

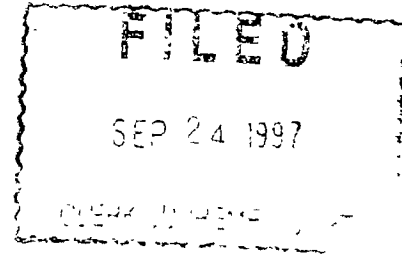
IN THE COURT OF APPEALS OF IOWA

No. 7-220 / 96-0822
Filed September 24, 1997

000121

**IN RE THE MARRIAGE OF DAVID H.
GOLDMAN AND CATHERINE F. GOLDMAN**

Upon the Petition of
DAVID H. GOLDMAN,
Petitioner-Appellee/Cross-Appellant,



And Concerning
**CATHERINE L. FAJEN f/k/a CATHERINE F.
GOLDMAN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas D. Hanson of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellant.

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

Heard by Cady, P.J., Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

STREIT, J.

Respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. Respondent asserts the trial court's calculations of alimony, child support, and attorney fees were inadequate. Petitioner argues the district court erred in determining his earning capacity for purposes of setting child support and the court had no authority to permit respondent to submit additional evidence regarding attorney fees or to reopen the record when the case had already been submitted. Both parties claim the property division was inequitable and request appellate attorney fees.

David and Catherine Goldman were married in June 1984. They are the parents of one daughter, Jessica, born July 22, 1985. At the time of trial, David was fifty-three years old, and Catherine was forty-three.

Before the Goldmans were married, Catherine worked as a registered nurse at hospitals in New York, Florida, and Des Moines. She worked at Mercy Hospital in Des Moines until her sixth month of pregnancy. During her last full year of employment, in 1984, she earned \$22,882. Following Jessica's birth, Catherine worked on a part-time basis until early 1995.

David received his B.A. degree from Brandeis University in 1964 and did three years of graduate work in Oxford, England. He graduated from the University of Iowa School of Law in 1977. When the parties married, David practiced law with two other

lawyers and was involved in his family's business, Iowa Paint. In 1993, David earned \$100,500 from his practice and various investments. In 1994, his income decreased to \$65,000.

At the time of their marriage, David owned assets valued at \$308,000. Catherine's premarital estate was worth \$9500. During the marriage, each party received substantial gifts from their families. David received gifts totaling \$176,000 and Catherine received 1662 shares of American International Group (AIG) stock. She sold 860 shares during the marriage; the remaining shares are valued at \$71,079.30.

David filed a petition for dissolution of marriage in August 1994. In January 1995, by stipulation, the court entered a temporary order of joint custody of Jessica with Catherine having physical care. Catherine occupied the marital home in West Des Moines. The temporary order required David to pay \$225 per week child support, \$150 per week alimony, the monthly mortgage, car payments, and one-half of all uninsured medical bills.

Following trial, the court entered its decree on December 29, 1995. The court observed: ". . . [T]he court finds that David's efforts to earn income as an attorney during the pendency of this divorce have been about as minimal as Catherine's efforts to find a job. The Court finds that as to both David and Catherine, their earning capacity rather than recent, actual earnings should be used to avoid substantial injustice."

The court concluded Catherine had not been using her best efforts to obtain employment during the pendency of the divorce. The court found while Catherine might need some continuing education to sharpen or restore her nursing skills due to her absence from full-time nursing for ten years, she could earn between \$23,000 and \$31,000 per year. The court found while David's income had decreased from 1993 to 1994, his total income potential was still \$109,000 per year.

The trial court ordered David to pay alimony in the amount of \$1000 per month for sixteen months. David was ordered to pay child support in the amount of \$873.99 per month and one-half of all health and medical expenses not covered by insurance. Once Catherine obtained employment, David was ordered to pay one-half the expense of child care.

The court concluded both parties received roughly equal gifts from their parents, and these sums would not be considered when determining an equitable division of assets. The court ordered the family home, valued at \$285,000, should be sold. The court ordered David receive the first \$23,000 of the net proceeds, and \$23,000¹ be placed in Jessica's Piper Jaffray account, from which the parties had borrowed. The court found Jessica's assets were valued at over \$115,000. The court ruled Catherine was entitled to \$20,000 from David's retirement accounts because she remained home

¹ The amount owed to Jessica at the time of trial was \$22,955.

to care for Jessica and supported David in building a law practice. David was awarded marital property valued at \$690,966 and was ordered to pay liabilities of \$290,603 for a total property award of \$400,363. Catherine was awarded marital property valued at \$305,009 and liabilities of \$114,327 for a total net award of \$190,682. The court also awarded Catherine \$3000 in attorney fees. Both parties filed rule 179(b) motions which the district court denied. Catherine appeals, and David cross-appeals.

I. Standard of Review. Our review of this equitable action is de novo. Iowa R. App. P. 4; *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. 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) [the] present standards of living, and [(3) the] ability to pay balanced against relative needs of the other." *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Miller*, 532 N.W.2d at 162; *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991); *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3)(1997). See *In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy the inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991).

The court considers the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *In re Marriage of Debblor*, 459 N.W.2d 267, 270 (1990); Iowa Code § 598.21(3)(f)(1997). 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, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse through a limited period of retraining. *Id.* The duration of this type of award depends on the particular needs of the dependent spouse. *Id.* at 63.

Catherine argues that because she remained home with Jessica and her illnesses, she has failed to keep her skills up-to-date, and that she would require additional classes

and training to be competitive in the nursing field. She argues she is entitled to \$1500 per month in alimony until Jessica turns eighteen.

The trial court determined Catherine's earning capacity is \$27,500 per year and awarded her alimony of \$1000 for sixteen months. The court found there is nothing about Jessica's or Catherine's health which would interfere with Catherine being employed full-time and it is up to Catherine how hard she wants to work at obtaining full-time employment. Catherine has made minimal efforts to find a job.

Although Catherine has not made reasonable efforts to obtain employment, she was used to a comfortable lifestyle while she was married for eleven years. The trial court's order for alimony will not allow Catherine to continue in the standard of living anywhere comparable to that enjoyed during the marriage. We find sixteen months is rather brief for rehabilitation after such an absence from the workforce. Rehabilitation will take longer than sixteen months. Although Catherine received temporary alimony since the parties' separation, it was not unreasonable for Catherine to not immediately focus on returning to the workforce, given the uncertainties of this litigation and the child's health. We find Catherine should receive rehabilitative alimony in the amount of \$1000 per month, until and including June 1, 1998. Rehabilitative alimony is certainly not meant to be a crutch, or taken advantage of, but should be based on the individual needs of the spouse. Catherine should continue to seek employment and needed training during this additional time and not abuse the extra time.

III. Child Support. Catherine next contends child support should be increased to at least \$1027 per month, due to the strain of Jessica's continuing medical costs. Shortly after her birth, it was discovered that Jessica was a moderate to severe asthmatic. We find the child's health concerns do not significantly interfere with Catherine's earning capacity. She has required considerable hospitalization, but has recently responded well to treatment. She continues to take numerous medications to control her condition.

The child support guidelines are to be strictly followed unless their application would lead to an unjust or inappropriate result. *In re Marriage of Swan*, 526 N.W.2d 320, 325 (Iowa 1995); *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). Deviation from the child support guidelines is discouraged. *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 697 (Iowa 1993); *State ex rel. Schaaf v. Jones*, 515 N.W.2d 568, 570 (Iowa App. 1994).

Before applying the guidelines, we must first determine the net monthly income of the custodial and noncustodial parent. We make this determination from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). An award of child support may be based upon the party's earning capacity, as opposed to his or her actual earnings. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343-45 (Iowa App. 1996). David maintains the district court erred in determining his

earning capacity for purposes of child support was \$109,000 per year and argues his income was only \$65,000.

The guidelines give discretion to the district court in setting child support to adjust amounts as necessary to do justice under the special circumstances of each case. *Lalone*, 469 N.W.2d at 695; *Miller*, 475 N.W.2d at 679-80. The district court stated David was a “better lawyer” than his income for the years 1994-1996 reflected and made a finding of earning capacity. The court found his 1990-1993 income was a more accurate reflection of his income than the income generated since filing for divorce. It is within the trial court’s discretion to make this determination. We affirm.

The trial court included the alimony payments to Catherine in determining child support. Short-duration alimony is not deducted before fixing child support, *see In re Marriage of McKamey* 522 N.W.2d 95, 99 (Iowa App. 1994), nor should it be included as income if only received for a short duration in determining child support. Even though we increased the payment time of Catherine’s alimony, we find the alimony is still short in duration and should not be included in her income or deducted from his income in determining child support. Using the district court’s calculations of David’s (\$109,000 gross income ²) and Catherine’s (\$27,500 gross income) earning capacities,

² Less \$221 per month medical insurance.

we find the amount of child support owed by David should be \$947 per month, commencing March 1, 1996.

IV. Division of Property. Catherine next asserts David should be required to pay her a \$20,000 lump sum property settlement, and she should also receive one-half of David's retirements accounts. David asserts the court ignored a substantial portion of his premarital net worth when dividing the assets and liabilities of the parties.

The partners to a 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) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Iowa law does not give credit to a party for the value of the property owned prior to the marriage. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). Instead, the property brought to the marriage by each party is a factor to consider together with the other relevant factors in determining an equitable property division. *Id.*; Iowa Code § 598.21(b) (1995).

At trial, the parties agreed to the distribution of assets and liabilities except for valuation differences on property. The primary discussion focused on the parties' premarital worth and the gifts received by the parties during the marriage. The court found David's premarital estate exceeded Catherine's by approximately \$298,500. The court determined the gifts received by both parties were essentially equal in value and were excluded from the distribution.

Pension benefits are subject to equitable division. *In re Marriage of Huffman*, 453 N.W.2d 246, 248 (Iowa App. 1990). *See also In re Marriage of Bevers*, 326 N.W.2d 896, 900 (Iowa 1982)(it is proper to consider pension benefits in formulating the economic portions of a dissolution decree). The court here equitably determined to apportion pension fund assets awarding Catherine \$20,000 to provide for her retirement security.

The court also ordered Catherine to pay David the first \$23,000 of the homestead sale proceeds. The court awarded David the homestead sale proceeds in light of David's premarital worth. To set aside \$23,000 cash to David from the sale of the house will significantly lessen the abilities of Catherine to establish a home for her and the child (the net distribution total to both parties may be as low as \$60,000). Although the trial court properly considered David's premarital worth in its division of assets, the setting aside of \$23,000 from the homestead sale proceeds to David would be inequitable.

This division of assets and liabilities will result in a net worth awarded to David of \$377,363, and a net worth awarded to Catherine of \$213,682. The district court did an admirable job dividing the assets and liabilities in this case given the complexity of the couples' finances. We affirm the district court regarding the remaining division of property.

V. Attorney Fees. Catherine additionally contends she should have been awarded more trial attorney fees, and also contends she should be awarded appellate attorney fees. David contends the district court was without authority to permit Catherine to submit additional evidence regarding attorney fees after the case was submitted. David also requests an award of appellate attorney fees.

Catherine ignores David's point and argues she need not make a separate application for fees--that she requested fees in the pleadings. While this is true, what David objects to is the four pages of a billing statement totaling \$9,407.46 that were attached to the application. The court's consideration of this evidence after submission was improper. Iowa R. Civ. P. 192 (1996).

However, based on a de novo review of the record, attorney fees of \$3,000 are fair and reasonable and shall be paid by David to Catherine.

No appellate fees are ordered. Appellate court costs are taxed to David.

AFFIRMED AS MODIFIED.