IN THE COURT OF APPEALS OF IOWA

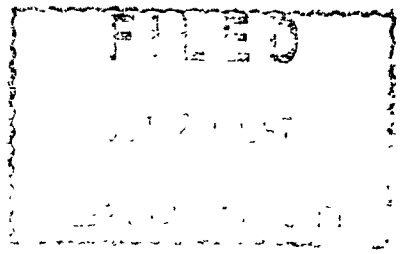
No. 7-305 / 96-1314

000267

IN RE THE MARRIAGE OF DOUGLAS J. MOCHAL AND TERRY D. MOCHAL

Upon the Petition of
DOUGLAS J. MOCHAL,
Appellant,

And Concerning
TERRY D. MOCHAL,
Appellee.



Appeal from the Iowa District Court for Buchanan County, Alan Pearson, Judge.

Appeal of various economic provisions of a modification of decree of dissolution of marriage. **AFFIRMED IN PART; REVERSED IN PART.**

Charles A. Hallberg, Oelwein, for appellant.

A. J. Flickinger, Independence, for appellee.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Scope of review. In this equity action, our scope of review is de novo. Iowa R. App. P. 4; *State ex rel. Tack v. Sandholdt*, 519 N.W.2d 414, 416 (Iowa App. 1994). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Calculation of child support. The marriage of Douglas and Terry Mochal was dissolved by a decree of dissolution on April 12, 1988. The decree provided that Douglas was to pay $100 per week for child support for the parties' three children. On modification in 1996, the district court found Douglas's net monthly income was $2166 and Terry's was $487. Two of the parties' children were still minors and the court increased Douglas's child support obligation to $743 per month. It ordered Douglas to pay $150 per month in additional support for the parties' oldest child who was enrolled in college. Douglas argues the court should not have considered his extensive overtime in modifying the child support.

"[O]vertime wages come within the definition of gross income used to calculate the proper award." *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993) (citing *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992)). Overtime pay is excluded from the computation of monthly income when overtime

is speculative or uncertain, or where a parent must work overtime to meet a burdensome child support obligation. *Id; accord In re Marriage of Petit*, 493 N.W.2d 865, 868 (Iowa App. 1992); *In re Marriage of Lalone*, 469 N.W.2d 695, 698 (Iowa 1991).

In this case, however, Douglas's overtime is not speculative. Although it is not guaranteed by his employer, Douglas has chosen to work long overtime hours to improve the family's standard of living. With the information the court had before it, the amount of child support clearly fell within the guidelines amount. Should the employer's situation change, as Douglas argues may happen, we would be faced with a different scenario. That, however, is speculative and not reflective of Douglas's current level of income. We accordingly find the trial court correctly included Douglas's overtime pay in its calculation of the child support obligation.

II. Testimony. Douglas argues the district court incorrectly declined to hear the testimony of Deann Patee or Lou Sanbouef, the company's bookkeeper and vice-president respectively, as it related to the issue of overtime. Douglas had an opportunity to present evidence on the issue of his overtime earnings, but he represented that his proposed witnesses would address the pending sale of the company, not the issue of overtime, and the court correctly concluded the pending sale was not an issue in the modification hearing. Moreover, Douglas made no request for an offer of proof which would be the proper remedy when the court limits the testimony. The court must make its decision on the evidence presented and

"[n]either the court nor opposing counsel can know whether evidence which a party desires to present is competent or material until it is offered." 75 Am. Jur. 2d *Trial* § 436 (1991). We thus affirm the district court on this issue.

III. Clarification of stock payment. As a condition of his employment with Iowa Ham Canning, Douglas was required to buy company stock. He used family assets to do so and the trial court, in 1988, divided the value of the stock between Douglas and Terry. The 1988 decree stated:

> Terry is awarded one-half of the value of the Iowa Ham Canning Stock. However, payment of such award is deferred until such time as Douglas *retires, dies or is fired.* Terry's one-half interest in such stock shall be measured by the value of the stock at the date on which it is cashed in. This award is without interest. (Emphasis added).

A problem arose when, in 1995, the company liquidated some of the stock, presenting a triggering event not contemplated by the original decree. Terry, in her petition for modification, requested one-half the proceeds of the liquidated stock. The same judge presided over the modification hearing and the original dissolution action and modified the language as follows:

> Terry Mochal is awarded one-half the value of the Iowa Ham Canning stock. Payment of the award is deferred until Douglas Mochal retires, dies, is fired *or the stock is liquidated. Terry Mochal shall receive one-half the value of the stock at the time the event triggering distribution occurs. The* award is without interest *and is intended to achieve an equal distribution of this asset and spread the risk of market rises and declines evenly between the parties. (Changes italicized).*

The court reasoned, "It was clearly not within the Court's contemplation that there would be a distribution of proceeds prior to one of the three named events occurring." Douglas contends the district court improperly modified a property settlement award by amending the stock distribution provisions of the 1988 decree. While it is true that property divisions made under Iowa Code section 598.21(11) are not subject to modification, the district court in this case did not modify a property award. It only added a condition upon which payment is due; that is, it clarified the method of distribution. The division of the assets was not changed.

We decline to characterize this as a modification of a property award; we therefore affirm the district court.

*IV. **Stock and dividends.***

*A. **Past dividends.*** Since the 1988 decree, Douglas has received substantial dividend distributions from the Iowa Ham Company. Terry argues she should have been been awarded one-half the distributions. We note that Terry failed to cross-appeal the denial of past dividends and we can thus afford her no relief on appeal. *See Boyd v. Boyd & Boyd, Inc.*, 386 N.W.2d 540, 545 (Iowa App. 1986).

B. Future dividends. On modification, the district court stated that the "payment of dividends was outside the Court's contemplation in the original decree [and this] Court declines to award [to Terry] retroactively one-half of the dividends paid." Yet, the court then awarded to each party one-half of any *future* dividend distributions paid on this stock.

The modification decree is inconsistent in denying past but awarding future dividends. The same reasoning should apply to all dividends, past and future. The court recognized that the original decree had awarded Terry one-half of the *value* of the stock as opposed to one-half of the *actual stock.*

"Stock dividends are an incident of ownership of stock." 18B Am. Jur. 2d *Corporations* § 1178 (1985). Thus, dividends are paid to the owner only. Douglas is the owner of the actual stock, and as such, is entitled wholly to the dividends, past and future. We accordingly modify by striking the award of future dividends to Terry.

*V. **Appellate attorney fees.*** Terry requests $1500 in appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We determine the parties must each pay their own fees, and costs are assessed one-half to each party.

Having carefully considered all the arguments before us, we affirm the district court in part, but modify to strike the award of future dividends to Terry.

AFFIRMED IN PART; MODIFIED IN PART.