

IN THE COURT OF APPEALS OF IOWA

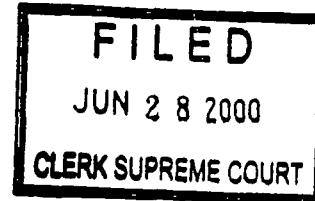
No. 0-318 / 99-0896

Filed June 28, 2000

**IN RE THE MARRIAGE OF DONNA SUE WALL
AND NORMAN MAYNARD WALL III**

**Upon the Petition of
DONNA SUE WALL,
Petitioner-Appellee/Cross-Appellant,**

**And Concerning
NORMAN MAYNARD WALL, III,
Respondent-Appellant/Cross-Appellee.**



Appeal from the Iowa District Court for Polk County, Linda R. Reade,
Judge.

Norman appeals from the financial provisions of the dissolution decree.
He contends the court erred in: (1) awarding Donna rehabilitative and
reimbursement alimony, (2) improperly calculating child support obligations, and
(3) requiring him to pay \$10,000 toward Donna's attorney fees. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for
appellee.

Heard by Sackett, C.J., and Vaitheswaran, J., and Habhab, S.J.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206
(1999).

SACKETT, C.J.

Respondent Norman Maynard Wall and Petitioner Donna Sue Wall challenge by appeal and cross appeal the economic provisions of a March 16, 1999, decree dissolving their seventeen-year marriage. We affirm.

The parties, both born in 1960, married in 1982. It was the first marriage for each. They have two children, Peter, born in 1990, and Jacqueline, born in 1991. Peter has an attention deficit hyperactivity disorder and has problems with schoolwork. Jacqueline was diagnosed as having pervasive developmental disorder, attention deficit hyperactivity disorder, oppositional defiant disorder and autism. She is belligerent, defiant and aggressive and has frequent tantrums. She too has problems with schoolwork. Issues regarding the children's custody and visitation were resolved by a stipulation which provided the primary physical care of Jacqueline be with her father and the primary physical care of Peter be with his mother. The issues addressed by the stipulation are not a subject of this appeal. However, each party asks that we consider the responsibility taken for the child in his or her care in assessing the economic issues. Evidence shows the children are better off separated and living with the parent who assumed his or her primary physical care. We consider both parents have taken on a tough assignment. We give neither Donna nor Norman more credit than the other for childcare responsibilities in addressing the economic issues.

At the time of the dissolution Donna was employed as a rental management agent earning about \$2,000 per month. Norman was just completing a residence in anesthesiology. He had contracted to work for the Boone County, Iowa, hospital and it was anticipated he would begin the work as

early as June of 2000. There was evidence, though disputed, that Norman could earn approximately \$160,000 annually in that employment.

The district court first distributed the assets and liabilities. As a result, Donna received a net award of approximately plus \$9,340 and Norman received a minus award of approximately \$149,000. The court fixed the child support of each and offset one against the other which resulted in Donna owing Norman \$332.89 and Norman owing Donna \$443.60. Norman was ordered to pay Donna the difference of \$110.71 a month. Norman was ordered to pay Donna rehabilitative alimony of \$500 a month for three years. Commencing April 1, 1999 through June 1999 he was to pay her \$250 as reimbursement alimony with such amount to increase on July 1, 2000, to \$1,750 a month for 105 months. Norman was also ordered to pay \$10,000 towards Donna's attorney fees.

Norman contends Donna should not have been awarded rehabilitative and reimbursement alimony. Donna contends on cross appeal the amount awarded was not sufficient. Norman contends it was not equitable to award Donna attorney fees. Donna contends she should have appellate attorney fees and that the district court should have ordered Norman to pay her expert witness fees. Norma further challenges the amount of child support he was ordered to pay. Donna also challenges the award.

We review *de novo*. Iowa R. App. P. 4; Iowa R. App. P. 14(f)(7). The partners in the 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). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable

in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App.1983).

At the time of the marriage Donna had \$2,500 in assets. Norman had none. At the time of the marriage Donna had an AA degree. After the marriage she took various courses and obtained a dental assistant's certificate in 1986. Donald was a high school graduate at the time of marriage. They both had a variety of jobs and moved frequently never accumulating many assets. In 1989 they filed for bankruptcy.

In about 1991 Norman decided to go to medical school but had to complete his undergraduate hours first. He was able to finish this work in two years by attending two colleges. During this period neither party worked. Norman's family did assist the couple to the extent that they gave them a concession on residential property they rented the couple. In 1992 the couple moved to Des Moines and Norman began attending medical school. It was necessary that he borrow money to complete his education. Donna's parents cosigned his first loan for \$25,000. He then joined the United States Navy and got scholarships of about \$45,000 and obtained loans from the Navy of \$58,650. His agreement with the Navy was that for each year of active duty he completed after graduation the Navy would forgive one year of loans. If he were in active duty three years all education loans from the military would be forgiven. He took out additional loans and received an additional approximately \$10,000 in scholarships. The family also received food stamps and Medicaid. Norman ultimately graduated from the Osteopathic Medical School in Des Moines. At the

time of trial he was a resident in anesthesiology at the University of California at San Francisco earning about \$2,9991.67 a month.

The economic provisions of a dissolution decree are based on a number of factors, including the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed in the marriage. *In re Marriage of Mouw*, 561 N.W.2d 100, 102 (Iowa App. 1997).

Spousal support is provided for under Iowa Code section 598.21(3). Whether spousal support is justified is dependent on the facts of each case. See *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). In assessing a claim for alimony, we consider the property division and alimony together in determining their sufficiency. See *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa App. 1982). Entitlement to spousal support is not an absolute right. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976). An alimony award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the alimony who also has a need for support. *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa App. 1992).

Reimbursement alimony is distinguishable from rehabilitative alimony. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Rehabilitative alimony is a way of supporting an economically dependent spouse through a limited period of education or training following divorce. *Id.* Reimbursement alimony is based upon economic sacrifices made by one spouse during the marriage that directly

enhance the future earning capacity of the other. *Id.* at 64. The two types of alimony are designed to achieve different goals.

We first consider the challenges to the award of rehabilitative alimony. Donna wishes to become a dental hygienist. She anticipates that she will need two years to complete a program at the Des Moines Area Community College in order to be certified. She testified there is a two-year waiting period for the program, but when she completes it she will have annual earnings of \$30,000 to \$35,000. Norman contends Donna does not need additional education. He points out she at an AA degree prior to marriage and during the marriage obtained a dental assistant's certificate. He alleges she has taken other classes during the marriage. He points out Donna has worked for her present employer for six years and makes about \$2,000 per month. Donna was awarded rehabilitative alimony for three years at \$500 per month. There is no inequity in providing this amount to her to be certified as a dental hygienist. We affirm on this issue.

We next address the questions of whether the district court was correct in awarding Donna reimbursement alimony and if the amount awarded was equitable. An award of reimbursement alimony is based upon the future earning capacities of the parties. *Id.* In determining future earning capacity, a court may consider the education, skill, or talent of the parties. *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978).

Donna made sacrifices to assist Norman in completing his education. The record indicates that Norman should have greater earning potential than Donna because of the education he completed during the marriage. In Iowa

dissolution, an advanced degree is not considered an asset. *In re Marriage of Plasencia*, 541 N.W.2d 923, 926 (Iowa App. 1995). However, because it has the potential to increase the future earnings of the person receiving the degree, it is a factor to be considered when determining the equitable division of property. *In re Marriage of Janssen*, 348 N.W.2d 251, 253 (Iowa 1984); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978). Education obtained during a marriage that will enhance future earnings is a proper factor to consider in assessing the equity of the economic provisions of a dissolution decree. *Mouw*, 561 N.W.2d at 102 (citations omitted).

There is little property to divide. The only way the inequities can be handled in this case is through reimbursement alimony. The only real question is whether the amount awarded by the district court is excessive or insufficient or fair.

Norman contends the award is excessive because there is no guarantee that he will begin working in July of 2000 or that he will net \$160,000 annually. He points out that he will be the first anesthesiologist at the Boone hospital, that he has mental problems which bear on his ability to function as a doctor, and he leaves the marriage with a substantial debt load. He contends that he should pay no more than \$500 per month alimony of any kind for a period of five years.

Donna contends the evidence shows that Norman has the ability to earn \$160,000 or more a year and the award was not adequate. She contends she should have \$500 in reimbursement alimony until Norman finished his residency, and then \$2,835 per month for ten years.

The anticipated earnings of \$160,000 annually is reasonable based on Norman's education. The problem is that Norman, while his physical health is good, suffers mental problems which resulted in his being discharged from the Navy. The report on his discharge noted he finds it difficult to concentrate and to sustain his attention in the operating room. Norman advances these problems may well affect his earning potential. We agree with Norman that these problems may impact on his ability to work as an anesthesiologist. However, with his medical training there is no reason to find the anticipated earning figure found by the trial court is not reasonable. We find no reason to depart from the reimbursement alimony award made by the district court and affirm on this issue.

Norman contends that in computing child support the district court should have considered the amount of alimony he will be paying. For purposes of applying the child support guidelines the district court considered Donna's income to be \$1,970 per month and Norman's \$2,992 per month. Loan advancements were not considered income for purposes of applying the child support guidelines. The court then computed Donna would owe Norman \$321.05 per month for Jacqueline's support and Norman would owe Donna \$446.56 for Peter's support. The result was that after the district court's ruling on a 179(b) motion Norman was to pay Donna \$125.50 per month in support. In addition, Norman was to maintain health insurance on the two children as long as neither party has a child support obligation and Norman was made responsible for one hundred percent of medical, hospital, dental, orthodontic, optical, psychological counseling and prescription expenses for Jacqueline and one-half

of such expenses for Peter. Donna was ordered to be responsible for the other one-half of Peter's expenses.

The amount of alimony paid can be considered in determining the amount of child support to be ordered. See *In re Marriage of Lalone*, 469 N.W.2d 695 (Iowa 1991). Our guidelines give discretion to the district court in setting child support to adjust the amounts provided by the guidelines "upward or downward .

if the court finds such adjustment necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case." *Id.* at 697. Consideration of the amount of alimony paid under the decree, while not provided by our guidelines as a deduction from income, may nevertheless be considered by the court in an attempt to "do justice between the parties." *Id.*

The district court did not abuse its discretion in fixing child support or by not considering alimony being paid at the time of the dissolution hearing. Whether alimony should be considered at such time as its amount increases should best be decided at that time.

Donna contends that Norman should be required to pay in whole or in part the \$2,500 she paid Alan Ryerson, who testified as an expert witness in her behalf. The district court found no statutory authority allowing it to assess these fees against Norman. While the court recognized an expert witness fee for trial testimony can be awarded as court costs under Iowa Code 622.72(1999) and did in ruling on a 179(b) motion tax as court costs Ryerson's testimony at \$150 an hour, the court declined to require Norman to pay for work Ryerson did prior to trial. The court found even if there were authority to require Norman to pay the

entire expert witness fees, it declined to make the award considering the current financial condition of Norman. We affirm on this basis.

Norman contends he should not have been required to pay \$10,00 towards Donna's attorney fees. Donna requests attorney fees on appeal. A controlling factor in fixing attorney fees is ability to pay. *See In re Marriage of Williams*, 303 N.W.2d 160, 167 (Iowa 1981). Dissolution courts have considerable discretion with regard to attorney fees. *In re Marriage of Schissel*, 292 N.W.2d 421, 428 (Iowa 1980). *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 662 (Iowa 1989). We affirm the trial court's award of attorney fees. We award no attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED.