IN THE COURT OF APPEALS OF IOWA

No. 0-701 / 99-1383
Filed March 28, 2001

IN RE THE MARRIAGE OF SUZANNE KAY HURLEY AND JAMES MARTIN HURLEY

Upon the Petition of
SUZANNE KAY HURLEY,
Petitioner-Appellee,

And Concerning
JAMES MARTIN HURLEY,
Respondent-Appellant.

FILED
MAR 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Fayette County, James L. Beeghly, Judge.

James Hurley appeals various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Larry F. Woods, Oelwein, for appellant.

Joseph R. Sevcik of Snow, Knock, Sevcik, Betterton & Hinze, Cedar Falls, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

James Hurley appeals from the economic provisions of the decree dissolving his marriage to Suzanne Hurley. We affirm.

I. Background Facts & Proceedings.

James and Suzanne Hurley's thirty-two-year marriage was dissolved in July 1999. At the time of the dissolution, James was fifty-one and Suzanne was fifty. One of their six children was a minor.

James has been employed by the railroad since 1971. In 1994 he transferred from Oelwein to Clinton, and in 1995 he transferred to De Soto, Missouri. He earns roughly $58,000 per year.

Suzanne was a homemaker for much of the parties' marriage. In 1991 she began working part-time. Since 1997 she has worked full-time at Goodwill Industries earning roughly $15,000 per year. She did not move with James from Oelwein when his position with the railroad there ended.

The district court's dissolution decree included the following provisions: (1) James was ordered to pay Suzanne $1000 in alimony per month until she reaches age sixty-two; (2) Suzanne was awarded an interest in James's Tier II Railroad Retirement benefits; (3) Suzanne and James were each awarded $4725 in cash; and (4) James was ordered to pay $1500 of Suzanne's attorney fees. James appeals these economic provisions.

II. The Merits.

Our review is de novo. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We examine the entire record and adjudicate anew

the issues properly presented on appeal. *Id.* We give weight to the fact findings of the district court, but are not bound by those findings. *Id.*

A. Alimony.

James claims Suzanne should receive no more than $300 of alimony per month for three years. Alimony is not an absolute right. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). A discretionary award of alimony may be made after considering those factors listed in Iowa Code section 598.21(3). *In re Marriage of Sychra*, 552 N.W.2d 907, 908 (Iowa Ct. App. 1996). Among those factors are the length of the parties' marriage, the parties' ages and health, the parties' earning capacities, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. Iowa Code § 598.21(3) (1999).

Given these factors, Suzanne received an appropriate alimony award. The parties were married thirty-two-years. By the time their marriage was dissolved, James's earning capacity significantly exceeded Suzanne's. He can afford a reasonable alimony obligation even though his choice to make weekly trips between Missouri and Oelwein increases his other expenses. An alimony award of $1000 per month for roughly eleven years balances James's ability to pay with Suzanne's needs. *See, e.g., Kurtt*, 561 N.W.2d at 387 ("When determining the appropriateness of alimony, the court must consider '(1) the earning capacity of each party; and (2) present standards of living and ability to pay balanced against relative needs of the other.'") (citations omitted). We affirm.

B. Retirement benefits.

James also claims Suzanne received an excessive share of his retirement benefits. As a railroad employee, James will be entitled to receive benefits pursuant to the Railroad Retirement Act. *See* 45 U.S.C. §§ 231-231u (1994). "The Act provides two tiers of benefits: Tier I benefits are equivalent to those the employee would receive if covered by the Social Security Act, while Tier II benefits resemble a private pension and are based on earnings and career service." *In re Marriage of Conger*, 492 N.W.2d 715, 716 (Iowa Ct. App. 1992) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75, 99 S. Ct. 802, 804-05, 59 L. Ed. 2d 1, 6-7 (1979)). Only the latter benefits are divisible property subject to distribution upon a dissolution of marriage. *Conger*, 492 N.W.2d at 716.

The district court awarded Suzanne an interest in James's Tier II benefits according to a formula that complied with the model language distributed by the Railroad Retirement Board. The district court's dissolution decree stated the following:

> Suzanne's share of the TIER II benefits will be computed by multiplying the divisible portion of James' monthly benefit by a fraction, the numerator of which is the number of years James worked for the railroad employer during the marriage ([28]) and the denominator of which shall be the total number of years James was employed by the railroad, and then dividing the product by 2.

James argues that, at a minimum, the numerator in the above-quoted formula should be 15.83 rather than 28 because federal law prohibited the district court from awarding Suzanne a portion of any Tier II benefits he accrued prior to September 1983. James misreads the applicable law. The United States Supreme Court initially interpreted the Railroad Retirement Act to prohibit a

spouse from receiving an interest in any benefits his or her spouse could become entitled to under the Act. *Hisquierdo*, 439 U.S. at 583-87, 99 S. Ct. at 809-11, 59 L. Ed. 2d at 12-14. Congress later amended the Act, characterizing Tier II benefits as "community property" subject to distribution upon divorce or other legal separation. Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, § 419, 97 Stat. 411, 438 (1983) (codified as amended at 45 U.S.C. § 231m). Congress's amendment to 45 U.S.C. § 231m applies to "annuity amounts *payable* for months beginning [with September 1983]." Pub. L. No. 98-76, § 419(b), 97 Stat. 411, 438 (emphasis added); *see also* 20 C.F.R. § 295.1(a) (2000). Significantly, Congress did not provide the amendment to § 231m would apply only to annuity amounts *accruing* in or after September 1983. *Compare* Pub. L. No. 98-76, § 419(b), 97 Stat. 411, 438 *with* Pub. L. No. 98-76, § 104(d), 97 Stat. 411, 416 (stating the amendments made by section 104(d) to § 231a and § 231d "shall be effective with respect to annuities *accruing* after [August 1983]") (emphasis added). *See generally In re Marriage of Benson*, 545 N.W.2d 252, 253-54 (Iowa 1996) (providing background information on pension plans). Suzanne is not barred from receiving a portion of the Tier II benefits James accrued before September 1983.

Alternatively, James argues Suzanne should receive little to none of his Tier II benefits because the value of those benefits have been increased by his willingness to relocate and maintain his employment with the railroad. His argument is based in part on evidence not in the record at the time of the parties' dissolution trial. This evidence includes estimates from the Railroad Retirement

Board showing what James's benefits may have been had he quit working for the railroad in 1995 and estimates of what his benefits could be if he worked for the railroad until 2008. Even if this evidence was in the record, we would not reduce Suzanne's share of James's Tier II benefits. The district court's division gives Suzanne "a just and equitable share of the property [she and James] accumulated through their joint efforts." *See Conger*, 492 N.W.2d at 716-17 (quoting *In re Marriage of Havran*, 406 N.W.2d 450, 452 (Iowa Ct. App. 1987)). Moreover, calculating Suzanne's exact share of James's Tier II benefits before those benefits are payable would prevent her from earning a reasonable return on her interest in the benefits. *See Benson*, 545 N.W.2d at 257 (citing Steven R. Brown, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 39 Baylor L. Rev. 1131, 1146 (1987)). We affirm.

C. Cash.

James further claims the amount of cash each party received pursuant to the dissolution decree should be adjusted to reflect the $4000 Suzanne allegedly removed from the parties' joint savings account when she filed for the dissolution. Specifically, he claims awarding $6725 in cash to him and $2725 in cash to Suzanne will result in an equal division of the parties' cash assets.

There is little evidence the $4000 at issue even existed other than James's testimony and the parties' respective statements of affairs.[1] Regardless, a district court's division of property must be equitable—not equal. *In re Marriage of*

[1] Suzanne's statement of affairs stated she had $2000 in her own bank account. James's stated she had $4000 in her account.

Bonnette, 584 N.W.2d 713, 714 (Iowa Ct. App. 1998). James received a greater share of the parties' retirement accounts and other securities. He also concealed money from Suzanne while their dissolution trial was pending—some of this money may never been divided between the parties. We affirm.

D. Attorney Fees.

Finally, James claims the district court should not have required him to pay $1500 of Suzanne's attorney fees. He claims the award was inappropriate because the parties stipulated they would be responsible for their own attorney fees and Suzanne never requested such an award. "A stipulation settling an issue in a dissolution proceeding is a contract between the parties which becomes final when accepted and approved by the court." *In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa Ct. App. 1995). Because the district court never accepted and approved the parties' oral stipulation regarding attorney fees, the stipulation was not binding on the court. *See id.* Moreover, although Suzanne never explicitly stated she was requesting an award of attorney fees, the issue was before the court at trial. After hearing the court's proposed division of the parties' $9450 in cash assets, Suzanne's attorney noted the proposal raised "an issue as to whether or not [James] then should be ordered to pay some of [Suzanne's] fees because he has a much higher income." We affirm.

Suzanne requests we also order James to pay $2500 of her appellate attorney fees. In evaluating such requests, we consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re*

Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). In light of these factors, we order James to pay $1000 of Suzanne's appellate attorney fees.

We have considered all the claims James has presented on appeal, whether discussed in detail or not. We affirm the district court.

AFFIRMED.