

FILED

JAN 26 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EVELYN EUBANK AND KEITH EUBANK

Upon the Petition of)

EVELYN EUBANK,)

Petitioner-Appellee/
Cross-Appellant,)

And Concerning)

KEITH EUBANK,)

Respondent-Appellant/
Cross-Appellee.)

54

8-482
87-1595

Appeal from the Iowa District Court for Warren County
(No. DM6-394), Peter A. Keller, Judge.

The husband appeals the economic provisions of his
dissolution decree and the wife cross-appeals. **AFFIRMED AS
MODIFIED.**

Phil Watson of Watson & Peterson, P.C., Des Moines, for
respondent-appellant/cross-appellee.

Mason J. Ouderkirk of Ouderkirk Law Firm, Indianola,
for petitioner-appellee/cross-appellant.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ. Hayden, J., takes no part.

DONIELSON, J.

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The husband appeals from a dissolution decree and the wife cross-appeals. Both challenge various economic provisions.

The parties were married in 1958. They have three adult children. Keith is a veterinarian and owns a one-third interest in a partnership which operates a veterinary clinic. His gross income from his veterinary practice in 1986 was over \$55,000. Evelyn is a high school graduate. During much of the marriage, she was not employed outside the home. She presently earns \$15,500 per year from clerical work.

The district court assigned a value of \$100,000 to Keith's one-third interest in the veterinary partnership. In valuing the partnership, the court stated that it did not include an amount for "good will." Keith was awarded his \$100,000 interest in the veterinary partnership, subject to a debt of \$29,000 attributable to Keith's purchase of the partnership interest. Keith was also directed to assume unsecured debts of about \$17,000.

Evelyn was awarded the parties' house. The parties placed values on this house ranging from \$38,000 to \$55,000. The house is subject to an encumbrance of \$13,646. Evelyn was also awarded 120 acres of pastureland valued at \$24,000 to \$36,000, subject to a debt of \$4,067. In addition, Evelyn was awarded the parties' one-half

interest in a farming operation consisting of 200 acres and 31 head of cattle. Evelyn's brother owns the other half-interest in this farming operation. The court found that this farming operation was so heavily encumbered that it had no net value.

Keith was directed to pay Evelyn alimony of \$500 per month for five years. He was also directed to contribute \$6,000 towards Evelyn's attorney fees. In addition, the decree and pretrial temporary order required him to pay a total of \$2,500 towards the fees of appraisers hired to value the veterinary partnership.

Keith appeals from the dissolution decree. He challenges the division of property, the alimony award, the attorney fee award, and the requirement that he pay expert witness fees. As a part of his challenge to the division of property, he contends the district court placed too high a value on his interest in the veterinary partnership.

Evelyn has cross-appealed from the dissolution decree. She contends the property, alimony, and attorney fees awarded to her were inadequate. She asserts that the value placed on Keith's interest in the veterinary partnership was too low. She has also filed a motion for award of attorney fees, expenses, and costs on appeal.

Our scope of review is de novo. Iowa R. App. P. 4. The court gives weight to the fact findings of the trial court, especially when considering the credibility of the

witnesses, but is not bound by them. Iowa R. App. P. 14(f)(7).

I. Keith claims that the trial court erred in fixing a value of \$75,000 on the veterinary practice and basing the property division thereon after finding that no good will existed, when the tangible assets of the practice were at most \$45,206. Evelyn claims the trial court erred in finding no good will existed with respect to Keith's share of the practice and undervalued his gross interest in the business at \$100,000.

The trial court found that no good will should be attributed to Keith's portion of the veterinary practice because it was not convinced that any good will would be realizable upon the sale of the entire practice or upon the sale of a partial interest. The court found the business assets to be worth a total of \$300,000: \$225,000 for the real estate and \$75,000 for the remaining assets. Keith's one-third interest equaled \$100,000.

The trier of fact is at liberty to accept or reject any or all opinion evidence on the value of the assets. Schantz v. Schantz, 163 N.W.2d 398, 404 (Iowa 1968). Four different methods of valuation were presented at trial. The business assets excluding real estate ranged in value from \$1,300 to \$488,500. Good will was valued at a negative \$25,300 by one expert. Other evidence indicated that no dollars were allocated for good will when Keith

bought into the partnership or when Dr. Arand was bought out.

We have carefully reviewed the record and the findings of fact by the trial court. Expert testimony was given on the value of the veterinary practice. The trial court did not accept this testimony in total, but arrived at its own valuation after evaluating the testimony. We find that the values established are well within the range of evidence and should not be disturbed on appeal. In re Marriage of Wiedemann, 402 N.W.2d 744, 748 (Iowa 1987).

II. Keith next contends the trial court erred in failing to adopt the parties' written and oral stipulation for a property division with respect to the parties' homestead, household goods and furnishings, and 120 acres of pasture ground. Evelyn claims the court acted properly because the parties did not come to a meeting of the minds.

Whether there was an agreement here or not, a stipulation between the parties is just one of many factors to be considered by the court when distributing the property. Iowa Code § 598.21(1)(a)-(m). A property settlement entered into between the parties to a divorce in anticipation of a divorce, is not binding upon the trial court as a matter of law. Bamesberger v. Bamesberger, 238 Iowa 492, 495, 28 N.W.2d 28, 31 (1947). The important point here is an overall equitable distribution of the parties' property. Our de novo review will ensure this result.

III. Keith challenges the equity of the overall property settlement. He argues that petitioner has received 52.7% of the property net of debt. Evelyn is requesting an additional sum of \$31,700 plus interest be paid to her by Keith.

The court is to divide all property except inherited property equitably between the parties. Iowa Code § 598.21(1). Equity need not be achieved with mathematical precision, but is dependent upon the circumstances of each individual case. In re Marriage of Vrban, 293 N.W.2d 198, 204 (Iowa 1980). The factors to be considered are well established. See Iowa Code § 598.21(1)(a)-(m). We find that an equitable distribution has been made.

The parties were married for almost nineteen years. Keith was forty-seven years of age at the time of divorce and Evelyn was forty-six. Both have generally good health although Keith has had back problems and Evelyn has suffered some emotional stress. She also is in need of dental work. Both have contributed to the marriage in terms of time and income. Keith earned his professional degree while married as a result of joint efforts by the parties. This degree has not been included as an asset, but was considered by the trial court when dividing the property. Evelyn is currently employed and is expected to continue to be so. Monthly living expenses are relatively equal for the parties, however, Keith has substantial debt obligations.

Keith has been awarded his share of his veterinary practice and the parties' unsecured debts. Evelyn has been given the house, most of the furniture and appliances, and the 120 acres of pastureland. Both of these major assets are subject to mortgages. Each party retained vehicles of relatively-equal value. We find this distribution to be equitable.

IV. The next area challenged is the award of alimony. Keith has been ordered to pay Evelyn \$500 per month until November 1, 1992, regardless of whether she remarries or cohabits with a non-related male on a permanent basis. Evelyn requests \$750 per month until she reaches sixty-two years of age.

The guidelines for ordering support payments include the length of the marriage, the health of the parties, the distribution of the property, educational levels, the earning capacity of the party seeking maintenance, and the feasibility of the party seeking maintenance to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21(3). We have reviewed all of these factors in light of the current case law and find the alimony award to be equitable under these circumstances.

The spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the

marriage as possible, to the extent that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well. In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa App. 1983). Once the dependent spouse's standard of living is assured, there is no reason in equity for the supporting spouse to provide still more. Id. Furthermore, as a matter of public policy, we believe it is desirable to encourage both parties to use the talents and skills they possess without imposing onerous burdens on them. Id.

Evelyn has the capacity to support herself. She has been awarded a sufficient amount for a reasonable period of time, which, in addition to her property award, will allow her to achieve a comparable standard of living.

V. The next challenge concerns the order requiring respondent to pay expert witness fees. Keith contends the amount is in excess of that authorized by Iowa Code section 622.72. Evelyn asserts that Keith should pay all of Evelyn's expert witness fees. The trial court awarded Evelyn a total of \$2,500 towards her litigation expenses.

Iowa Code section 598.11 allows the court, in its discretion, to order either party to pay the clerk a sum of money to enable the other party to prosecute or defend the dissolution action. However, the amount allowed for expert witnesses is specifically limited to \$150 per day compensation in addition to the regular witness fees. Iowa Code § 622.72; 622.69.

The trial court found that expert Dennis Shull was employed for two days. Expert James Hayes was employed for five days. The fees payable by Keith are thus limited to \$1,050.

Limiting the amount of expert witness fees is especially important in the area of dissolutions, and we can see no reason why section 622.72 should not apply in this case. This section has recently been found to apply to paternity-child support actions. Gremillion v. Erenberg, 402 N.W.2d 410, 413 (Iowa 1987). The supreme court did not distinguish paternity actions, but plainly stated, "a court's authority to order [expert witness] fees is controlled by Iowa Code section 622.72, which limits to \$150 the amount which may be ordered for expert witness fees." Id.

This case is distinguishable from both cases cited by petitioner. In In re Marriage of Williams, 303 N.W.2d 160, 166 (Iowa 1981), the court was not bound by section 622.72 because the parties agreed on the use of the expert. No agreement was made on these two experts used by Evelyn. Furthermore, the award of expert fees by the trial court was not a part of a total damage award as was the case in Kendall v. Lowther, 356 N.W.2d 181, 191 (Iowa 1984). Therefore, we hold that section 622.72 does apply, and we thus modify the order requiring Keith to pay additional expert fees. Since Keith paid \$2,000 to the clerk for the

temporary order, only \$1,050 of it should have been used for the witness fees. The rest should be credited towards Keith's obligation for Evelyn's attorney fees.

VI. On the issue of attorney fees, Keith challenges the order requiring him to pay Evelyn the sum of \$6,000. Evelyn has requested that Keith be ordered to pay \$9,000 towards her attorney fees.

The award of attorney fees in a dissolution action depends upon the relative financial circumstances of the parties. In re Marriage of Vrban, 359 N.W.2d 420, 428 (Iowa 1984). The record here adequately supports the trial court's determination that Keith, who has greater earnings than Evelyn, was better able to pay these fees. Id. However, Keith has been ordered to pay \$500 a month alimony, the statutory limit of expert fees, and the parties' unsecured debts in addition to his own fees. Evelyn has her own income and will receive a substantial property settlement.

Considering all of the economic provisions of the dissolution, we find an equitable distribution has been made. Therefore, we affirm as modified the decision of the trial court.

VII. Evelyn has requested attorney fees, expenses, and costs on appeal. She is requesting not less than \$8,812.84 to be paid by Keith. We have authority to grant such an application. In re Marriage of Horstmann, 263 N.W.2d 885,

892 (Iowa 1978). Such allowances are generally based on the parties' respective abilities to pay. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). We conclude that in addition to the attorney fees allowed by the trial court, Keith shall pay \$1,000 for attorney fees and costs on appeal.

AFFIRMED AS MODIFIED.