

IN THE COURT OF APPEALS OF IOWA

No. 3-176 / 92-915

FILED

NOV 29 1993

CLERK SUPREME COURT

000423

**IN RE THE MARRIAGE OF SUZANNE V. MUHLBAUER
AND DARYL L. MUHLBAUER**

Upon the Petition of
SUZANNE V. MUHLBAUER,

Appellant/Cross-Appellee,

And Concerning
DARYL L. MUHLBAUER,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Crawford
County, Richard Vipond, Judge.

The wife appeals and the husband cross-appeals various
economic provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

R. Laubenthal of Smith, Peterson, Beckman & Willson,
Council Bluffs, for appellant.

Dee Ann Wunschel and Russell Wunschel of Wunschel &
Eich, Carroll, for appellee.

Considered by Oxberger, C.J., Schlegel, J., and
Peterson, S.J.* Donielson, J., takes no part.

*Senior judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

PETERSON, S.J.

000-1214

Suzanne and Daryl Muhlbauer were married in 1971. Their oldest child, Paul, is an adult and not affected by the terms of the dissolution decree. The second child, Jennifer, was born on August 9, 1973. She attends college in Sioux City. The youngest child, Danielle, was born on February 22, 1979, and is a minor.

Daryl is self-employed as a farmer. His parents gave him an eighty-acre farm with a farmhouse. The parties substantially improved the house during the marriage. The parties have purchased several additional farms and at the time of the dissolution owned 592 acres, which had a total value of \$1,000,500. The district court found Daryl's average income was \$59,000, and his net monthly income was \$2,222.

Suzanne had been employed part-time for an insurance company for eight years. Her income was slightly over \$3,000 per year. She testified she would soon have an opportunity to work full-time, and her income then would be \$10,400. Suzanne stated she would like to go back to school, but she did not have any specific plans to do this.

The district court entered a decree of dissolution for the parties on April 23, 1992. The court set aside to Daryl the farm his parents had given him and set aside to Suzanne \$15,000 which she had inherited. The marital property was divided so that each party received net marital assets worth \$316,083. Included in the property

awarded to Suzanne were two farms; the Zimmerman farm, which contains about 160 acres; and the Price farm, which contains about forty acres. Daryl was awarded the marital residence, all other farmland, and the farm equipment. In order to equalize the property division, Daryl was ordered to pay Suzanne a cash property settlement of \$28,000. Daryl was given the right to rent the farms awarded to Suzanne for the 1992 crop year.

The parties were granted joint legal custody of Danielle, with Suzanne having primary physical care. As noted, the court found Daryl's net monthly income was \$2,222. The court found Suzanne would be receiving \$16,730 each year in rent for the farms awarded to her in addition to her earned income. The court concluded her net monthly income was \$1,830. The court then applied the guidelines and ordered Daryl to pay \$500 per month in child support for Danielle. He was ordered to pay \$600 for each of the four quarters Jennifer was expected to remain in school. No alimony was awarded. Daryl was ordered to pay \$15,500 for Suzanne's trial attorney fees in addition to \$500 he had paid for temporary attorney fees.

Suzanne filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for new trial. Daryl also filed a rule 179(b) motion. The district court overruled the motions. Suzanne appealed, and Daryl cross-appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district

000426

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. Suzanne contends the district court should have awarded her rehabilitative alimony of \$500 per month for two years. She points out that she did not work outside the home for many years because of the parties' agreement she would take care of their children. Suzanne believes she now needs additional education in order to increase her earning capacity.

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). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of reeducation or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989).

We note Suzanne had been offered a full-time position and that she had no firm education plans. Furthermore,

Suzanne has sufficient income to continue her education if in fact she desires to do so. We affirm the district court on this issue.

III. Suzanne claims the division of property was not equitable to her. As noted above, Suzanne was awarded two farms. Daryl was ordered to pay the mortgages due on the farms. The Zimmerman farm is subject to a mortgage of \$103,320, and the Price farm is subject to a mortgage of \$7,323.

Suzanne believes Daryl should be required to pay the indebtedness on the two farms awarded to her immediately so that she will be able to sell the farms or borrow against them. In the alternative, she asks for a lien in the amount of the mortgages against Daryl's equity in the real property awarded to him.

The partners in 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). 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.

Under the dissolution decree Daryl was ordered to pay total debts of \$504,029. If we were to require him to immediately pay these mortgages, he would most likely be required to sell property, which would result in a decrease in his income and subsequently his ability to pay the

000423

remainder of the debts. We determine it would be inequitable to require him to immediately pay the mortgages on the property awarded to Suzanne.

However, we agree that Suzanne should be given a lien against Daryl's equity in the real property awarded to him in the amount of \$110,643. The purpose of this lien is to secure Daryl's performance under the decree to pay the mortgages due on the two farms awarded to Suzanne. We modify the dissolution decree to add this provision. We affirm the distribution of property in all other respects.

IV. In his cross-appeal, Daryl asks to be allowed to rent the farms awarded to Suzanne for a period greater than one year. He asks for the exclusive right to rent these farms for ten years.

We decline to include such a provision in the dissolution decree. Daryl's request to have the exclusive right to rent the two farms would unduly restrict Suzanne's rights in the property. We note that where parties have elected to sever their matrimonial ties, the courts should, wherever practicable, accommodate their decision completely. In re Marriage of Webb, 426 N.W.2d 402, 405 (Iowa 1988).

V. Finally, Suzanne seeks 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). We determine Daryl should pay \$500 towards Suzanne's attorney fees for this appeal.

In summary, we have modified the dissolution decree to give Suzanne a lien in the amount of \$110,643 on Daryl's equity in the real property awarded to him under the dissolution decree in order to secure his payment of the mortgages due on the two farms awarded to her. We have affirmed the district court on all other issues. Costs of this appeal are assessed one-half to Suzanne and one-half to Daryl.

AFFIRMED AS MODIFIED.