FILED
JAN 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-675 / 90-732

78

IN RE THE MARRIAGE OF JANICE L. DREES AND DANIEL L. DREES

Upon the Petition of

JANICE L. DREES,

Appellee,

And Concerning

DANIEL L. DREES,

Appellant.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Respondent husband appeals several provisions of the decree of dissolution. **REVERSED IN PART AND AFFIRMED AS MODIFIED.**

Steven H. Lytle of Nyemaster, Goode, McLaughlin, Voights, West, Hansell & O'Brien, P.C., Des Moines, for appellant.

Roger J. Hudson and Thomas T. Tarbox of Smith, Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson, P.C., Des Moines, for appellee.

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

DONIELSON, J.

Janice Drees (Jan) and Daniel Drees (Dan) were married in September 1965. They had three children: Daniel, Jr., an adult, and twins David and Douglas, born in February 1971. All three of the children were attending college at the time of trial and did not live with either parent. Where the twins would reside over summer break was not certain.

Jan is a teacher in the Des Moines School District. She has a bachelor's degree and a master's degree in teaching. Her annual salary is about $33,000 but due to Phase III funding she may earn additional money for special projects. The district court found her earning capacity was about $40,000 per year.

Dan is a vice president at the Iowa Hospital Association. He has a degree in business administration with a field of concentration in accounting and had completed one year of law school. The court found Dan's earning capacity was $53,000.

The district court entered a decree of dissolution for the parties. The court ordered the marital home sold and distributed the parties' marital property about equally. The court ordered both parents to assist the children in their college education expenses. The court also awarded the children some bank accounts directly. Dan was ordered to pay Jan alimony of $300 per month for five years.

Dan now appeals. He claims the court erred in: (1) awarding Jan alimony; (2) awarding Jan a portion of funds which were separate gifts to him; (3) awarding certain bank accounts directly to the children; (4) ordering him to pay an excessive amount for the children's college expenses; and (5) not designating which party may claim the children as exemptions for tax purposes. Each party asks for attorney fees for this appeal.

Our review in dissolution cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

I. **Alimony.** The trial court ordered Dan to pay Jan alimony in the amount of $300 per month for a period of five years. Dan contends he should not have to pay alimony to Jan because her earning capacity is comparable to his. He argues this is not a case where alimony is appropriate. Dan does not question the appropriateness of requiring him to pay $300 per month to assist in the house payment (which exceeds $1,000 per month) but believes the payments should cease upon the sale of the residence. We agree.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

In In re Marriage of Francis, 442 N.W.2d 59 (Iowa 1989), our supreme court described the various forms of alimony awarded by the Iowa courts. (1) Permanent alimony "has traditionally taken the place of support that would have been provided had the marriage continued." Id. at 63. This type of alimony is "payable for life or so long as a spouse is incapable of self-support." Id. at 64. (2) "Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." Id. at 63. (3) "Reimbursement" alimony is similar to a property award and "predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other." Id. at 64.

We do not find any of the above forms of alimony applicable to the circumstances of this case. Because Jan is not "incapable of support," traditional alimony would be

inappropriately awarded. Nor is Jan "economically dependent": she earns in excess of $30,000 per year in salary and the trial court found her earning capacity was $40,000 per year. Lastly, the record does not indicate that Jan made economic sacrifices during the marriage that directly enhanced Dan's earning capacity. In light of Jan's earning capacity and the property division, we find no justification for the trial court's award of alimony. We reverse the trial court's award of alimony.

However, we conclude that until the marital residence is sold, Dan is to contribute $300 per month toward the house payment. We modify the decree accordingly.

II. Gifted Property. It appears from the record that over the course of this twenty-four-year marriage, Dan's mother presented him with gifted funds of approximately $80,000. She also gave each of the Drees children in excess of $22,000 to be used toward their educations. The trial court awarded the children's funds directly to them, awarded Dan and Jan specific property, and then ordered "[a]ll the rest of the savings and personal property of the parties" divided equally between Dan and Jan. Dan contends the court erred by awarding Jan a portion of funds he received as separate gifts from his mother. Although Dan admits that he used some of the gift money for the family, he believes that this does not mean that the entire gift became commingled marital property.

A. Specified bank accounts. Iowa Code section 598.21(2) requires that property given to or inherited by either party ordinarily is to be considered the property of that party. However, in the present case the trial court noted,

> The parties and the children all received gifted property during the marriage. The earnings of both parties and the gifted property of the parties and the children were commingled to a greater extent than were properties kept separated and segregated. The assets of the parties, including their earnings and the gifted property to the parties and the children were used during the marriage to pay living expenses, purchase homes, and purchase investments to defer taxes. Further, most, if not all of the gifted property was received over 15 years ago. Further, the commingling of the property was by design rather than accidentally [sic], and it appeared to this Court that if there were any remaining gifts intact that that was by accident rather than by design. And because of the above, the assets of the marriage should be divided about equally except as the Court did in the original findings and the correction the Court proposes herein.
>
> One other comment about the children's gifted property. Some of that was commingled and the children had benefit of that commingling because (in addition to use for living expenses and investments) in one instance about $38,000 was used to provide a portion of the home the children enjoyed. There is , however, some funds that were gifted to the children that the Court set out in the Court's original findings. The Court did that to announce to the parents and to the children and to the world that these funds are set off to the children and to stop any further commingling.
>
> The Court repeats that the lifestyle that the children and the parents enjoyed was only possible because of the parents' income and the gifts that all of them received. All parties, parents and children, will have to share in the blame or credit for the financial circumstances they now find themselves in.

Ruling on Respondent's Motion to Amend and Enlarge Findings and Conclusions at 1-2 (emphasis added).

It is apparent to this court the trial court was not convinced Dan had established that any gifted property remained. Our de novo review of the record supports the trial court's findings and conclusions. We are unable to conclude the bank accounts identified by Dan contain "segregated gifted funds" as he alleges. The parties had several bank accounts in several financial institutions. Some of these accounts were in only one of the parties' names, some were in both parties' names, and still others were jointly held by a party and one of their children. Nothing we have found establishes that the accounts specified by Dan contain gifted property. Dan acknowledges that he commingled gifted funds with the parties' earnings. He also testified the parties spent in excess of $200,000 beyond their earnings over a period of seven years. We are unable to harmonize this spending with Dan's allegation that $60,000 of $80,000 in gifted funds remain intact.

Because the trial court was unable to determine whether the claimed funds were gifted property, the trial court was required to divide the accounts equitably. § 598. 21(1) ("The court shall divide all property, except inherited property or gifts received by one party, equitably between the parties after considering all of the following [factors].") (emphasis added). We find no reason to disturb the trial court's findings or its division of property on appeal.

Even if clear evidence of gifted funds had been presented, we would not be inclined to overturn the trial court's division of property. Subsection 598.21(2) does not demand that property acquired by gift or inheritance must always be set aside to the donee. See In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989). Gifted property is subject to property division "upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." § 598.21(2). The length of a marriage is important in considering subsection 598.21(2); the expectation of maintaining a standard of living made possible by inheritance or gift rises as the length of the marriage increases. Id. The length of time a gift is held after it was given also bears on the question of whether to set aside gifted property to the donee. In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982) (also enumerating several other factors for consideration).

Several factors mitigate against the appropriateness of setting aside the claimed accounts for the exclusive enjoyment of Dan. See id. The gifted funds were presented to the parties over a lengthy period of time, most of the gifts being received over fifteen years ago. The marriage endured for over two decades. Over a period of several years the parties became accustomed to a life-style which would not have been available to them absent the various gifts of the parties' families. See In re Marriage of

Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981). We find that Dan had, in effect, re-gifted the funds for the family's use. Under these circumstances, we conclude it would be inequitable to set aside the claimed funds for the exclusive enjoyment of Dan. We conclude the trial court's division of the property, including the division of the accounts alleged to contain segregated gifted funds, was equitable and we therefore affirm.

B. The children's education accounts. According to Dan, the court erred by awarding certain bank accounts directly to the children. It is not contested the accounts in question contain money to be used for the children's education. They were set up by the children's grandmother and funded by her. All of the accounts are in the children's names and Dan's name. Dan feels that these accounts were not marital property and not within the courts' jurisdiction. We disagree.

> [T]he trial court in a dissolution proceeding may assume jurisdiction over the assets held by a custodian pursuant to the Uniform Gifts to Minors Act, chapter 565A, to protect the children's interest. [] This is not unlike the protective power exercised over parents and children to assure that a child receives proper care and treatment. [] Iowa Code section 598.2 provides the district court with jurisdiction over the subject matter of a dissolution action, which includes: (1) the award of custody, Iowa code section 598.41; (2) the responsibility for child support, Iowa Code section 598.21(4); and (3) provision for the appointment of counsel to represent the interest of the child, Iowa Code section 598.12. Inherent in this statutory scheme is the jurisdiction and authority of the court to protect the children's financial interests.

In re Marriage of Hoak, 364 N.W.2d 185, 188 (Iowa 1985) (emphasis added) (citations omitted).

We conclude the trial court had inherent authority to protect the children's financial interests by awarding the accounts directly to Daniel, Jr., David, and Douglas. The trial court ordered this award with the stipulation that the funds were to be used as the donor intended, i.e., for the children's education. Further, the trial court explained, in its ruling on Dan's motion to amend or enlarge, the award was made in order to cease the commingling of these funds. Nor do we believe the trial court was imprudent in awarding the accounts to persons then nineteen and twenty-two years of age. Under the circumstances of this case, we affirm the trial court's order that the accounts be transferred to the children to cover educational expenses.

III. **Parents' Contributions to Children's College Expenses.** The trial court ordered Dan to pay $2,500 per year toward each of David's and Douglas' education and ordered Jan to pay $1,000 per year toward each of their educations. These amounts were adjusted from those in the original decree where the trial court ordered Dan to pay $3,000 toward each of the twin's educational expenses and Jan to pay $1,200 toward each. Dan contends the court ordered him to pay an excessive amount for the children's college expenses. He points out that the children have the bank accounts discussed above, they have the ability to

earn income, and each child has substantial savings of his own. He also reminds this court that Jan has a comparable income and should share more equally in the educational expenses.

Section 598.1(2) defines "support" to include support for a child who is between the ages of eighteen and twenty-two who is a full-time student in a college or University. Iowa Code § 598.1(2) (1989). Pursuant to Iowa Code section 598.21(4), the trial court is to consider the financial resources of the child and the financial resources of both parents (and other factors) in determining child support obligations. See In re Marriage of Hoak, 364 N.W.2d at 191; see also In re Marriage of Boehlje, 443 N.W. 2d 81, 84 (Iowa App. 1989).

The record indicates the children of Dan and Jan are full-time students of in-state universities. The record concerning the educational expenses of the twins is that the cost of full room, board, books, and tuition amounts to $6,000 per child per year. Living expenses cost an additional $3,200 per child per year. Thus, each twin requires $9,200 per year in support. The trial court contemplated the parents would contribute $3,500 collectively toward these expenses. It also contemplated the twins would use their education accounts and other personal earnings to cover the remaining expenses.

In view of the twins' education accounts, we find the support ordered is excessive. We order the parties'

contributions modified to the extent Dan shall contribute $1,500 per year per twin and Jan shall contribute $1,125 per year per twin. We modify the decree accordingly.

IV. Personal Income Tax Exemptions. Dan contends that the court erred by not designating which party has the right to claim the personal exemptions for the children for income tax purposes. The trial court refused to allot the exemptions and indicated that it was the court's intent to leave the issue to be decided according the Internal Revenue Service rules. We find no reason to rule otherwise.

Each party asks for 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). The parties shall pay their own attorney fees.

Costs on appeal are assessed one-half to each party.

REVERSED IN PART AND AFFIRMED AS MODIFIED.