

FILED

SEP 6 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

116

IN RE THE MARRIAGE OF KATHRYN MARIE HILKER AND GREGG FRANCIS HILKER

UPON THE PETITION OF
KATHRYN MARIE HILKER,

Petitioner-Appellee,

AND CONCERNING
GREGG FRANCIS HILKER,

Respondent-Appellant.

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Filed September 6, 1984

4-218
83-1259

Appeal from Linn District Court, Larry J. Conney, Judge.

Respondent appeals from the financial provisions of the decree dissolving the parties marriage. **AFFIRMED AS MODIFIED.**

John M. Maher of Maher & Forte, P.C., Cedar Rapids, for respondent-appellant.

Robert Nelson and David Nelson of Nelson & Nelson, Cedar Rapids, for petitioner-appellee.

Considered by Oxberger, C.J., Donielson, and Schlegel, JJ.

OXBERGER, C.J.

Respondent appeals from the financial provisions of the decree dissolving the parties' marriage. On appeal he asserts that alimony should not have been awarded to petitioner, that the trial court's division of the marital property was inequitable, that the trial court should have set aside some of the marital property to provide a fund for the education of the parties' children, and that the trial court should not have awarded attorney's fees to petitioner. Petitioner requests that she be awarded attorney's fees for this appeal.

Petitioner and respondent were married in 1964. They have two children, one of whom is now in college and the other of whom soon will be. Joint custody was awarded by the trial court, and custody is not at issue on appeal.

At the time of trial, respondent worked as a factory representative and earned approximately \$42,000 per year. Petitioner has worked since 1978. Her compensation for 1980 totaled nearly \$20,000, and the following year it exceeded \$20,000. In 1982 petitioner accepted a position with a local radio station as sales manager. Her starting salary included a \$20,000 base plus an override incentive on sales, which could be expected to total \$25,000. Petitioner's total income for that year was nearly \$25,000. Less than one month before the parties separated, petitioner left this position, and upon request immediately secured a job with the same radio station as a staff salesperson at a salary of \$200 per week. Despite the foregoing, the trial court found that petitioner had no reasonable likelihood of ever enjoying any greater earning capacity than \$200 per week and ordered respondent to pay alimony of \$150 per week.

The financial statements provided by petitioner and respondent indicate that their assets included their marital home, a cabin at Delhi, three automobiles, a boat and shore station, a trailer for the boat, some cash and securities, and miscellaneous personal effects. Their debts included two mortgages on the

marital home and various installment obligations. The trial court awarded to petitioner the parties' marital home, the boat, trailer and shore station, petitioner's automobile, and most of the parties' personal property. Respondent was awarded the remainder of the personal property, stock in the Elmcres Country club, the cabin at Delhi, and a residence in Cedar Rapids that respondent then intended to purchase. At the time of trial, respondent had not yet made the downpayment, although he had borrowed \$500 to put up as earnest money. Petitioner was ordered to pay the first mortgage on the marital home and miscellaneous debts totaling \$6000. Respondent was ordered to pay the second mortgage on the marital home, all mortgage arrearages under the first mortgage, and the remainder of the parties' debts.

A pretrial order issued by the trial court designated the issues to be litigated at trial. It provided:

The issues for trial are: Property-alimony. No other issues shall be litigated unless this order is modified upon application of counsel at least one week before trial.

No modification was requested. At trial before the close of petitioner's evidence, her attorney asked her three questions on the record concerning her ability to pay her attorney's fees. No objection was made to this colloquy. The trial court awarded attorney's fees to petitioner, holding that since respondent did not object to the introduction of evidence on this issue, the court was no longer bound by its pretrial order.

I. Scope of Review

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We examine the entire record and determine the parties' rights anew based upon all credible evidence bearing upon properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 158 (Iowa 1977). While we give weight to the findings of the trial court, we are not bound by them. Iowa R. App. P. 14(4)(7).

II. Alimony

Respondent argues that, considering petitioner's past earnings, the trial court's award of alimony was inequitable. We agree. An award of alimony is to be based upon the recipient's need for support as well as upon the obligor's ability to pay.

The criteria for evaluating the appropriateness of an award of alimony are enumerated in Iowa Code section 598.21. We do not recount those criteria here; however, we point out that it is incumbent upon the trial court to consider the earning capacity of both parties before awarding alimony. See In re Marriage of Hitchcock, 309 N.W.2d 432, 436 (Iowa 1982). Moreover, earning capacity "has not been and should not be limited to consideration of only the actual earnings of the parties... at the time of the dissolution." In re Marriage of Horstmann, 263 N.W.2d 885, 890 (Iowa 1978). Potential earnings must be considered as well.

The trial court, in its findings of fact, found that petitioner had "no reasonable likelihood of achieving any greater measure of earning capacity than she presently enjoys." We do not believe that petitioner's current earnings are indicative of her potential earning capacity. We note that during the three years prior to the dissolution, petitioner's income grew steadily from nearly \$20,000 to \$25,000. Although at the time of trial petitioner was earning only \$9600, it is our opinion that this drastic reduction in her income was self-inflicted. It has long been the rule in this jurisdiction that a party "cannot voluntarily abandon his employment, reduce his wages, or by other conduct bring about a reduced income and thereby avoid, or cause the reduction of, a reasonable support order." Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978), quoting Commonwealth ex rel. Mazon v. Mazon, 163 Pa. Super. 502, 505, 63 A.2d 112, 114 (1949). The converse of this rule is that a party's voluntary reduction of her income may not be taken into consideration when determining either the appropriateness or the amount of alimony to be received.

We need not question petitioner's good faith in terminating her position as sales manager and accepting a position as a staff salesperson, since her reasons for doing are irrelevant to our decision. Petitioner is not free to plan her future under the supposition that respondent will be obligated to guarantee the continuation of her previous earnings. Petitioner's need for support is determined by her capacity to earn money, not her present earnings. This is the rule we must apply, even though the result may be to compel her to accept and maintain employment which may be difficult or undesirable. See Ellis v. Ellis, 262 N.W.2d at 267.

Petitioner's employment history reveals that she is capable of earning at least \$25,000 per year. Her need for support is measured accordingly. Respondent currently earns about \$42,000. His monthly net is about \$2500. Keeping in mind that our goal is to permit both parties to live separately in a manner and style approximating that which they enjoyed prior to the dissolution, without imposing too onerous a burden upon respondent, we hereby modify the trial court's decree and order respondent to pay alimony in the sum of \$300 per month for four years, or until petitioner dies or remarries.

III. Child Support

It is well settled that both parents have an equal duty to provide support for their children. See Yansky v. Yansky, 172 N.W.2d 114, 117 (Iowa 1969). Although support is usually considered a duty owed to minor children, which ceases as each child attains his majority, in appropriate circumstances the court may order continued support to provide for the children's continuing education. Iowa Code section 598.1(2) provides that the court may require either party to pay for the support of a child "who is between the ages of eighteen and twenty-two years who is regularly attending an approved school. . . , or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission

to a college, university, or area school." The thrust of this provision is to treat as minors, for purposes of the support provisions, children between the ages of eighteen and twenty-two who are or will be full-time students at the college or university level.

The factors to be considered in determining whether a divorced parent should be ordered to pay support for an adult child in such circumstances include the financial condition of the parent, the ability of the child for college work, the age of the child, and whether or not the child is self-sustaining. In re Marriage of Urban, 293 N.W.2d 198, 202 (Iowa 1980). It is our opinion that an award of support is appropriate in this case. Petitioner and respondent have two children, Gregg, Jr., and Daniel. Gregg, Jr., is currently a student at the University of Iowa. Daniel has completed his senior year of high school and will be ready to enroll at the University of Iowa in the fall. The record indicates that both children are excellent students who are more than capable of doing college work. Although both boys work, neither one is self-sustaining. The cost of sending both boys to the University of Iowa has been established to be approximately \$3000 per child per year.¹ Respondent, who was awarded primary care of the children, cannot afford to bear this cost alone.

Section 598.21(1) of the Iowa Code empowers the court to "protect and promote the best interests of children of the parties by setting aside a portion of the property of the parties in a separate fund or conservatorship for the support, maintenance, education and general welfare of the minor children." To protect the best interest of Greg, Jr., and Daniel, we order that the parties' marital home and the cabin at Delhi be sold, that the proceeds be used first to retire the parties'

¹The trial court found the cost to be \$5000. It is our opinion that this figure represents more than the cost of tuition, room, and board. Because both boys have shown themselves capable of holding summer jobs, we feel that they can provide for their own incidental expenses, and it would be inappropriate to provide for them under § 598.1(2).

debts, and that any proceeds remaining after retirement of the parties' debts be placed in a joint interest-bearing account (in the names of petitioner and respondent) and used solely to cover the educational expenses of the children. Any expenses incurred for the children's college education relating to tuition, room, and board, which are in excess of the amount in such fund shall be borne by both parties as follows: two-thirds by respondent and one-third by petitioner. Under no circumstances shall petitioner's obligation exceed \$1600 per year.

IV. Property Settlement

The guidelines controlling the distribution of marital assets in a dissolution proceeding are set out in Schantz v. Schantz, 163 N.W.2d at 405, but modified to exclude fault. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). The purpose of these guidelines is to insure a division which is equitable to both parties. Precedent is of little value since any determination as to what is right depends upon the peculiar facts of each case. Schantz at 405.

From our review of the evidence, we conclude that the property division ordered by the trial court is inequitable. Using the trial court's estimates of asset values where applicable, we find that the parties had a net worth of \$32,594. We arrive at this figure as follows:

<u>Assets</u>		<u>Liabilities</u>	
Marital home	\$ 86,000	1st Mortgage	\$ 65,465
Boat, Trailer, and		2nd Mortgage	5,500
Shore Station	7,250	Mortgage arrears	2,675
Elmcrest Club Stock	1,500	Ford Motor Co.	3,000
Furniture	5,769	Peoples Bank	1,000
Delhi Cabin	11,515	T. Abernathy	2,000
Petitioner's auto	4,100	J. Maher	3,900
	\$ 116,134		\$ 83,540

Our figures differ from those of the trial court in three respects. First, we did not include the value of the Cedar Rapids residence in our computation. Respondent does not own that property; he is merely renting it with the intention

of purchasing it at some future time. He has not even placed a down payment on the property. Therefore, there is no equity which can be deemed to be a marital asset. Second, we included the value of petitioner's automobile in our computation. We can find no reason why the trial court neglected this item. Lastly, we did not reduce the value of the marital home by closing costs and costs of sale.

The trial court's division of the parties' assets and liabilities left petitioner with a net award of \$30,969, and a net award to respondent of \$1,625. We will not leave undisturbed so inequitable a result. We therefore modify the provisions relating to the distribution of marital property as follows:

1. The marital home and the cabin at Delhi are to be sold. The debts of the parties are to be retired from the proceeds of the sales, and any remaining proceeds shall be placed in a separate account for the benefit of the parties' children, pursuant to Iowa Code section 598.21(1).

2. The jet boat, trailer, and shore station are to be sold. The proceeds of this sale shall be distributed equally between petitioner and respondent.

3. The parties' furniture and personal effects are to be divided equally between petitioner and respondent.

The remaining provisions concerning the distribution of marital property are affirmed. The result of our modifications is that, assuming the house and cabin sell for \$86,000 and \$11,515 respectively, nearly \$14,000 will be placed in a separate fund for the benefit of the children's college education. The trust fund will end when each child reaches age twenty-two, and any unexpected funds are to be divided between the parents equally. Petitioner is awarded \$10,609 of the remaining assets, and respondent is awarded \$8009. All of the debts of the parties have been retired.

V. Attorney's Fees

Respondent argues that the trial court should not have awarded petitioner her attorney's fees since a pretrial order precluded litigation of attorney's fees. We do not agree. What the pretrial order did was to strike the issue of attorney's fees. Thus, this issue is treated as though it had never been pleaded. However, we have consistently held that "where evidence is introduced to prove an unpleaded issue and the other party does not object to it the issue is tried by consent." Nelson v. Leaders, 140 N.W.2d 921, 923 (Iowa 1966). An issue tried by consent is properly before the court, and the court may determine that issue.

Respondent argues that the three questions asked by counsel to petitioner did not constitute trial of the issue by consent. However, we find no authority for the proposition that a certain quantum of evidence must be presented by one party without objection before the issue may be said to be tried by consent. It was incumbent upon respondent to object to counsel's questioning if he intended to rely upon the pretrial order. He did not object, and therefore, it was within the discretion of the trial court to consider the issue of attorney's fees.

Upon review of this matter, we conclude that the trial court properly considered the economic position of both parties. We are therefore not inclined to disturb its award.

Petitioner seeks allowance of additional fees for this appeal. We do not grant them. "Attorney fees are not recoverable as a matter of right." In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). Any allowance for additional fees must depend upon petitioner's financial needs and respondent's ability to satisfy them. We are of the opinion that, in light of the property settlement herein ordered, petitioner should be able to pay the attorney's fees she incurred in this appeal.

MODIFIED AND AFFIRMED.