IN THE COURT OF APPEALS OF IOWA

No. 4-595 / 94-470

IN RE THE MARRIAGE OF JAMES L. LILIENTHAL AND DEBORAH M. LILIENTHAL

Upon the Petition of

JAMES L. LILIENTHAL

Appellant,

And Concerning

DEBORAH M. LILIENTHAL,

Appellee.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cass County, Keith E. Burgett, Judge.

James Lilienthal appeals the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

J. C. Salvo and Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Francine O'Brien Andersen of Andersen Law Offices, Audubon, for appellee.

Considered by Donielson, C.J., Habhab, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

James L. Lilienthal and Deborah M. Lilienthal were married on June 30, 1990, at Wiota, Iowa. Their marriage was dissolved by decree entered on January 20, 1994. They lived together in the home that James owned prior to their marriage at Rural Route 3, Box 149, Atlantic, Iowa. They separated on March 30, 1993, when Deborah left the marital home and moved into the battered women's shelter where she remained until July 19, 1993. At the time of the trial, she was living in Atlantic, Iowa, and James was living at the Rural Route 3 address.

The parties have one child, a son, Nathan, born on January 1, 1991. While the parties lived together, Michael, James's son from an earlier marriage, lived with them. He was thirteen years of age at the time of trial.

James is a high school graduate and has taken some courses at the local area community college. Deborah is also a high school graduate, but has had no further training.

James is employed at Glacer Vanderval Inc. as a technician. This requires him to be able to operate several of their machines. At the time of trial, he had been employed there for approximately ten years and was working the 7:00 a.m. to 3:12 p.m. shift. He is paid $10.51 per hour and is paid every two weeks. His gross income on a biweekly basis is $840.80. His net income after deductions for federal and state income tax, FICA and Medicare, and medical insurance is $666.09. This would be a gross annual income without overtime of $21,860.80, and a net income without

overtime of $17,318.34, or a gross monthly income of $1821.73 and a net monthly income of $1443.20.

The parties' income tax returns for the years 1990, 1991, and 1992 show that James's gross income for those years was $19,963, $20,985, and $26,973, respectively. James is required to work overtime when the demands of his employer require it. Glacer Vanderval is in the automotive industry and the demands of that industry fluctuate to a degree and, because of this, the overtime is required. The record does not indicate what James was being paid on an hourly basis for the years 1990, 1991, and 1992; however, assuming that his pay rate for the year 1992 was the same, he received approximately $5000 extra pay due to overtime for that year.

In 1993, he was paid for 367.7 hours of overtime as of the date of the trial. This information was provided by Curt Weninger, Human Resource Manager for Glacer Vanderval. He was unable to determine the amount of overtime that James had been paid for the previous years. He also was unable to predict how much, if any, overtime would be required of James in the future because of the unpredictable aspect of the business.

Weninger explained that a portion of the overtime required in 1993 was due to a decision made by Glacer Vanderval to bring 110 jobs to the Atlantic facility where James worked. Because of the training which was required for these people, an abnormal amount of overtime demand was put on the trained employees. The new employees have now been trained and the overtime is dwindling. He also noted an

additional employee had been trained to do that work which caused James to work overtime.

The property James owned at Rural Route 3 contains about eight acres. A portion of it is tillable and he receives $800 a year as rent for that tillable portion.

Deborah's income at the present time consists of benefits from the Aid to Dependent Children program in the sum of $361 per month and food stamps with a value of $170 per month. She also receives $50 per month child support above and beyond the ADC payment. She was not employed during the time the parties lived together, but has been employed in the past in waitressing positions and telemarketing. She described them as low paying jobs. The 1990 income tax return showed she had gross income in that year of $3784.

There is nothing in the record to indicate the condition of James's health. Consequently, we assume that it is good. However, he has had problems with substance abuse in the past. This involved both alcohol and marijuana. As a result of his second OWI conviction, he entered a recovery program at the Manning General Hospital. He completed this program prior to the time of his marriage to Deborah. He contends he has been substance free with the exception of the first months of 1993, when he "slipped."

Deborah has suffered from severe depression since mid-1992 and has consulted professionals for this condition. At the time of trial, she was taking Paxil, which had been prescribed for this condition. She also suffers back problems of an

undescribed nature which are the result of a car accident. She contends she cannot sit or stand for prolonged periods of time as a result of this condition.

This marriage has been marred by violence and alcohol abuse. James was charged with the crime of domestic abuse assault. The charge was amended to simple assault and he was convicted of that charge on April 13, 1993. He was sentenced to serve thirty days in the county jail. That sentence was suspended except for two days which he served. A no-contact order involving Deborah was also issued on that date. There were other situations in which James assaulted Deborah, and she was observed by others at several times with bruises on various portions of her body. James admits having a temper problem; however he believes he has it under control at this time. Both parties were abusing alcohol. Deborah did, during the time the parties lived together, and James did in the early months of 1993. The arguments between the parties and violence which appear in the record also appear to involve the use of alcohol.

The farm on which the parties lived at Rural Route 3 in Atlantic, Iowa, was purchased in 1984 for the sum of $31,000. This property was awarded to James as a result of the dissolution of his first marriage to Linda E. Lilienthal. He paid for the property by borrowing $10,000 from his parents and executing a mortgage in the sum of $21,000. As of June 30, 1993, there was a balance due on the mortgage of $15,698.56. He has not repaid the loan to his parents. This loan was not memorialized by any written documents.

James contends the property is worth $30,000, and Deborah contends it is worth $35,642. Neither party presented any expert testimony concerning the value of this farm. The assessed value for the year 1989 was $31,265; for the year 1991 it was $35,642; and for the year 1993 it was $41,345. The trial court determined the farm had a value of $41,345, which we accept.

An argument precipitated the separation of the parties on March 30, 1993. As a result of this argument James left the home, and while Deborah was alone on the premises, she caused a substantial amount of damage to the home and some of the personal property located in the home. Windows were broken and cupboard doors ripped off and a chair had been forced "through a wall." The repairs were made by James; however, he did secure the assistance of a contractor to help with the repair of the windows. At the time the parties married, the home in which they lived was furnished. Deborah had some furnishings of her own and they were stored in an out building on the premises. In addition, Deborah's parents provided them with a refrigerator and a stove. They also had a 1983 Ford automobile which James used to go to and from work. This had a value of $250. Subsequent to the parties' separation, James purchased a 1993 Ford Escort. There is insufficient evidence in the record to determine if there is any value to this vehicle. During the time the parties lived together, Deborah's mother provided her with a 1978 Ford automobile for her use. Both parties contended there were funds in the savings account and checking account at the credit union; however, there is insufficient evidence in the record to

determine the amount, if any, in those accounts. The parties had outstanding medical bills of $1857. James also shows a debt to the Nishna Credit Union that is payable in the sum of $180 a month. The balance due on that debt was not shown. They also owe the Western Iowa Gas Company $395 and the J. O'Brien Construction Company $283.

There was also an indication on the financial statement of some antiques; however, the record is not sufficient to establish a value for those. There was testimony concerning Indian artifacts. James has been collecting these since he was a child and, during the parties' marriage, Deborah also found some of these items. We believe there is again insufficient evidence to establish a value for these items. The parties also had some soybeans valued at $2000.

During the time the parties lived together, James's son, Michael, lived with them. Deborah remained in the home and provided the homemaker services, including the supervision and care of Michael and Nathan.

During the last few years of the parties' marriage, James handled all financial matters. He would provide signed checks to Deborah in order to allow her to shop for the various necessities she needed in taking care of the household chores and providing meals for the parties. She was not given any cash, and James also assumed the responsibility for keeping gas in the automobile her parents provided for her use. On one occasion when Michael needed medical attention, it was necessary that

Deborah borrow some money in order to secure gas for her automobile to get the medical attention for Michael.

The parties' marriage was dissolved by decree entered on January 20, 1994. Pursuant to that decree, the custody of Nathan was awarded to James and Deborah jointly, with the primary physical care vested in Deborah. The decree specifically set forth visitation rights for James. It provided initially that James pay child support in the sum of $450 per month. He was also ordered to provide major medical and dental insurance. The parties were each awarded the personal property in their possession, including the Indian artifacts. Deborah was awarded the 1983 Ford and the 1978 Ford belonging to her mother and Deborah. James was awarded the 1993 Ford automobile subject to any indebtedness. Each party received the bank accounts in their name and each received one-half of the income tax refunds for the year 1992. The decree awarded the real estate located in Cass County, Iowa, described as:

> [A]ll that part of the Northeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 14-77-36 West of the Fifth Principal Meridian lying West of the right of way of the C.R.I. & P. Railroad Company and Lot 1 of Lot 4 of the Northwest Quarter of the Northeast Quarter of Section 14-77-36 West of the Fifth Principal Meridian and Blocks 7 and 8 in the Town of Lorah, all in Cass County, Iowa,

to James. The decree further awarded Deborah the sum of $10,000 as property settlement from James. James was required to assume and pay the debt listed on the parties' financial affidavits.

James filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). In the order in response to the motion, the court reduced the child support to $398 per month. The order did not indicate the means that was used to calculate the child support. It only indicated that James's average gross income for a three-year period was $23,830. The 179(b) motion also attacked the $10,000 award to Deborah. In ruling on the motion, the court found that the value of the farm was $41,345. The court determined that a cash award should be made to Deborah in lieu of rehabilitative and periodic alimony. The court felt this award would aid Deborah in establishing a new household and get her through a difficult adjustment, which had been exacerbated by her experience as a person who had suffered from domestic abuse. It found her job skills were minimal and, although she has limited job experience, it would be necessary for her to obtain employment. The court specifically found that the cash award was not tied to any property evaluation, but was a combination of factors set out in Iowa Code Chapter 598.21. The court found that James had substantial earning capacity while Deborah had virtually none and her emotional health had deteriorated because of the domestic abuse and she needed to receive counseling to regain her emotional health. The court denied James's request in the 179(b) motion to change the $10,000 award.

James appeals, contending the trial court imposed a punitive inequitable property division on James based on fault and the trial court erred in determining James's child support obligation. Deborah seeks an award of appellate attorney fees.

Our review of this case is de novo. Iowa R. App. P. 4; *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991). We apply this standard to the economic provisions of the decree as well as the support provisions. *Zinger v. Zinger*, 243 N.W.2d 639, 640 (Iowa 1976). In equity cases, especially as to credibility of witnesses, we give weight to the fact findings of the district court, but we are not bound by them. Iowa R. App. P. 14(f)(7).

We note again that neither party set out in their briefs the scope or standard of appellate review as required by Iowa Rule of Appellate Procedure 14(5).

James initially contends the trial court imposed a punitive inequitable property division upon him based on fault. He is referring to the award of $10,000. We believe the trial court awarded this amount not as a property settlement, but as rehabilitative and periodic alimony. The decree entered on January 20, 1994, referred to this grant as "property settlement." We note, however, that the language came from a proposed decree submitted by the respondent. The trial court, in ruling on the motion filed pursuant to Iowa Rule of Civil Procedure 179(b), described the cash award made to the respondent "in lieu of rehabilitative and periodic alimony." The trial court then explained the reasons for the award.

Rehabilitative alimony was conceived as a way of supporting an economically-dependent spouse for a limited period of reeducation or retraining following a dissolution, thereby creating an incentive and opportunity for that spouse to become self supporting. Traditional alimony is designed to take the place of the support that

would have been provided had the marriage continued. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Normally, traditional alimony is not awarded in marriages of limited duration such as this one. *In re Marriage of Zoellner*, 400 N.W.2d 80, 83 (Iowa App. 1986).

We believe the alimony the trial court awarded was of a rehabilitative nature. Under the circumstances of this case as described by the trial court, we believe rehabilitative alimony should be awarded; however, we believe the amount awarded was excessive. We believe a reasonable amount of rehabilitative alimony to be awarded to Deborah would be in the sum of $125 per month for a period of twenty-four months.

James next contends the trial court erred in determining his child support obligation. The basic issue with respect to the determination of child support is whether overtime should be included in the calculations. If the overtime pay appears to be an anomaly or is uncertain or speculative, its exclusion from child support calculations may be appropriate. *In re Marriage of Brown*, 487 N.W.2d 331 (Iowa 1992). We believe in this situation overtime should not be used in the calculation of child support. The amount of overtime included in James's wages for the year 1993 was explained by his employer as resulting from adding additional personnel which caused additional overtime. Further, another individual has been trained to provide the services James provided for his employer that caused some of the overtime.

overtime. Further, his employer was unable to say with any certainty that overtime would be afforded in the future.

James contends the net monthly income used for the calculation of child support should be reduced by the alimony he is required to pay and $25 for the medical bills he is required to assume.

The child support guidelines authorize a deduction for alimony paid pursuant to a court order. *In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991). However, we believe the award of the beans to James, which was not on his financial statement, offsets the medical bills he is required to assume. We believe he is entitled to a deduction of his alimony payments, but he is not entitled to a deduction for the medical bills in determining his net monthly income for the calculation of his child support obligation.

James's gross income on a biweekly basis is $840.80. His net income, after deductions for federal and state withholding, FICA and Medicare, and medical insurance, is $666.09. His gross monthly income from Glacer Vanderval Inc. $1821.73, and his net monthly income, after authorized deductions, is $1318.20. We believe the rent for the tillable land on the farm should be added into this amount, and accordingly we find his net income for child support purposes for the year would be $16,618.40, or $1384.86 per month. The appropriate guideline amount is 25.8 percent. Accordingly, we find that his child support should be $357 per month.

Deborah seeks 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 Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We believe in this situation that James should pay $500 toward Deborah's attorney fees.

AFFIRMED AS MODIFIED.