

FILED

IN THE COURT OF APPEALS OF IOWA FEB 26 1986

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF SHIRLEY CAROL ENGLAND
AND BILLY JOE ENGLAND**

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Upon the Petition of	)	
SHIRLEY CAROL ENGLAND,	)	Filed February 26, 1986
Petitioner-Appellee,	)	
And Concerning	)	<u>5-649</u>
BILLY JOE ENGLAND,	)	<u>85-398</u>
	)	<u>85-492</u>
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Cass County (No. 975) - Keith E. Burgett, Judge.

Respondent appeals from the provisions of the decree dissolving the parties' 29-year-old marriage. **AFFIRMED; WRIT OF CERTIORARI ANNULLED.**

Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for respondent-appellant.

C. R. Hannan of Perkins, Sacks, Hannan & Reilly, Council Bluffs, for petitioner-appellee.

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

Respondent appeals from the provisions of the decree dissolving the parties' 29-year-old marriage. Respondent contends the trial court erred in the property division (1) by attributing certain property to him which actually belonged to his children; (2) in failing to include in its determination which property should go to each party and the amount of personal property awarded to the wife; (3) in awarding the wife an inequitably large amount of money; (4) in awarding alimony to the wife; and (5) in awarding the wife attorney fees. Petitioner also seeks appellate attorney fees.

The parties were married in 1955 while the husband, B.J., was in medical school. They had five children, four of whom are in or have graduated from college and one who was a senior in high school at the time of trial. Joint custody was awarded with the father being the custodial parent for the minor child, and no child support was required from the mother. The court awarded the father the family home although he did not request it, and in his brief he asks this court to order that it be sold. A discrepancy existed in the testimony as to how much B.J. actually had or would contribute to the education of the children. The judge did not address the issue in his decree, although B.J. argues in his brief that future contributions should be considered.

B.J., a physician, had gross income of \$187,000, \$184,000, and \$205,000 in the last three years preceding trial. He testified his net income was substantially less but the court held he had subtracted substantial personal expenses as office expenses. The court awarded the wife, Shirley, alimony of \$1,500 per month. She is 53 years old, presently unemployed although trained as a nurse, and suffering from emotional problems.

The court noted B.J.'s testimony as to valuation of the assets tended to minimize his assets and increase his liabilities. The court opined it had substantial

doubt as to his credibility. It also noted that at times his testimony varied with ownership as indicated on his tax returns; therefore, the court wrote it did not entirely accept his testimony at face value.

The court awarded a lien for one-half the value of the home to Shirley, \$10,000 of which was payable within 30 days of the decree. The court made other economic provisions for the wife and husband. He ordered B.J. to pay Shirley's attorney fees because his "lack of candor has caused unnecessary legal expense in the handling of this matter."

This decree was filed February 15, 1985. B.J.'s notice of appeal was filed March 6, 1985. No money was paid to Shirley within 30 days pursuant to the dissolution decree. The application for citation for contempt was served March 21, 1985. B.J. filed his resistance on April 4 stating he had filed the letter of credit which stayed the proceedings. The trial judge found him to be in willful contempt, and sentenced him to thirty days in jail. He withheld mittimus for 24 hours allowing respondent time to comply with the provisions of the decree. Respondent filed a petition for a writ of certiorari on this issue which has been consolidated with the appeal.

I. Economic Provisions. Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

A. Property Division. Before addressing B.J.'s three contentions regarding the property division, we shall briefly review the salient features of division of marital property in Iowa. Iowa Code section 598.21(1) (1983) does not statutorily sanction a percentage division of property. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa Ct. App. 1984). Rather, the ultimate issue is whether the distribution is equitable under the circumstances. In re Marriage of Callenius, 309 N.W.2d 510, 514 (Iowa 1981).

B.J. submits the Camaro automobile, grand piano, and musical instruments, valued at \$7,000, \$2,500, and \$9,875, respectively, should not have been considered in the division of property because such items belong to his children. While we have little doubt the children use such items, we are unable to find the ownership is exclusively vested in the children. No evidence exists that the children paid any of their own money towards the purchase of such items. Thus, these items were properly considered in the property division.

B.J. also maintains that trial court failed to determine which party should get which items of personal property and that Shirley was awarded too much personal property. The parties agreed to an equal division of personalty and B.J. submits the household goods were valued at \$7,035 with Shirley receiving \$5,250 and B.J. the remaining \$1,785. B.J. contends this is not an equal division. Shirley explains the apparent discrepancy by indicating that in their house valued at \$65,000, it was unlikely that only \$1,785 was within the premises as claimed by B.J. The trial court allowed each party to retain the household goods and appliances in their possession except for the \$2,500 piano, which was awarded to B.J. After reviewing the record and credibility findings of the trial court, we decide to leave the division of this property intact.

B.J.'s final claim regarding the property division involves the disposition of the family home and the amount of cash awarded to Shirley. Neither party wanted to live in the family home, valued at \$65,000, after the dissolution. The trial court awarded the home to B.J. and awarded Shirley a lien of one-half the value (i.e., \$32,500). The trial court set up a payment schedule as follows: \$10,000 to Shirley thirty days after the decree and four annual installments of \$5,625, including 10% per annum interest. Shirley was also entitled to receive a lump sum payment of \$30,000 no later than five years after the entry of the decree. Because there is no dispute, we order that the house be sold.

The trial court awarded the property as follows:

	<u>Shirley</u>	<u>B.J.</u>
House	\$ 0.00	\$ 65,000.00
Automobiles	2,750.00	
Van		3,000.00
Camero		7,000.00
Office Equipment	0.00	15,000.00
Cash	0.00	1,000.00
Furniture and Appliances	0.00	
Piano		2,500.00
Accounts Receivable	0.00	15,000.00
Drug Inventory	0.00	5,000.00
Office Equipment	0.00	5,000.00
Keogh Plan	25,433.34	25,433.34
Capital Account	3,000.00	3,000.00
Insurance	14,604.91	18,770.13
Musical Instruments	0.00	9,875.20
Retirement Account	<u>1,398.04</u>	<u>0.00</u>
TOTALS	\$ 47,186.29	\$175,578.67

In the trial court's decree, after deducting the cash payments B.J. must make to Shirley, and adding in the value of the household goods, B.J. has \$111,293 and Shirley has \$114,936. B.J. submits a proposal to have the house sold, split the proceeds equally, and then he would pay Shirley \$20,626 so that he would have \$103,062. The flaw in B.J.'s proposal is that he does not account for the Camaro, piano, and instruments awarded him valued at \$19,375, the household goods which were arguably divided fairly, nor the cash and accounts receivable. Any difficulty in valuation appears properly attributable to B.J., who must bear the consequences. We see little reason to disturb the trial court award.

B. Alimony. B.J. maintains the alimony award of \$1,500 per month is not supported by the facts. As the trial court ordered, alimony will be provided by B.J. until Shirley dies, remarries, or reaches age 62 (she is now 53) when payment will be reduced in proportion to the social security benefits she receives. The alimony award is considered in conjunction with the property division. See In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979); In re Marriage

of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). The relevant standard for this case is that alimony is awarded according to each party's earning capacity, the present standard of living, and the relative needs of each party. See Iowa Code § 598.21(3); In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981). The parties differ on their disposable income and expenses.

As a physician, B.J. will always have greater earning capacity than Shirley. However, Shirley recently received her nursing degree. Notwithstanding her emotional problems, it is not uncommon for nurses to earn between \$14,800 and \$22,000 annually. Shirley, under the trial court award, will receive \$18,000 annually (\$1,500 x 12 months).

B.J. will continue his practice in which his net income has been \$60,000 annually. B.J. has agreed to pay for the college expenses of the parties' two youngest children. B.J. claims to have a net income of \$32,455 annually after deducting college expenses of \$10,000 and personal expenses were \$24,864, which according to B.J. leaves few funds to pay alimony. We find that B.J.'s income has been \$60,000 for four years and that after personal expenses and alimony are paid he still will have \$7,000 annually to dispose of at his choice.

We note that Shirley sacrificed her education to further B.J.'s career and raise their children. Even though B.J. subsequently paid for Shirley's education, the alimony award is justified. We arrive at this conclusion after considering In re Marriage of Janssen, 348 N.W.2d 251 (Iowa 1984); In re Marriage of Horstman, 263 N.W.2d 885 (Iowa 1978); In re Marriage of Hayne, 334 N.W.2d 342 (Iowa Ct. App. 1983). In Hayne, we stated:

The equitable principles that we have recognized and enforced in the past require, in dissolution cases, that the spouse with the lesser earning capacity is entitled to be supported for a reasonable time in a manner closely resembling the standards existing during the marriage as possible to the extent that it is possible without destroying the right of the other party providing the income

to enjoy at least a comparable standard of living as well. Once the dependent spouse's standard of living is assured, there is no reason, in equity, for the supporting spouse to provide still more.

Id at 351.

We feel the trial court's alimony award embodies these principles.

C. Attorney Fees. Shirley was awarded \$2,000 in trial attorney fees and seeks \$4,178, in addition, for trial and appellate attorney fees.

The primary consideration in awarding attorney fees in a dissolution proceeding is the resources of the parties. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982). The court considers the resources of the party requesting such fees, the ability of the other party to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981).

While Shirley alleges that B.J. forced her to incur unnecessary expenses to defend the cash and alimony award, and that attorney fees are awarded to enable parties to present their cases, Locke v. Locke, 263 N.W.2d 694, 695 (Iowa 1978) (citing Iowa Code § 598.11 (1977)), we find instructive guidance in Griffin v. Griffin, 356 N.W.2d 606 (Iowa Ct. App. 1984), where a wife who had independent income and received property pursuant to the property division was not entitled to attorney fees. While Shirley is capable of paying a portion of her attorney fees, we uphold the trial court's \$2,000 award and award her \$2,500 for appellate attorney fees.

II. Contempt. B.J.'s final claim is that the trial court erred in finding him in contempt for nonpayment of money due under the dissolution on the ground he had filed his notice of appeal and filed an irrevocable letter of credit in favor of Shirley. Thus, B.J. asserts "willfulness" could not be implied from

his actions. The respondent filed an application for writ of certiorari in the contempt action which has been consolidated with this appeal.

B.J. claims his attorneys informed him that the filing of the irrevocable letter of credit stayed the proceedings so he did not make the required payment. Iowa Rule of Appellate Procedure 7 states, in relevant part:

- a. No appeal shall stay proceedings under a judgment or order unless Appellant executes a bond with sureties, to be filed with and approved by the Clerk of Court where the judgment or order was entered. (emphasis added).

B.J.'s obligations were due on March 15 and a contempt action was filed on March 22. The letter of credit was filed on March 29. B.J. was held in contempt on April 15.

A letter of credit is not a bond so the proceedings were not stayed under Rule 7. See Heishman v. Jenkins, 372 N.W.2d 506, 509-10 (Iowa 1985) ("A deposit of cash is not a supersedeas bond. A supersedeas bond is a written promise to perform certain conditions, which may or may not be secured by a deposit of cash. No such promise was entered into by [the party held in contempt]. Moreover, although a supersedeas bond may be conditioned upon the posting of a certain sum of cash, the terms of such bond must be approved by the court rather than its clerk where the judgment does not involve the payment of money.")

Next, B.J. raises the defense of absence of willfulness. He notes that the letter of credit exceeded 125% of the obligation and that he acted upon advice of counsel. The law in this area was well-summarized in Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980), as follows:

Exercise of the contempt power is a delicate one requiring care to avoid arbitrary or oppressive conclusions. Gibb v. Hansen, 286 N.W.2d 180, 184 (Iowa 1979); Knox v. Municipal Court, 185 N.W.2d 705, 707 (Iowa 1971).

Only willful disobedience of a court order will justify a conviction for contempt. Lane v. Oxberger, 224 N.W.2d

245, 247 (Iowa 1974). In this context a finding of disobedience pursued "willfully" requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not. Huston, 255 Iowa at 548, 122 N.W.2d at 898.

Contempts may be indirect (constructive) or direct. An indirect contempt is an act not committed in the presence of the court, but at a distance from it, which tends to degrade the court or obstruct, interrupt, prevent, or embarrass the administration of justice. Knox, 185 N.W.2d at 707.

See also Phelps v. District Court, No. 84-1832, slip op. at 9 (Iowa Sup. Ct. Jan. 15, 1986) (The burden of proof in a contempt proceeding was changed from clear and satisfactory proof to beyond a reasonable doubt.); Skinner v. Ruigh, 351 N W 2d 182, 184-85 (Iowa 1984); Bevens v. Kilburg in and for Linn County, 326 N W 2d 902, 904 (Iowa 1982).

The contempt period was, at least, from March 15 to March 28. The trial court's record on the contempt hearing indicates only these dates were used and B J.'s assertions fail to explain why he failed to act from March 15th through the 28th. Compare Bevens, 326 N.W.2d 902; with Heishman, 372 N.W.2d 506. We are not confronted with an inadequate record of contempt as in Heishman. Therefore, respondent's petition for a writ of certiorari is annulled.

AFFIRMED; WRIT OF CERTIORARI ANNULLED.