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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-520 / 92-54

IN RE THE MARRIAGE OF BILLIE RAE BELL AND JOHN MICHAEL BELL

Upon the Petition of

BILLIE RAE BELL,

Appellant/Cross-Appellee,

And Concerning

JOHN MICHAEL BELL,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Robert O. Frederick, Judge.

The wife appeals and the husband cross-appeals from various economic provisions of the district court's decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Thomas P. Schlapkohl, Des Moines, for appellant.

Max H. Buck of Grimes, Buck, Schoell & Beach, Marshalltown, for appellee.

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

DONIELSON, J.

John and Billie Bell were married on June 8, 1968. The parties had three children. The oldest two children, Jason and Christian, are adults and are not affected by the terms of the dissolution decree. The youngest child, Morgan, was born on November 13, 1981. The parties lived in Marshalltown, Iowa, during the marriage.

Billie was approximately forty years old at the time of the dissolution hearing. She did not work outside the home during most of the marriage. Billie has a high school degree. After the parties separated in August 1989, Billie moved to Des Moines and obtained full-time employment at a bank as a clerk/typist. She voluntarily left that employment and obtained a part-time job as a receptionist at a law firm. Billie was currently earning $7,800 and had net monthly income of $503. If Billie had kept her full-time employment at the bank she would have income of $12,000 and net monthly income of $782.

John was about forty-six years old at the time of the hearing. When the parties were married, John had completed his education as a mortician and was serving a one-year apprenticeship. He began employment at Pursel-Davis, Inc., a funeral home in Marshalltown, in December 1968. He was employed there as the manager of the funeral home at the time of the trial. He earned $54,681 in 1990 and had net monthly income of $2,954.

Shortly before the dissolution trial, Pursel-Davis was purchased by Sietsema-Vogel, Inc. Trent Vogel, the sole shareholder of Sietsema-Vogel, testified his son, R. T. Vogel, was going to become the manager of Pursel-Davis and John would be employed only as a funeral director. Under this plan John's income would be reduced to $30,000 and he would have net monthly income of $1,841.

Billie filed a petition for dissolution of marriage on August 1, 1990. Trial was held on July 23, 1991. The parties agreed to joint legal custody of Morgan, with Billie having primary physical care.

The district court entered its decree on August 22, 1991. The court calculated John's child support obligation using net monthly income of $1,841 for John and $782 for Billie. The court ordered John to pay child support of $352 per month. Billie was awarded alimony of $400 per month for ten years.

The court set aside to John a money market account and a certificate of deposit (CD) which were purchased with money he inherited. This property had a value of $39,619. The court divided the marital property to give Billie property worth $97,101 and John property worth $120,321. John was ordered to pay $2,000 towards Billie's attorney fees.

Billie filed a motion for new trial and a motion to enlarge. She claimed Vogel's testimony was a surprise and a new hearing should be held on the issue of John's

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income. She also asked the court to award her one-half of the money market account and CD. While the motion was pending, John paid Billie the amount he owed her under the property division. Billie filed a notice of nonwaiver and accepted the payment.

The district court denied the motion for new trial. The court did award Billie one-half of the money market account and CD. After this modification, Billie was awarded property worth $116,910 and John was awarded property worth $140,130.

Billie appealed and John cross-appealed.

I. Scope of Review.

Our review of this equitable action is de novo. Iowa R. App. 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. Appellate Waiver Doctrine.

We first address John's argument that Billie waived her right to appeal by accepting the payment of the amount due to her under the division of property in the decree.

A party may waive his or her right to appeal by accepting the benefits of a decree. Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987). The party relying on the

appellate waiver doctrine has the burden to demonstrate a voluntary and knowing waiver. Id. In the case of Medd v. Medd, the supreme court found that where an appellant had accepted payment after trial, but had notified appellees by letter that he did not intend to waive his right to appeal, the appellant had not waived his right to appeal. 291 N.W.2d 29, 32 (Iowa 1980).

In this case we find John has failed to show Billie voluntarily and knowingly waived her right to appeal. At the time she accepted the payment, Billie filed a notice stating she was not waiving her right to appeal. We conclude the appellate waiver doctrine does not apply here.

III. Motion for New Trial.

Billie contends the district court should have granted a new trial under Iowa Rule of Civil Procedure 244. She states she was surprised by Vogel's testimony that John's income was going to be reduced to $30,000. She also states that after the trial she discovered evidence that John's employment contract prohibited Vogel from reducing his salary. She points out that the awards of child support and alimony were based on John's salary.

In ruling upon a motion for new trial, broad but not unlimited discretion is vested in the trial court, and the grant of a new trial will not be disturbed unless an abuse of discretion is shown. Kiner v. Reliance Insurance Co., 463 N.W.2d 9, 13 (Iowa 1990). We will not find an abuse of

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discretion unless it is shown that the trial court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. Id.

We conclude the district court did not abuse its discretion here. Vogel specifically testified he was going to reduce John's salary and the district court made its awards based on this evidence. If later circumstances show John's salary is not reduced, or if John obtains other employment at a higher income level, Billie may bring an action for modification.

IV. Child Support.

Billie contends the district court's award of child support does not follow the child support guidelines. She also argues that John's child support obligation should be based on his previous net monthly income of $2,954.

There is a rebuttable presumption that 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). The court cannot vary the amount of the child support without a written finding that the guidelines would be unjust or inappropriate. In re Marriage of Powell, 474 N.W.2d 531, 533 (Iowa 1991). The court must determine the parents' current monthly income from the most reliable evidence presented. Id. at 534.

We agree with the district court that the most reliable evidence here came from John's employer, who testified John's income would be reduced to $30,000. We therefore apply the child support guidelines using the amount of $1,841 for John's net monthly income and $782 for Billie. However, our calculation shows John should pay $433 per month for the support of Morgan, not $352 as calculated by the district court. We therefore modify the dissolution decree to order John to pay child support of $433 per month. We make this modification retroactive to the date of the decree.

V. Alimony.

Billie contends the award of alimony should be increased both as to its amount and its duration. She asks for $650 per month for ten years and then $400 per month until her death or remarriage. In his cross-appeal, John contends the award of alimony should be eliminated.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. In re Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989). 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.

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We find the district court's alimony award of $400 per month for ten years is appropriate under the circumstances of this case. Billie has been out of the job market for many years and her earning capacity is currently much less then that of John. We determine the award of alimony for ten years should be sufficient to allow her to become self-supporting.

VI. Property.

Billie claims the district court's distribution of property was inequitable to her. She states she should be awarded a cash settlement of $11,610 in order to equally divide the parties' property. She also asks to be awarded some specific household goods. In his cross-appeal, John asks that his inherited property, the CD and money market account, be set aside 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 Iowa Code section 598.21(1) (1991), a court should divide all property, except inherited property or gifts received by one party, equitably between the parties. The intent of the donor and the circumstances of

the gift or inheritance control whether the gift or inheritance is to be set off in the dissolution. In re Marriage of Hoffman, 493 N.W.2d 84, 89 (Iowa App. 1992). We no longer look at whether the asset has been placed in joint ownership. Id.

We determine John's inherited property should be set aside to him. We therefore modify the dissolution decree to eliminate the portion of the dissolution decree awarding Billie one-half of the CD and money market account. We affirm all other provisions of the property distribution.

VII. Trial Attorney Fees.

Billie contends she should have been awarded an additional $916 for her trial attorney fees. The district court ordered John to pay $2,000 towards her trial attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn the award the complaining party must show that the trial court abused its discretion. Id. We find Billie has failed to show the district court abused its discretion here.

VIII. Appellate Attorney Fees.

Both Billie and John seek 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

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parties' financial positions. Id. 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. Id. at 104. We determine each party should pay his or her own attorney fees for this appeal.

IX. Summary.

We have modified John's child support obligation in order to comply with the child support guidelines, and have ordered him to pay child support of $433 per month for the parties' minor child. We have also modified the property distribution to set aside to John his inherited property, a CD and money market account. We affirm the district court's decree of dissolution on all other issues. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.