IN THE COURT OF APPEALS OF IOWA

No. 6-690 / 95-1208

FILED
JAN 29 1997
CLERK SUPREME COURT
000187

**IN RE THE MARRIAGE OF CYNTHIA G. KINDSCHUH AND JOHN L. KINDSCHUH**

**Upon the Petition of**
**CYNTHIA G. KINDSCHUH,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning**
**JOHN L. KINDSCHUH,**

Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

John Kindschuh appeals and Cynthia Kindschuh cross-appeals from the entry of the dissolution decree. **AFFIRMED AS MODIFIED.**

Stacey N. Bell of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Shindler & Scalise, P.C., Des Moines, and Larry L. Miller, Des Moines, for appellant.

Harlan M. Hockett and Joseph Bertogli, Des Moines, for appellee.

Heard by Sackett, P.J., and Streit and Vogel, JJ.

**VOGEL, J.**

***Background facts.*** John and Cynthia Kindschuh were married on June 7, 1975. They have two children, John, born June 27, 1978, and Janet, born June 28, 1981. On June 15, 1995, the district court entered a decree dissolving the marriage of John and Cynthia.

The district court decreed that Cynthia and John have joint legal custody of their minor children, primary physical care with Cynthia. John Kindschuh appeals several economic issues of the trial court's decision and Cynthia Kindschuh cross-appeals.

***Scope of review.*** 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 the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

***I. Property division.*** The division of property between parties in a dissolution must be equitable to both parties. Iowa Code § 598.21 (1995). A court looks to many factors in arriving at an equitable division of assets, including the contribution of each party to the marriage, both monetary and non-monetary. Iowa Code § 598.21(1)(c) (1995); *In re Marriage of Callenius*, 309 N.W.2d 510 (Iowa 1981) (considering

wife's contribution as parent and housewife in calculating an equitable distribution of property). Cynthia's contributions to the marriage include income from some part-time work, inherited monies, and her domestic efforts as a full-time mother and homemaker.

During the course of the marriage, Cynthia received over $160,000 in the form of gifts or inheritances from her parents. John argues the court siphoned off all the gifted and inherited property and awarded it to Cynthia. John's fact assertion is incorrect. At the time of the dissolution decree, slightly more than $66,000 of the total $160,000 remained in an account and could be traced to the gifted and inherited monies. Only these assets were set off to Cynthia and stipulated by John to be non-marital assets. The other $100,000 of the total gifted and inherited purse was commingled during the marriage and spent for the good of the family. This amount was not set off to Cynthia. Iowa Code section 598.21 provides that property received by either party through inheritance or gift, whether prior to or during the course of marriage, is the separate property of that party and not subject to property division unless it would be inequitable to the other party to keep it separate. Additionally, "[t]he intention of the legislature cannot be defeated by awarding to a party who has had the good fortune to receive a large gift or inheritance a smaller proportion of the marital assets than he or she would otherwise have received." *In re Marriage of Wood*, 325 N.W.2d 774, 775 (Iowa App. 1982).

Moreover, John cannot now claim the trial court was incorrect in awarding the gifted and inherited property to Cynthia as the trial court approved a stipulation by the parties regarding certain marital assets, including the gifted and inherited property. John cannot, as a matter of right, withdraw his stipulation of this issue. *See In re Marriage of Ask*, 551 N.W.2d 643, 645-46 (Iowa 1996)(holding that a stipulation is binding and is tantamount to a consent decree once a court approves it and that a stipulation is accorded the sanctity of an ordinary contract). We find that the trial court's order in its determination and distribution of the gifted and inherited property was fair and equitable and will not be disturbed on appeal.

The trial court awarded Cynthia fifty-percent of John's pension plan, valued at $33,697.00, as well as fifty-percent of his 401(k) account valued at $87,962.00. John argues that Cynthia should not receive any of John's pension and only a percentage of his 401(k) account. He also argues that the court should not have considered the amount in the accounts which accumulated after the parties' separation on February 26, 1995. However, the date of the dissolution decree, rather than the date of separation, is the only reasonable time when an assessment of the parties' net worth should be undertaken. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994)(citing *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976)). We find that the district court was correct in its determination and hereby affirm the one-half division each of the pension and 401(k) plan.

*II. Valuation of spousal support.* John claims that the district court was incorrect in awarding Cynthia alimony based on her earning capacity, and Cynthia believes the court was incorrect in determining the amount and duration of the award. We affirm the trial court on both issues.

John and Cynthia both have a college education, John with a degree in business administration and accounting and Cynthia in secondary education. John has been employed by John Deere for over 20 years with a current salary of $63,840.00 plus bonuses based on the company's profits. By mutual agreement, Cynthia stayed home during most of the marriage as a full-time mother and homemaker. In 1994, she obtained a full-time teaching position at Montessori school where her net monthly income is $1097.00.

The court ordered John to pay Cynthia the sum of $400 per month commencing March 22, 1995, and continuing each and every month thereafter until Cindy's death or remarriage for a period of ten years, whichever shall first occur. Alimony is not a right and it depends on the circumstances of each case. *In re Marriage of Wessels*, 542 N.W.2d 486,490 (Iowa 1995). Before awarding alimony, the district court must consider the factors listed in Iowa Code section 598.21(3) (1995). These factors include the earning capacity of the party seeking maintenance, which John argues was not sufficiently addressed by the trial court. We believe the trial court did sufficiently consider this factor as well as balance and consider all of the other factors delineated in Iowa Code section 598.21(3) (1995). John cites *In re*

*Marriage of Miller*, 532 N.W.2d 160 (Iowa App. 1995), to support his argument that Cynthia is not working at her earning capacity, is able to become self-supporting, and thus should not be awarded permanent alimony. In *Miller*, the wife had acquired an associate degree in accounting, but she was employed part-time as a cashier at Hy-Vee. There was no evidence there that she tried to get an accounting job and thus work up to her earning capacity. The court decided on that basis the wife would not be awarded permanent alimony and that she would have twenty years to begin her accounting career and become self-supporting. *See Miller*, 532 N.W.2d at 162.

Conversely, in this case, Cynthia's training is in secondary education. She is employed as a full-time teacher at Montessori. Evidence was presented at trial that if Cynthia became a secondary school English teacher in Des Moines, she would likely earn an annual salary over $20,000. However, evidence also revealed the chances of Cynthia attaining this type of employment are ten percent or less. There is then, a difference between choosing not to work up to your earning capacity, as in *Miller*, and wanting to work up to your earning capacity, but being unable to because of a tight job market. Cynthia argues the traditional form of spousal support awarded to her is insufficient to make up for the disproportionate earning capacities between the parties. We find the trial court gave sufficient consideration to all factors in setting an appropriate amount of alimony. Therefore, we affirm the award and amount of traditional alimony set by the trial court.

John additionally argues that the court should not have required him to maintain Cynthia as a beneficiary on his John Deere term life policy in the amount of $50,000 to secure spousal support payments as long as the obligation exists. The courts have used insurance to secure spousal support payments, but usually use a declining balance method. That is, the insurance should be limited to the amount needed to guarantee an obligation for alimony. *See In re Marriage of Lytle*, 475 N.W.2d 11 (Iowa App. 1991); *In re Marriage of Boehlje*, 443 N.W.2d 81 (Iowa App. 1989). We affirm the trial court's decision requiring John to maintain a life insurance policy as a security for spousal support payment, but modify the decree to reflect a declining balance on the policy amount to correspond with the declining obligation.

***III. Income tax exemption.*** John's net monthly income and child support obligation were calculated by the trial court with each party receiving one child as an income tax exemption. John argues that he should be allowed to claim both children as dependents and thus be accorded exemptions for both of them on his federal and state income tax returns. He cites the case *In re Marriage of Miller*, 475 N.W.2d 675 (Iowa App. 1991) to support his argument. The *Miller* case is inapposite, however, when applied factually to this case. In *Miller*, the income tax figures the trial court used in calculating the husband's net monthly income were based on his being allowed to claim all of his children as exemptions on his tax returns. The trial court ultimately did not allocate those exemptions to him and the appellate court

determined that any exemptions the trial court gave to the wife should be given to the husband. *Miller*, 475 N.W.2d at 679. Conversely, in this case the trial court calculated John's child support and net monthly income factoring in that each party would receive one child as an exemption. Thus, unlike the situation in *Miller*, the trial court here had an accurate basis from which to derive the net monthly income and accordingly granted each party a right to claim one exemption. We find that the trial court properly and fairly considered the financial circumstances and we affirm on this issue.

*IV. Life insurance.* John argues that the trial court mistakenly required him to maintain the children's life insurance policies. The court found that the parties agreed that certain John Deere term life insurance policies on the lives of the children should be maintained by John only as long as his contract with John Deere allows. That ruling encompasses the situation that should company policy preclude John from maintaining the insurance, he is relieved of this obligation. We affirm the district court.

*V. Educational expenses.* The trial court ordered that if either of the parties' minor children is properly enrolled and qualifies for post-high school education under Iowa Code section 598.1(6) (1995), then the obligation of each party shall be determined by first subtracting from the cost of the tuition, room and board, books and fees, the amount of any scholarships or financial aid (not loans) available and that the remainder of the expense shall be borne by the parties, prorated according to each

party's adjusted gross income. We modify the trial court's ruling to only require each parent to pay, in proportion to his or her adjusted gross income, the cost associated with a student attending a state supported school in the state of the student's residence. See *In re Marriage of Lieberman*, 426 N.W.2d 683 at 686 (Iowa App. 1988). This does not preclude either child from attending a more expensive school, but merely caps the amount each parent is obligated to contribute to the education. *In re Marriage of Frink*, 409 N.W.2d 477 at 481 (Iowa App. 1987).

*VI. Attorney fees.* The trial court ordered John to pay Cynthia $1,558.35 for attorney fees. Cynthia requests that the trial court award her an additional $1,500 of attorney fees as well as a reasonable amount of attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We find no evidence in the record that would warrant an increase of the attorney fees award. We determine each party must pay their own appellate attorney fees. Costs are taxed one-half to each party.

Having considered all other issues, we affirm the trial court, as modified.

**AFFIRMED AS MODIFIED.**