

IN THE COURT OF APPEALS OF IOWA

No. 0-361 / 89-237

FILED

SEP 26 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARCIA ANN FREESTONE AND
MICHAEL G. FREESTONE,

Upon the Petition of

MARCIA ANN FREESTONE,
Appellee,

And Concerning

MICHAEL G. FREESTONE,
Appellant.

Appeal from the Iowa District Court for Dallas County,
Darrell Goodhue, Judge.

Husband appeals from a dissolution decree and
challenges its economic provisions. Wife requests
attorney's fees on appeal. **AFFIRMED.**

Charles L. Roberts, Des Moines, for appellant.

Paul R. (Rick) Huscher of Law Offices of Paul R.
Huscher, Des Moines, for appellee.

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

DONIELSON, J.

Michael and Marcia Freestone were married February 21, 1981. It was the second marriage for both parties. Michael had three children from a previous marriage and was paying child support of \$521.45 per month. The parties separated in May of 1987 and the matter came for trial August 30, 1988. Although no children were born of their marriage, Marcia was pregnant by another man at the time of trial. Marcia did not seek, and Michael was not ordered to pay child support. Both parties were in good health.

At the time of trial Michael was a self-employed truck driver. The district court estimated his annual income was between \$22,000 and \$27,000. Marcia worked for the Iowa National Guard and as a certified medical aide at Regency Care Center in Norwalk, Iowa. Her annual income was \$15,800 per year.

The trial court noted that Michael had brought nearly \$80,000 into the marriage whereas Marcia had brought in approximately \$5000. Michael's contribution had included an inheritance from his mother, equity in a house from a previous marriage, and his trucking and farming equipment. Marcia had a mobile home and household furnishings. The parties' assets were intermingled during the marriage and suffered substantial dissipation.

The trial court awarded Marcia the household and personal effects in her possession (\$3000), some personal items of sentimental value, a fully indebted Isuzu pickup,

a 1982 automobile (\$2200), a horse in her possession (\$630) and a colt in Michael's possession (\$630), and various bank accounts (approximately \$525). The district court also ordered Michael to pay rehabilitative alimony to Marcia in the monthly amount of \$400 for 24 months (\$9600). Michael was awarded the remainder of the parties' assets with an approximate value of \$54,000, including a \$14,000 jointly held IRA.

On appeal Michael contends the property was inequitably divided. He also contends Marcia is not entitled to alimony because, inter alia, her pregnancy at the time of trial constitutes marital misconduct and procurement of alimony by fraud.

I. SCOPE OF REVIEW. Our review 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, but we are not bound by them. Iowa R. App. P. 14(f)(7). 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 Sparks, 323 N.W.2d 264, 265 (Iowa App. 1982).

II. PROPERTY DIVISION AND ALIMONY. The purposes of property division and alimony are not the same. Property division is based on each partner's right to "a just and equitable share of the property accumulated as the result of their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). Alimony, on the other

hand, is a stipend to a spouse in lieu of the other spouse's legal obligation for support. In re Marriage of Wegner, 434 N.W. 2d 397, 398 (Iowa 1988). We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

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). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). 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). Self-sufficiency and mutual economic independence are the goals of rehabilitative alimony. In re Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989).

Michael brought a significantly greater portion of property to this marriage, including an inheritance from his mother. Unfortunately, most of these assets dissipated substantially during the course of the marriage. The trial court was aware of the inequality of contributions to the marriage, the existence of Michael's inheritance, the

intermingling of the assets, and the economic losses suffered. It was also aware that Michael's livelihood was dependent upon his truck. For these reasons, the trial court awarded a very significant portion of the assets to Michael.¹ However, in recognition of the contributions made by Marcia during the marriage, the trial court also concluded that an award of rehabilitative alimony was equitable.

Marcia worked off and on during the marriage. She rode and drove the truck with Michael during the first year of the marriage. She has worked through a temporary placement service and performed many household chores, including sharing in the care of Michael's children during visitation periods. She worked full-time at the time of the trial. Following the separation, she became a practical nurse and entertained hopes of completing her training to become a registered nurse. The trial court determined that rehabilitative alimony was appropriate to aid in this pursuit, especially given the distribution of the parties' assets.

While we might not have made the identical distributions of property and alimony, the trial court

1. Appellant now complains the trial court should have given him "credit" for property which was divided by the parties prior to the dissolution proceeding. We believe this property was divided by mutual consent and Michael has presented no evidence which dissuades us in that belief.

worked out a creative solution. We conclude the property and alimony awards are equitable under the circumstances.² We affirm the trial court in all respects.³

III. APPELLATE ATTORNEY FEES. 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).

After a full consideration of the record, including the property division, Michael's rather substantial debt load, and Marcia's obligation to defend the trial court's decision, we order Michael to pay \$500 toward Marcia's appellate attorney's fees.

Costs of this appeal are taxed to appellant.

AFFIRMED.

2. We note that alimony will be included in Marcia's income and deductible from Michael's income for tax purposes.

3. We find no merit in Michael's contention that Marcia's pregnancy at the time of trial (over one year after the parties had separated) makes it inequitable for her to be awarded rehabilitative alimony. Appellant's arguments are based upon out-dated cases from jurisdictions which only recognize "fault" divorce and have no value in this court. Additionally, appellant has not presented any evidence of fraud on Marcia's part. She stipulated that she was pregnant and sought no child support from Michael. The trial court was not mislead in any way.