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MAR 14 1977
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DENIS Y. REED AND PRISCILLA F. REED

Upon the Petition of )
DENIS Y. REED, ) Filed March 14, 1977
Appellant, )
And Concerning ) 24
PRISCILLA F. REED, ) 2-57766
Appellee. )

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Appeal from Polk District Court - Waldo F. Wheeler, Judge.

Appeal of alimony provisions of dissolution decree. Affirmed.

John R. Hearn, of Des Moines, for Appellant.

Martin R. Dunn, of Des Moines, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

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SNELL, J.

Petitioner, Denis Y. Reed, and respondent, Priscilla F. Reed, were married on January 28, 1967 in Omaha, Nebraska. At the time of the marriage, both were starting the second semester of their junior year at Drake University. Both parties graduated from Drake University in May of 1969, Denis obtaining a Bachelor of Science in Education and Priscilla a Bachelor of Fine Arts with a specialty in Music Education. Priscilla sought employment as a school teacher and Denis enrolled in Drake University's law school. Denis graduated from law school in May of 1971.

After Denis graduated from law school, Priscilla quit teaching and the parties moved to Story City where Denis practiced law. Denis earned income from employment with a Story City law firm until June of 1972 when he became general counsel for Associated General Contractors of Iowa. The parties had one child, a son, Alexander, born October, 1971.

On June 13, 1974 Denis Reed filed a petition for dissolution of marriage. Priscilla, respondent, appeared, never answered or counterclaimed, but testified. The court entered a decree of dissolution of marriage which awarded respondent custody of the parties' child, ordered Denis to pay $150 monthly child support until the child reached age 18, married or became self-supporting and divided the property between the parties. The court also awarded respondent $150 a month alimony. Petitioner appeals only that part of the decree which relates to alimony.

The alimony award of $150 per month was to continue until respondent remarried. The first payment was payable on the 15th day of the next month following entry of the decree. The decree was entered on October 3, 1974. Respondent remarried in May, 1976. At most then, only 19 such installments were due

under the terms of the decree. Our consideration is limited to the $2850 which would have been paid under the decree.

Petitioner argues three issues on appeal: (1) whether in the absence of a request for, or an absence of mention of alimony in the pleadings, the trial court had jurisdiction to award alimony; (2) assuming that the trial court had jurisdiction to award alimony, whether under the evidence an award of alimony was proper; and (3) assuming that an award of alimony was proper, whether under the evidence the trial court's award was excessive in amount and in duration.

An award of alimony is not mandatory; any right thereto must be determined on a case by case basis under the peculiar facts of each case. Behrle v. Behrle, 228 N.W.2d 25 (Iowa 1975). Respondent's needs must also be weighed against petitioner's ability to pay. In re Marriage of Murray, 213 N.W.2d 657 (Iowa 1973). Our review is de novo and we examine the whole record and adjudicate rights anew on those propositions properly presented, provided the issue has been raised and error, if any, is preserved in the course of the trial proceedings; while we give weight to the findings of the trial court, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592 (Iowa 1974).

In considering the alimony and property divisions we use the criteria explained in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) excluding considerations of fault as per the decision in In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In re Marriage of Winter, 223 N.W.2d 165, 169 (Iowa 1974). We are also mindful of the fact that "an allocation of alimony and the awarding of property rights have a different purpose but are closely related in determining the amount to be awarded." In re Marriage of Zoellner, 219 N.W.2d 517 (Iowa 1974).

I. Petitioner's initial contention is that the court lacked jurisdiction to award alimony. In the petition for dissolution, petitioner alleged "that provision should be made for the care, custody, control and support of the minor child of the parties." Nowhere in the petition was alimony mentioned. Petitioner contends that since the petition did not state any request for alimony nor did respondent raise it in an answer, the court was restricted to that relief which was consistent with the petition and embraced in the issues. He therefore argues that the trial court lacked jurisdiction to grant alimony. We disagree.

In Hopping v. Hopping, 233 Iowa 993, 10 N.W.2d 87 (1943), the defendant moved to dismiss the garnishment proceedings on the contention that the judgment for permanent alimony went beyond the allegations and the prayer of the plaintiff's petition and beyond any claim or demand in the original notice. The petitioner made no mention of alimony, either temporary or permanent, in the prayer of her petition, nor in the original notice which was personally served on the defendant. The court rejected the defendant's contention that the trial court lacked jurisdiction to grant alimony. The court citing prior Iowa cases stated that the power of the trial court to grant alimony is an incident of the power to decree the divorce of the parties. Once the jurisdiction over the subject matter and the parties is proper, the court has the power to award alimony, if it is justified, regardless of whether it is claimed in the petition or in an answer.

Although *Hopping* was decided under prior divorce law, § 598.1, The Code, states "'dissolution of marriage' means a termination of the marriage relationship and shall be synonymous with the term 'divorce'." Section 598.5 only sets out

the provisions which must appear in a petition for dissolution; it does not state what must be in an answer or what may be established in court. Respondent is not required to answer or counterclaim under chapter 598, The Code. In fact, § 598.21 would appear to be contrary: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties and the maintenance of the parties as shall be justified." This section indicates that a dissolution decree should encompass the entire marital relationship and is not limited to the issues contained within the petition.

In Hutcheson v. Hutcheson, 197 N.W.2d 594, 597 (Iowa 1972), the court noted § 598.21 is a reenactment of § 598.14, The Code 1966 except for the inconsequential substitution of "justified" for the word "right". The statute considered in *Hopping* is worded the same as the 1966 statute aforesaid except for the use of the words "dissolution of marriage" for the word "divorce."

There is no legislative intent indicated to prevent consideration of alimony as petitioner claims. We hold alimony was properly considered.

II. Petitioner's next contention is that assuming the trial court had jurisdiction to award alimony, under the facts, respondent was not entitled to alimony. His argument is that respondent is young, in good health, capable of earning $9500 annually as a school teacher and should be held to the highest income which she could earn with reasonable diligence. Therefore, alimony is not required. Further, under his estimated financial statement, his net income over expenses without including the award of $150 a month child support is only $122.59. He argues his inability to pay is another reason why

an award of alimony was improper.

Petitioner claims that, in deciding whether or not to award alimony, respondent must be held to her highest potential earning capacity. Evidence at trial showed that a teacher with respondent's experience and qualifications could earn $9500 in the Des Moines School System. Her income would be approximately $790 per month; thus, petitioner argues, alimony would not be required.

In the instant case, there is no evidence that respondent was able to find employment at the income level suggested by petitioner. There is only mere speculation. Respondent Priscilla stated at trial that she was motivated by a desire to stay at home and raise their son. If it can be reasonably avoided, a mother in custody of young children, should not be compelled upon dissolution of her marriage to work outside the home. Youel v. Youel, 218 N.W.2d 449 (Iowa 1974); In re Marriage of Dowie, 215 N.W.2d 276, 277-78 (Iowa 1974); In re Marriage of Matson, 215 N.W.2d 358, 360 (Iowa 1974); In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974); In re Marriage of Campbell, 204 N.W.2d 638 (Iowa 1973).

At the time of the dissolution, petitioner's monthly income as counsel for Associated General Contractors was $1350. He also received approximately $150 per month income from his former law practice in Story City; however, the duration of such income was uncertain. Respondent's net monthly income from cosmetic sales was approximately $400. She states that she has monthly expenses totaling $658. On the other hand, petitioner states his monthly expenses are $1,043.33 which leaves him a net income after taxes and expenses of only $122.59. When the $150 per month child support payment is taken into consideration, he claims a monthly deficit income of $27.41.

Therefore, he argues based upon his ability to pay, alimony was improper. Yet because her income from cosmetic sales is on a commission basis, respondent's income is only approximate and may vary greatly. Even in light of the $150 a month child support, respondent still has a monthly deficit of $108. Her needs are clear.

The propriety of alimony must be viewed in light of the property settlement. The decree awarded the household goods to the party having possession of each. Although petitioner was ordered to assume all debts and obligations, he also received all collateral securing these liabilities. Petitioner's problem is a shortage of cash to meet the financial obligations for which he is responsible. This however does not mean that the property distribution was inequitable. In re Marriage of Novak, 220 N.W.2d 592, 597-98 (Iowa 1974). The assumption of debts is not unreasonable nor is it an abuse of discretion. In re Marriage of Bingman, 209 N.W.2d 68, 72 (Iowa 1973). In light of all the circumstances, awarding respondent alimony was proper.

III. Petitioner's final contention is that the award of $150 a month alimony is beyond the needs of respondent, that alimony should have been limited to $108 and that $150 was therefore excessive. He also argues that it is excessive as to duration. Because of respondent's remarriage, the issue of duration is moot.

In Hutcheson v. Hutcheson, 197 N.W.2d 594, 597 (Iowa 1972), the respondent claimed the alimony award was excessive of petitioner's proven needs and therefore punitive in nature. The court, in interpreting § 598.21, The Code, stated: "There is nothing in this statute limiting the court's consideration of alimony solely to the element of petitioner's basic 'needs'."

The monthly alimony payment is deductible by petitioner for federal income tax purposes. Respondent will have to include these payments in her gross income. Her economic realization for the $150 will be reduced accordingly. We find the monthly alimony award of $150 was not excessive.

Respondent has also asked for attorney fees for this appeal. Those items relating to costs for the trial transcript and printing briefs and arguments are properly taxed as court costs which will be taxed against the petitioner on the appeal. In re Marriage of Zoellner, *supra* at 526. Although we do not determine the total amount to be charged as attorney's fees for respondent's attorney, petitioner shall pay $350 toward that amount.

The decree of the trial court is affirmed.