also directed Paula to pay Philip token child support of $1 per year for the two children in his primary physical care.

The parties' house had been sold before the marriage. The net proceeds of the sale were in the form of a $10,000 promissory note. The decree awarded this promissory note to Paula. The decree also awarded her savings bonds worth $9,000, stocks valued at about $3,200, income tax refunds of nearly $8,000, a car, and various household goods. The decree awarded Philip savings bonds of $9,000, stocks valued at about $7,600, an IRA account worth $4,812, life insurance policies with a cash value of $9,539, a car, and household goods.

Paula was directed to assume debts of over $4,000. Philip was directed to assume debts of over $1,900 and also to contribute $1,000 toward Paula's attorney's fees.

Philip has appealed from the dissolution decree. He challenges the division of property and the award of alimony. Philip also contends that Paula should be required to pay him child support of at least $300 per month.

I. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448,

452 (Iowa 1981). 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).

II. Philip first contends that the division of property was not equitable. He feels that certain property should not have been included as marital property because it was given to him as gifts from his parents. Philip received a 1971 Volkswagen camper from his mother in 1982. At that time the camper had been valued at $625. Paula testified that the camper was given to the family in order to take the children camping.

Philip also received stock in the early part of December in the years 1978, 1979, and 1981 from his parents. Philip testified that his birthday was December 9, and he received the stock as birthday presents. Paula testified that the stock was a Christmas present for the entire family. Philip's mother testified in a deposition that the stock had been given to Philip alone. The financial records of the parties showed that the family still received a Christmas check of $200 in the years stock was given. However, in years when Philip's parents did not send stock, they sent Christmas checks of larger amounts. At the time of the dissolution the stock was valued at $10,800.

Philip also contends that the court should have considered Paula's college degree as a marital asset and

that the court should have further considered the tax consequences of its property division.

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). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

Property division and alimony must be considered together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987). Property inherited by or gifted to one marriage partner is not subject to division unless the failure to do so would be unjust. Id. at 360.

The question here is whether the property was given to Philip alone. We believe Philip's mother gave the camper for the family to use and that it was properly considered marital property. Considering the work Philip had done on the camper, we agree with the trial court's valuation of $1,500. The stock presents a more difficult question. However, considering all of the evidence, we believe the stock should be considered marital property, not property of Philip alone.

Paula's degree does not itself constitute an asset of the parties for court consideration in making distribution

upon dissolution of the marriage. See In re Marriage of Wagner, 435 N.W.2d 372, 373 (Iowa App. 1988)

We affirm the property division made by the district court.

III. Philip contends the court erred in awarding alimony to Paula of $100 per month for five years. In her appellee's brief she states that in July 1990 she remarried and moved to Kansas City, Missouri, where she is presently unemployed but seeking work as a teacher. Paula states that the alimony issue is moot since her remarriage automatically terminated the alimony.

A court of review must ordinarily limit its consideration to the record made at trial or in supplementary proceedings upon limited remand. In re Marriage of Callenius, 309 N.W.2d 510, 513 (Iowa 1981). Accordingly, in our de novo review we have not considered the extra-record facts advanced by Paula.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). 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, 437 (Iowa 1981)

We affirm the trial court's award of alimony to Paula.

IV. Finally, Philip asks that Paula be ordered to pay child support more in line with the Iowa Supreme Court Guidelines for Child Support rather than the token amount of $1 per month she now pays. Under the guidelines Paula would be required to pay about $325 per month.

The trial court issued the decree in this case on October 4, 1989. The permanent child support guidelines were not yet effective on that date. On Philip's motion the court entered an expanded ruling on December 29, 1989, which simply stated that substantial injustice would result if Paula were required to pay any child support, and therefore, the guidelines were inapplicable.

It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to consider are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4).

At the time of the decree Paula was employed and earned $20,820 for the school year. This is a decent income. The

fact that Philip had a higher income does not excuse her from helping to support her children.

The trial court found her net monthly income to be $1,275. The trial court found Philip's net monthly income to be $3,786. Under the currect guidelines, Paula should pay thirty percent (30%) of her net monthly income. We determine Paula is to pay $382.50 per month child support. These payments should continue until each of the children reaches the age of eighteen, marries, becomes self-supporting, or is otherwise emancipated. We modify the trial court's decree accordingly.

V. Finally, Paula seeks 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We determine each party should pay its own attorney fees on appeal.

VI. We affirm the decree as set forth by the district court except for the modification as set forth above concerning child support.

Costs of this appeal are taxed one half to each party.

AFFIRMED AS MODIFIED.