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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-448 / 89-1678

IN RE THE MARRIAGE OF GARY M. LANDE and TWILA H. LANDE 208

Upon the Petition of

GARY M. LANDE,

Appellee,

And Concerning

TWILA H. LANDE,

Appellant.

Appeal from the Iowa District Court for Lucas County, Robert O. Frederick, Senior Judge.

Wife appeals economic provisions of the decree dissolving her marriage. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, Bennett, Nickerson and Newlin, Des Moines, for appellant.

Kermit L. Dunahoo and Victoria E. Lawry of the Dunahoo Law Firm, Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Respondent Twila Lande appeals various economic provisions of the district court judgment dissolving her marriage to petitioner Gary Lande. She challenges the support award as inadequate and contends the property division was inequitable. We affirm as modified.

I. Twila and Gary were married in 1959. They have four grown children. Gary has worked for thirty years as an over-the-road truck driver. He earns a net monthly income of approximately $1,600. Twila began working outside the home in 1971 on a part-time basis. Since the parties' separation in 1988, Twila has worked as a full-time secretary earning $14,000 per year. In 1980 Twila and Gary purchased a 132-acre farm which is encumbered with debt of approximately $123,000.

The district court dissolved the parties' marriage. The parties divided their personal property. The court awarded Twila an unencumbered car and one dollar per year of alimony. The court awarded the farm, farm machinery, and farm debt to Gary and released Twila of any liability. The court ordered the parties to pay their own attorneys' fees. The court later entered a qualified domestic relations order naming Twila as an alternate payee entitled to fifty percent of Gary's pension benefits accrued during the marriage.

Twila appeals. She contends that she is entitled to alimony of $600 per month until either she or Gary dies.

She also seeks an order requiring Gary to maintain a $50,000 life insurance policy with her named the exclusive beneficiary. Twila argues that she should be awarded her $200 share of the proceeds from the sale of cattle. She claims that Gary should pay a $405 debt. Twila argues that the decree should not be entitled to any weight because the court adopted verbatim Gary's proposed decree. Twila requests an award of attorney fees for trial and for appeal. Gary requests an award of appellate attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on issues properly presented. In re Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Twila contends the trial court erred in awarding her only one dollar per year in alimony. Twila points out that during the parties' thirty-year marriage, she was the primary caretaker of the home and family. Twila argues that she performed the majority of the chores on the farm since Gary was on the road driving a truck. As a result, Twila insists that she has few marketable skills and that jobs would be difficult to find at her age. Although Twila is currently employed as an accounting secretary earning $14,000 per year, she maintains that she is not able to afford an apartment of her own and is forced to live with

her daughter. Twila estimates her living expenses are approximately $1,313 per month. Twila requests she be awarded $600 per month.

Gary argues that he should not be ordered to pay alimony because his debt is extremely high. Gary incurred large amounts of debt both before and after the divorce proceedings had begun. Though Twila took only a small portion of the furniture, Gary borrowed $3,000 to purchase new furniture. Gary also is paying loan and insurance costs on two vehicles. The loans on the two automobiles total $9,200, or $409 per month. The fair market value of the farm, including machinery and equipment, is valued at $69,500, but Gary testified that he owes the federal government approximately $150,000 and is losing over $2,500 per year. In addition, Gary took out a life insurance policy costing $30 per month, naming his son, Kevin, as beneficiary.

Gary has a net income of approximately $1,755 per month. Twila has a net income of approximately $941 per month. Her living expenses are estimated to be $1,313 per month. Twila has been living with her daughter in order to save expenses. Gary, on the other hand, provides free accommodations for a companion and her two children.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re 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 Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). In evaluating the sufficiency of the alimony award, we consider the award of alimony together with the property division. In re Williams, 449 N.W.2d 878, 878 (Iowa App. 1989).

Our courts have recognized that the party with the greater income potential cannot avoid a duty to provide support merely because that spouse also has significant debt. See In re Ranniger, 423 N.W.2d 558, 560 (Iowa 1988); In re Janssen, 348 N.W.2d 251, 254 (Iowa 1984). While we believe Gary should be required to pay Twila alimony, we are not persuaded that Twila should receive permanent alimony of $600 per month. Rather, taking into consideration the financial condition of both parties, we find that Twila should receive alimony in the sum of $300 per month for a period of five years to enable her to achieve a greater degree of financial independence. Following this period, alimony payments shall revert to one dollar per year with the provision that the award of alimony may be reconsidered if a substantial change in the circumstances, such as bankruptcy, occurs.

Both parties are concerned about the effect of potential bankruptcy on the division of the pension benefits. We are likewise concerned that the stipulated domestic relations order splitting accrued pension benefits

not be defeated by a bankruptcy petition. Such a result would be inequitable.

Both parties have discussed briefly the effect Bush v. Taylor, 893 F.2d 962 (8th Cir. 1990), may have on this appeal. Despite the recognition that such a result would be inequitable, the Eighth Circuit in Bush held the pension payments award was a "debt" within the meaning of the bankruptcy statutes and was therefore dischargeable. 893 F.2d at 965-66.

On rehearing in Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990), the Eighth Circuit, sitting en banc, reversed itself. The court in Bush II noted that the obligation created by the decree was not a nondischargeable support obligation. See 11 U.S.C. § 523(a)(5). The court reasoned, however, that "it does not follow that [the husband's] entire obligation to [the wife] was a dischargeable debt." Id. at 993. Pension payments that become due and payable at fixed intervals after filing a bankruptcy petition may not be dischargeable. Id.

We consider this a just and equitable result. Our courts have long recognized marriage as an economic partnership to which both parties contribute their hard work and skills. Assets produced by the partnership are not in the nature of a gift, but are the spouse's separate property. To allow any other result would open the door for a debtor spouse to circumvent the divorce decree and to deprive the other spouse of that to which the spouse is lawfully entitled.

Whether or not Bush II is good law, we note that a discharge of the pension benefit obligation would present a substantial change in circumstances. See Iowa Code § 598.21(8) (1991). The trial court recognized this and retained jurisdiction over the alimony issue. The court ordered that "[i]n the event that Gary voluntarily or involuntarily takes bankruptcy, the court will consider the issue of alimony without recitation or demonstration of any other change in circumstance . . . ." We consider this an appropriate order under the circumstances and specifically affirm it.

III. Twila argues that Gary sold a jointly owned cow to their son, Kevin, for approximately $400. At trial Gary agreed that Twila was entitled to one-half the proceeds from the sale of the cow, but has not yet made such payment to Twila. Gary contends on appeal he loaned his son the money on the condition Kevin pay back the sum when he could. We find that $200 is due and owing and enter judgment for Twila in that amount, such payment to be made within sixty days from the date of this opinion.

Twila incurred medical bills of $405 prior to the parties' separation. Pursuant to a temporary order, the district court required Gary to pay the bill resulting from the surgery. The district court failed to address this debt in its decree. Gary does not dispute the fact that he owes this debt. We find that $405 is due and owing either to Twila or Surgery, P.C. We order Gary to pay the $405

debt incurred from Surgery, P.C., such payment to be made no later than June 1, 1991.

Twila also urges this court to order Gary to take out a life insurance policy in the amount of $50,000 naming Twila as beneficiary. Twila points out Gary has already taken out a policy naming his son, Kevin, as a beneficiary. Given the relative economic conditions of the parties, and taking into consideration all aspects of the decree, we decline to order Gary to purchase a life insurance policy naming Twila as a beneficiary.

IV. Twila seeks attorney fees for both trial and appeal. Gary seeks appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. In re Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Twila has not provided this court with any information concerning the amount of attorney fees incurred by her in prosecuting the dissolution action in the district court. The trial court ordered Gary to pay $2,500 towards her attorney fees. We decline to disturb the district court's award of attorney fees. We award Twila $1,500 for appellate attorney fees. Costs to be paid by Gary.

AFFIRMED AS MODIFIED.

Oxberger, C.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur specially. I disagree with the majority's attempt to apply the relational of Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990), to this case.

The dissolution decree in Bush provided each former spouse was to receive a portion of the husband's pension. The husband received the monthly pension check and he was to send a portion of it to the wife. Bush at 992. By using a qualified domestic relations order, the trial court here has assured the wife that her share of the pension cannot be discharged by the husband as a debt in bankruptcy. See Bush, 912 F.2d at 994; see also In re Marriage of Eichelberger, 100 B.R. 861, 866 (Bankr. S.D. Texas 1989).