IN THE COURT OF APPEALS OF IOWA

No. 2-405 / 91-1795

IN RE THE MARRIAGE OF TERRANCE W. McGEE AND ETHLYNN K. McGEE

Upon the Petition of
TERRANCE W. McGEE,

Appellee,

And Concerning
ETHLYNN K. McGEE,

Appellant.

FILED
MAR 30 1993
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

The wife appeals from the economic provisions of the district court's decree of dissolution. **AFFIRMED.**

Stephen P. Wing of Dwyer, Wing, Zamora, Taylor & Walters, Davenport, for appellant.

Seymore M. Raben, Davenport, for appellee.

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

HAYDEN, J.

Terrance (Terry) and Ethlynn K. (Kay) McGee were married in August 1965. They had two children. The older child, Sean, is now an adult and is not affected by the terms of this decision. The younger child, Corey, who was born in January 1975, is still a minor.

Terry has been employed by Firestone, Inc. since 1967 and currently is the manager of a store in Davenport. His base income is about $48,000. He also receives a bonus of about $20,000 each year. Terry has received incentive payments since 1986, which have increased his total income to about $120,000 in the years from 1986 to 1990.

Kay was not employed outside the home during most of the marriage. During the marriage she received a bachelor's degree and a master's degree in social work. Kay has been looking for work, but was unemployed at the time of the dissolution hearing. Evidence was presented to show she could expect to earn about $18,000 as a social worker.

Following trial, the district court entered its decree. The parties were awarded joint custody of Corey, with Kay having primary physical care. The court determined Terry's taxable income was $68,000, which represents his base salary plus bonus. Kay's earning capacity was determined to be $18,000. Using these amounts the court applied the child support guidelines. Terry was ordered to pay child support of $997 per month.

Prior to the dissolution, the parties had equally divided $243,000. Concerning the property items in dispute, the court awarded Terry property worth $28,346, which included his IRA and 401(K) plans. Kay was awarded property worth $19,531, which included her IRA. In addition, Terry was ordered to pay Kay a property settlement of $7,500 to more closely equalize the property division. In addition, Terry was ordered to pay debts of $2,325 and $2,000 for Kay's attorney fees.

The court awarded Kay alimony of $1,500 per month for twenty-four months, then $1,000 per month until she remarries or either party dies. Kay was also awarded a portion of Terry's pension benefits when he begins to receive such benefits. Her alimony award will be reduced by sixty percent of the pension benefits received. The court also provided if Kay obtains substantial or gainful employment the alimony award may be modified.

Both parties filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). After the court's ruling on these motions, Kay appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Kay first contends the district court should have included Terry's income from the incentive programs in determining his net income for purposes of applying the child support guidelines. She states his average net income for the years 1986 to 1990 was actually $83,999, or $7,000 per month. If Kay earned $18,000, her net monthly income would be about $1,050. Kay claims the child support guidelines require Terry to pay $1,575 per month in child support.

There is a rebuttable presumption the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). However, the guidelines provide where a noncustodial parent earns more than $3,001 per month, the appropriate amount of child support is deemed to be within the sound discretion of the court. The support may not be less than the amount provided for in the guidelines for a noncustodial parent with a monthly net income of $3,000.

The amount of child support Terry should be required to pay was thus within the sound discretion of the district court, but in any event could not be less than $675 per month in this case. The court ordered Terry to pay $997 per month. Kay has made no showing Corey's needs exceed this amount. We determine she has failed to show the court abused its discretion.

III. Kay also contends the property distribution was inequitable. She asks for a share of Terry's 401(K) and IRA accounts, his bank accounts, and his incentive plan compensation. Kay believes she should receive at least one-half of the assets accumulated during the marriage.

The partners 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). We consider property division and alimony together in evaluating their individual sufficiency. Id. The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

Kay admits the district court divided the parties' assets equally, except where this would result in adverse tax consequences to one or both of the parties. Under Iowa Code section 598.21(1)(j), the court is required to consider the tax consequences of the property distribution. See also In re Marriage of Hogeland, 448 N.W.2d 678, 680 (Iowa App. 1989). We determine the property distribution as set forth by the district court is equitable and we affirm it.

IV. Kay claims the award of alimony was not adequate. Kay states she will never earn as much money as Terry. Although Kay expects to earn $18,000 per year, and she was awarded liquid assets worth about $132,400, which she

expects to give her investment income of between $7,000 to $8,000 per year, she requests additional alimony in order to approach the standard of living she previously enjoyed. Kay asks for rehabilitative alimony of $3,000 per month for twenty-four months, and then $1,500 per month until she remarries or dies.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). Alimony is an allowance to the exspouse in lieu of a legal obligation to support that person. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. Id. Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

We determine the district court's award of alimony is sufficient under the facts of this case. We affirm the district court on this issue.

V. Kay also asks us to require Terry to obtain a life insurance policy worth at least $72,000 and naming her as the beneficiary for so long as he is required to pay alimony. She states in this way she will be protected if Terry should meet an untimely demise.

We first note the district court did not rule on this issue and Kay did not include it in her rule 179(b) motion. Thus, Kay has failed to preserve this issue for

appeal. See In re Marriage of Davis, 462 N.W.2d 703, 704 (Iowa App. 1990). Even if Kay had preserved error, we deny her request. If the parties had remained married Kay may well have been required to support herself after Terry's death.

VI. Finally, Kay asks for 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). In the present case, we determine each party has sufficient financial resources to pay his or her own attorney fees. Costs of this appeal are assessed to Kay McGee.

AFFIRMED.

Sackett, J., concurs and Oxberger, C.J., dissents.

OXBERGER, C. J. (dissenting)

I dissent.

This is a twenty-seven-year marriage. The majority finds Terry's annual income is $120,000 but bases the child support award on $68,000.

In In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992) the supreme court concluded that overtime pay may be included as monthly income for the purposes of assessing child support.

I conclude that the incentive pay that Terry receives should be used in determining his child support obligation.

Kay testified that child support needs exceeded the $997 a month awarded by the trial court. I would increase the child support award.

I would also increase the alimony award. Kay is nearly fifty years old. She has not been in the employment market for twenty five years. I do not believe the trial court's award of $1500 per month for two years and $1000 per month thereafter is adequate based on Terry's income of $120,000 per year.

I would award Kay appellant attorney fees and tax Terry court costs.