FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE RE MARRIAGE OF PATRICIA S. HEMMEN AND HENRY HEMMEN

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| Upon the Petition of | ) | |
| PATRICIA S. HEMMEN, | ) | Filed August 29, 1985 |
| Petitioner-Appellant, | ) | |
| And Concerning | ) | |
| HENRY HEMMEN, | ) | 5-375<br>84-1434 |
| Respondent-Appellee. | ) | |

Appeal from the Iowa District Court for Scott County - J. Hobart Darbyshire, Judge.

Petitioner wife appeals from the decree dissolving the parties' marriage.

**AFFIRMED AS MODIFIED.**

H. Reed Doughty and Theresa M. Bremer of Winstein, Kavensky, Wallace & Doughty, Davenport, Iowa, for petitioner-appellant.

Harold J. DeLange II of Wehr & DeLange, Davenport, Iowa, for respondent-appellee.

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

Petitioner wife appeals from the decree dissolving the parties' marriage. She asserts: (1) that the property division is inequitable; (2) that her child support award is inadequate; (3) that the trial court should not have provided for her alimony award to terminate when the parties' youngest child reaches his majority; and (4) that the trial court should have given her some means of assuring that respondent husband will pay the child support and alimony awards, in view of his past record of nonpayment. Petitioner wife also requests attorney fees on appeal. We affirm as modified.

Petitioner Patricia S. Hemmen and respondent Henry Hemmen were married in 1961. They have four children, one of whom is still a minor. Patricia did not work outside the home during most of the marriage. In 1983, she took a general office/bookkeeping job; it pays $769 net per month. Henry is an accountant; he earns $2,200 net per month. At the time of trial, the parties were having serious financial difficulties which, the district court found, were a result of their spending more than they earned. The parties' numerous debts included income taxes for the last seven years of the marriage.

The district court awarded Patricia custody of John and directed Henry to pay child support of $80 per week and alimony of $100 per week; the alimony award was to terminate when John reached majority or if Patricia remarried or died. The district court ordered the parties' house sold; the net proceeds were to be applied to the parties' debts and then equally divided. Patricia was awarded the parties' car, all of the parties' personal property except those items awarded to Henry, and her checking account. The district court awarded Henry several items of personal property, his office furniture, his checking account, some stock, an account receivable, and a real estate contract. The district

court directed Henry to pay his office debts and $1,000 toward Patricia's attorney fees. Patricia has appealed.

I. Patricia argues that it was inequitable for the trial court to require that the parties' house be sold in order to satisfy their debts. It is claimed that in recognition of her contributions to the marriage, low earning capacity, and responsibility of raising a minor child she should be awarded the home.

We recognize that the sale of the marital residence will result in some hardships for Patricia. However, as the trial court indicated, the sale is necessary in order to satisfy outstanding debts, including unpaid taxes to the state and federal governments. Because of the enormous amount of debt, there seems to be no other feasible alternative.

Patricia argues she should not be held responsible for the tax debts. She claims that the unpaid taxes result solely from the actions of her husband and that she should be characterized as an innocent spouse.

The record indicates that the parties to this action failed to file state income tax returns for several years resulting in a tax liability of $11,000. Henry was criminally prosecuted for failure to file, resulting in probation and a fine of $2,500. Henry indicated that he had made an agreement with the Iowa Department of Revenue to pay $450 per month on this obligation. There is an additional $1,100 owed to the State of Iowa for unpaid 1983 income taxes. There is also unpaid income tax due to the Internal Revenue Service in the amount of $25,500. Henry is currently paying this off at the rate of $193 per month, however, it is likely this will increase.

In reviewing these facts, the trial court determined that "it would be inequitable to require [Henry] to totally bear the enormous tax liability which accrued over the past six or seven years of marriage." We agree. We recognize that Patricia did not prepare the tax returns and it is possible she was unaware

of the fact that her husband was not paying taxes. Yet this factor alone does not absolve her of liability.[1] It cannot be ignored that both Henry and Patricia benefited from the use of funds which rightfully should have been used to pay taxes. It follows that both parties should assume some responsibility for paying off the debt now owed to the state and federal tax authorities. We believe, however, that Patricia's obligation should be limited to contributing towards unpaid taxes; she should not be required to pay a portion of the $2,500 fine which is solely attributable to Henry's criminal liability.

Accordingly, we affirm the trial court's decision to sell the marital residence and use the proceeds to satisfy various debts, including the tax liability. However, the decision is modified to exclude the $2,500 fine from the debts to be paid from the sale of the home. Henry shall be responsible for satisfying this obligation with his own funds.

Patricia also claims the trial court should have set aside a portion of a $10,000 gift from her mother. Patricia admits that she gave the money to her husband to pay debts. However, she states that approximately $5,000 is unaccounted for and she is entitled to that amount. We disagree.

Evidence would support the conclusion that the $10,000 was deposited in the parties' checking account and used to support the family and satisfy joint obligations. In fact, one of the exhibits admitted at trial accounts for the payment of bills and expenses in excess of $10,000. It would be inequitable at this point to allow Patricia to recover money which was made available to the marital unit for its unrestricted use and benefit. See In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa Ct. App. 1984).

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[1] Contrary to Patricia's assertion, she is not an innocent spouse within the meaning of 26 U.S.C. § 603(c)(1). This provision is only applicable when the tax liability is attributable to omissions from gross income.

We therefore conclude that the trial court did not err in failing to set aside approximately $5,000 for the sole benefit of Patricia.

II. Patricia argues that the child support obligation should be increased and should not terminate when the child attains majority.

In considering Patricia's claim, we examine the facts of this case in light of the factors listed in Iowa Code section 598.21(4). We further recognize that both parties to a marriage 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 Heinemann, 309 N.W.2d 151, 153 (Iowa Ct. App. 1983).

Our examination of the record convinces us that the child support obligation should not be disturbed. Pursuant to the decree, Patricia will receive child support payments of $80 per week. This amount strikes a proper balance between the child's need and Henry's ability to pay. We see no reason to increase the obligation.

This court is also unwilling to require Henry to make additional support payments after the child reaches majority. Parents are under no legal obligation to support adult children or pay for their college education. There is no reason this should be any different merely because the parents get a divorce.

Finding no error, we affirm the child support provision in all respects.

III. Patricia further claims that the alimony obligation should not terminate in five years when the parties' child reaches majority. Rather, she claims it should continue until she dies or remarries. We disagree.

Both parties to this action are healthy persons in their mid-forties. Patricia is currently employed and earns a net monthly income of $769 per month. We recognize that Patricia has been out of the job market for a number of years and may need additional training. However, given time, she should be able

to support herself and maintain a comfortable lifestyle. While some support payments are certainly justified, an award of permanent alimony under these circumstances would be inequitable.

**IV.** The final assignment of error in this action is that the trial court should have provided some means of assuring that support obligations will be paid. Patricia claims that lump sum alimony and child support payments would be more appropriate under the circumstances of this case.

We recognize that Henry repeatedly failed to make temporary support payments. In light of this, it can hardly be said that Patricia's concerns are unfounded. However, it is apparent from the record that requiring lump sum payments is not a feasible solution. The parties have lived beyond their means for several years and, as a result, have incurred substantial debts. Due to the serious financial difficulties evidenced in this case, it is apparent that Henry is not able to make lump sum payments. Patricia asserts that she could be awarded the marital residence in satisfaction of the support obligations. However, as we previously discussed, it is necessary to sell the house in order to pay off debts.

Under the facts of this case, we conclude that support payments should be made on a periodic basis rather than in the form of a lump sum settlement. It is not our intention to minimize the seriousness of Henry's failure to make temporary support payments on a regular basis. Should this problem continue, judicial relief would certainly be forthcoming. We urge Henry to make every effort to ensure that timely payments are made.

**V.** Patricia requests attorney fees on appeal. In evaluating this request, we consider the needs of the petitioner, Henry's ability to pay, and whether Patricia was obligated to defend the trial court's decision on appeal. See In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa 1981). Without attempting to

fix the total value of services, we conclude that Patricia should be awarded appellate attorney fees in the amount of $750.00.

**AFFIRMED AS MODIFIED.**