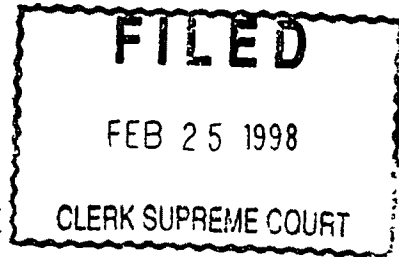


IN THE COURT OF APPEALS OF IOWA

000147

No. 7-761 / 97-0324
Filed February 25, 1998



**IN RE THE MARRIAGE OF STANLEY ARLEN
HACKBARTH AND SHARON LYNN HACKBARTH**

Upon the Petition of
STANLEY ARLEN HACKBARTH,
Appellant,

And Concerning
SHARON LYNN HACKBARTH,
Appellee.

Appeal from the Iowa District Court for Johnson County, August F. Honsell,
Judge.

The petitioner appeals various economic provisions of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, Iowa City, for
appellant.

John W. Hayek and Joseph T. Moreland of Hayek, Hayek & Brown, L.L.P.,
Iowa City, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

HUITINK, P.J.

Stanley Hackbarth appeals from the alimony and educational support provisions of the decree dissolving his marriage to Sharon Hackbarth. We affirm as modified.

I. Background Facts and Proceedings.

Stanley and Sharon Hackbarth were married on May 31, 1970. They have three children: Melissa, born August 15, 1974; Christopher, born September 19, 1979; and Andrew, born September 3, 1981. Stanley and Sharon were both forty-eight years of age when this case was tried.

Stanley is a pediatrician. He is one of six physician partners in Pediatric Associates of Iowa City. The district court determined his average gross annual income is \$186,000.

Sharon has a degree in education. She taught in the Iowa City schools from 1974 until Andrew's birth in 1981. Since then she has devoted her time to primary care of the children and part-time work as a preschool teacher. Her annual income is \$10,940.

Sharon was awarded physical care of the parties' minor children. Stanley was ordered to pay \$2000 per month child support which will be reduced to \$1500 per month when only one child is entitled to support. He was also ordered to pay Sharon \$3500 per month alimony until either dies or Sharon reaches age sixty-five. The district court's division of the parties' \$448,562 net worth is not disputed. Sharon was

awarded property valued at \$227,281. Stanley's property award was valued at \$221,281.

On appeal Stanley contends Sharon's alimony award is excessive in amount and duration. He also argues his educational support obligation should be limited to the cost of attending one of Iowa's state-supported universities.

II. Standard of Review.

The standard of review in this equity action is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Alimony.

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). 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, 350 (Iowa App. 1983).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). The purpose of traditional or permanent alimony is to provide the receiving spouse

with support comparable to what would be received if the marriage continued. *Id.* at 62. Traditional alimony in contrast to other forms of alimony is usually payable for life. *Id.*

Stanley's accountant projected Stanley's gross income for 1996 was \$176,000. Sharon's expert averaged Stanley's gross income for three years and projected future annual earnings of \$200,000. Stanley attributed the reduction in his income to economic and regulatory trends that have reduced physician incomes generally and his specialty in particular. We find the district court's determination of Stanley's earning capacity, \$186,000 gross annual income, fairly reflects his earnings history and the prevailing economics of the medical profession.

Sharon's earnings are based on a twenty-two hour work week. There is no evidence suggesting she has sought or is interested in securing full-time employment. Although Sharon has an education degree, her return to full-time teaching is unlikely because of her age, expired certification, and need for additional education. However, economic reality necessitates Sharon's eventual return to full-time employment of some kind. Sharon estimates gross annual earnings of \$20,000 if she were employed full-time in her present capacity.

The record does not disclose significant impediments to Sharon's resumption of full-time employment. She has a college degree and a substantial work history. Child care is not an issue because Andrew is now sixteen years of age. While not

unsympathetic to her situation, we believe it is unfair to assess Sharon's long-term needs on something less than her true earning capacity.

Sharon's modest long-term earning capacity is insufficient to meet more than her subsistence needs. Her ability to sustain a standard of living reasonably comparable to that she enjoyed during the marriage depends on Stanley's continued financial support. Stanley's earnings are sufficient to accommodate a substantial alimony obligation without a disproportionate reduction in his accustomed standard of living. The district court's award of permanent alimony was justified by Sharon's age, the duration of the marriage, and the disparity of the parties' earning capacities. We, for the same reasons, decline to reduce the duration of the award to a fixed term of years.

Because Sharon's earning capacity is greater than the district court determined, we find it necessary to reduce the amount of Sharon's alimony award. We modify the district court's judgment to award Sharon \$3500 per month for three years, commencing as provided in the decree. Upon the expiration of three years, this amount shall be reduced to \$3000 per month. In the absence of circumstances necessitating continued alimony upon Sharon's remarriage, we modify the decree to provide for the termination of alimony upon Sharon's remarriage. *See In re Marriage of Woodward*, 229 N.W.2d 274, 279 (Iowa 1975). We also provide for automatic termination of alimony should Sharon cohabituate with another man.

IV. Educational Support.

There is no dispute regarding Stanley's educational support obligation for his children. Stanley, however, disputes the district court's failure to place a limit on this obligation. He contends the obligation should be limited to the cost of attending a state-supported university in Iowa.

Iowa code section 598.21(5A), effective July 1, 1997, provides guidelines for determining whether a postsecondary education subsidy is warranted in dissolution cases. This section also establishes a formula for fixing the amount of a postsecondary education support obligation. *Id.* Under section 598.21(5A), the reasonable cost of postsecondary education is based on the cost of attending an in-state public institution. The child's expected contribution from scholarships, loans, and earnings is to be deducted from this amount. The remaining amount is apportioned to the parents whose shares shall not exceed thirty-three and one-third of the total cost. The educational support obligations imposed by the district court are accordingly modified to accommodate the requirements of section 598.21(5)(1)(1997).

V. Attorney Fees.

Sharon requests the court award her appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the

requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We decline to make an award in this case. Each party shall pay their own attorney fees.

AFFIRMED AS MODIFIED.