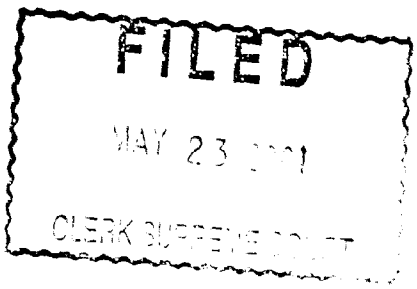
IN THE COURT OF APPEALS OF IOWA

No. 0-831 / 00-0739
May 23, 2001

IN RE THE MARRIAGE OF PAMELA L. MALLY AND MITCHELL R. MALLY

Upon the Petition of
PAMELA L. MALLY,
Petitioner-Appellee,



And Concerning
MITCHELL R. MALLY,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

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

Michael J. Motto of Carlin, Hellstrom & Bittner, for appellant.

Janice Hanrahan Roemer, Davenport, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Mitchell Mally appeals from the child support, spousal support, and property division provisions of a dissolution decree. We affirm as modified.

I. Factual Background and Proceedings. Mitchell and Pamela Mally were married on October 25, 1981. Three children were born of the marriage: Alissa, born March 5, 1984; Genna, born April 11, 1987; and Shailyn, born April 1, 1996. Mitchell was forty-three years of age at the time of trial. He graduated from Palmer College of Chiropractic in 1981. After working briefly for another chiropractor, he purchased a chiropractic office in Davenport. Mitchell also established Mally Enterprises, Inc., a business through which he conducts continuing education seminars regarding treatment of sports and industry related injuries.

Pamela was forty-one years of age at the time of trial. She attended Palmer Junior College and obtained a court reporting degree from American Institute of Commerce. Pamela worked as a clerk for two years in the Davenport City Assessor's office before she began performing clerical and office management duties in Mitchell's chiropractic office. She discontinued her work at the chiropractic office when the parties' oldest child, Alissa, was born in 1984 and has not held employment outside the home since that time. She has never worked as a court reporter.

During the marriage, Pamela managed the household and undertook primary responsibility caring for and supervising the children and transporting them to their numerous activities. Mitchell managed the family finances and developed a very successful chiropractic practice. In 1999, Mitchell reported

gross earnings of $178,481.26 from the practice and had additional income from Mally Enterprises, from real estate rented to the professional corporation, and from other investments. The district court found Mitchell had average adjusted gross income of $18,453 per month during the five years prior to trial.

The parties entered into a stipulation pertaining to custody of the children, which the district court approved. The stipulation granted Mitchell physical care of Alissa, and Pamela was given physical care of Genna and Shailyn. The decree requires Pamela to pay the sum of $100 per month for the support of Alissa and Mitchell is obligated to pay child support for Genna and Shailyn in the amount of $2500 per month. The decree also requires Mitchell to pay spousal support in the amount of $3000 per month for a term of ten years. The district court divided the assets and debts of the parties and ordered Mitchell to pay the sum of $223,365 to Pamela within one year as part of the property settlement. Mitchell appeals from the decree, contending the district court erred: (1) in failing to properly determine the parties' net monthly income and failing to properly apply the child support guidelines in determining the amount of child support; (2) in awarding excessive spousal support to Pamela; (3) in its findings with respect to the value of the chiropractic practice; and (4) in ordering him to pay attorney fees and costs of Pamela's expert. Pamela requests an award of appellate attorney fees.

II. Standard of Review. We review dissolution decrees de novo. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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).

III. Child Support. Mitchell contends the district court erred in failing to make findings with respect to the net monthly income of the parties and, as a result, failed to properly apply the child support guidelines when determining the amount of support owed by Pamela. We note he did not request such findings in a motion pursuant to Iowa Rule of Civil Procedure 179(b). Notwithstanding this, we believe the record is sufficient on de novo review for us to review this issue.

Mitchell's net monthly income clearly exceeds $6000 per month. The amount of his support obligation is therefore within the sound discretion of the district court, but shall be no less than the amount owed under the guidelines by a non-custodial parent with a monthly net income of $6000. *See In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999). On the other hand, at the time of trial Pamela had no source of income aside from spousal support. The district court attributed no monthly income to Pamela. Although she was trained as a court reporter and has some clerical experience, she has been out of the competitive labor market for more than fifteen years. She will not likely enter the job market until Shailyn, the youngest child, is attending school on a full-time basis. Pamela is in good health and has a work-life expectancy of approximately twenty years. Even though she will receive significant spousal support, the district court found it would be unjust or inappropriate to require Pamela to pay more than $100 per month for Alissa's support. Under the circumstances of this case, and in light of the respective financial circumstances of the parties, we find

the district court properly set Mitchell's child support obligation at $2500 per month. We affirm the district court's child support determinations.

IV. Spousal Support. Mitchell next objects to the amount and duration of the spousal support award to Pamela. As noted above, the district court ordered Mitchell to pay spousal support in the amount of $3000 per month for a period of ten years. "Alimony is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21(3). When determining the propriety of a spousal support award, we consider the property division between the parties. *In re Marriage of VanRegenmorter*, 587 N.W.2d 493, 495 (Iowa Ct. App. 1998); *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998). The imposition and length of an award of traditional alimony is primarily predicated on need and ability. *In re Marriage of Wendell*, 581 N.W.2d 197, 201 (Iowa Ct. App. 1998). District courts are afforded wide latitude in making alimony determinations and their rulings will be disturbed only where there has been a failure to do equity. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

The district court found Pamela should receive "traditional spousal support" to ensure she will be "able to continue to care for the children as she has . . . since 1984" and to give her "an opportunity to redevelop her work skills."

We note, under the property division provisions of the decree, Pamela will receive liquid assets valued in excess of $500,000. She is in good health and testified she plans to reenter the job market within two or three years, after their youngest child enters school. Under these circumstances, we find the spousal support ordered by the district court is inequitable. Mitchell shall pay spousal support in the amount of $3000 per month for five years; and the sum of $1500 per month for years six through ten after entry of the dissolution decree.

V. Property Division. The parties presented extensive expert testimony as to the value of Mitchell's professional corporation. Mitchell called Gary Collins, the corporation's certified public accountant. Collins combined an adjusted net asset value of $156,000 with a good will value of $84,000 to arrive at a total company value of $240,000. Pamela's expert, Rick Schneider, is also a CPA. He testified the corporation has a value of $569,000. Schneider's valuation included a good will value of $216,307. The district court found Schneider's testimony persuasive, and set the value of the company at $569,000.

We conclude the district court erred in its valuation of the professional corporation. First, we note Schneider failed to reduce the corporation's book value by the value of leasehold improvements in the amount of $24,164 appearing on the corporate books as an asset. The value of those improvements was also included in the value of the office building received by Mitchell under the district court's division of assets. Thus, by adopting Schneider's analysis, the court counted the value of the leasehold improvements twice. Schneider's opinion on valuation of the corporation is also overstated because it includes

$32,000 as the value of a split-dollar life insurance policy, an asset that was separately listed by the parties on their personal financial affidavits. Schneider's opinion also unrealistically assumes the corporation's accounts receivable for the years 1997 through 1999 are 100% collectible. Testimony at trial indicated treating all accounts receivable during that time period is untenable. Based on his personal knowledge of Mitchell's professional practice, Collins testified an historical average "collection ratio" of the firm's accounts receivable should be utilized to determine the collectible value of such accounts. We conclude Schneider's opinion as to the corporation's book value is unreliable.

Mitchell also contends the district court attributed excessive value to the good will of the corporation. The value of good will in a professional practice depends upon the ability of the professional to continue to practice his profession. *In re Marriage of Bethke*, 484 N.W.2d 604, 607 (Iowa Ct. App. 1992). Mitchell contends the corporation's good will would be realized as a divisible asset only if the company were sold with his covenant not to compete against the buyer. Such a sale would severely curtail his earning capacity which generates the funds needed to pay his future child and spousal support obligations. We have considered Mitchell's future earnings in our assessment of his ability to pay the spousal support awarded to Pamela for the ten years following the dissolution. *See In re Marriage of Hogeland*, 448 N.W.2d 678, 681 (Iowa Ct. App. 1989). We find Mitchell's argument persuasive and conclude the district court's valuation of the professional corporation is inequitable.

On de novo review, we conclude the value of the professional corporation is $240,000. Accordingly, we modify the property division provisions of the

decree to reduce Mitchell's payment to Pamela from $223,365 to $126,629. This sum shall be paid by Mitchell on or before May 1, 2004, with interest at the rate of ten percent per annum on the unpaid balance. All other aspects of the property division are affirmed.

VI. Attorney Fees and Costs of Appeal. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 874 (Iowa Ct. App. 1994). An award of attorney fees rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa Ct. App. 1987). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* Attorney fee awards must be fair and reasonable in amount and based on the parties respective abilities to pay. *Id.* The district court ordered Mitchell to pay $6,435.95 for Pamela's attorney's fee and $2,463.10 for the fee of her expert witness. We find no abuse of discretion on this issue.

Pamela requests an award of appellate attorney fees. Mitchell shall pay to Pamela the sum of $2000 to be applied against her attorney's fees on appeal. Each party shall pay one-half of the costs of this appeal.

AFFIRMED AS MODIFIED.

Vaitheswaran, J., concurs; Streit, J., concurs in part and dissents in part.

STREIT, P.J. (concurring in part and dissenting in part)

I concur with the majority's opinion modifying the value placed upon Mitchell's professional corporation. However, I disagree with the majority's reduction of alimony for years six through ten from $3000 to $1500. Because of the relative size of the incomes, or potential incomes, of the parties, it is inequitable for Pamela to receive such a severe reduction in alimony after five years. I would affirm the trial court's awarding ten years' of alimony after this twenty-year marriage.