IN THE COURT OF APPEALS OF IOWA

No. 1-380 / 00-1602
Filed August 15, 2001

IN RE THE MARRIAGE OF LINDA KAY GERARD AND WILLIAM GLEN GERARD

Upon the Petition of
LINDA KAY GERARD,
Petitioner-Appellant/Cross-Appellee,

And Concerning
WILLIAM GLEN GERARD,
Respondent-Appellee/Cross-Appellant.

FILED
AUG 15 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Poweshiek County, Dan F. Morrison, Judge.

The petitioner appeals, and the respondent cross-appeals, from the decree dissolving their marriage. **AFFIRMED.**

Donald J. Charnetski of Brierly Charnetski L.L.P., Grinnell, for appellant.

Roger W. Sunleaf of McNeil & Sunleaf, Montezuma, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

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MILLER, J.

Linda Kay Gerard appeals, and William Glen Gerard cross-appeals, from the district court decree dissolving their marriage. Linda contends the district court erred in awarding William nominal alimony and incorporating language on the procedure for seeking a future increase in the amount of alimony. William argues the court erred in not awarding him adequate trial attorney fees and requests an award of appellate attorney fees. We affirm on both the appeal and cross-appeal.

I. BACKGROUND FACTS

William and Linda were married in 1972 and Linda filed a petition for dissolution of marriage on January 24, 2000. The parties only remaining minor child, Heather, was fifteen at the time of the trial.

William was fifty-three years old at the time of trial and had a fourth grade education through the Vinton School for the Blind. He had been in special education classes while at the Vinton School. William is legally blind and was receiving $785 per month in Social Security benefits due to his disability. In addition, he earned $4 per hour cleaning up at construction sites for Able Construction Group (Able). William worked 376 hours for Able during the portion of 1999 he was employed with them and through June 14 of 2000 he had worked 453 hours for Able. William also owns equipment to mow lawns and clear snow and has received money for doing so periodically in the past. Thus, he is in generally good physical health and his blindness does not prevent him from doing some physical labor.

At the time of the dissolution trial Linda was forty-seven years old and had a high school education. She was working as a custodian at Grinnell College, where she earned net income of approximately $1436 per month. Additionally, she received $414 per month in Social Security for Heather due to William's disability, and $214 in Social Security for Kalie Marsh, a foster child who had lived with Linda and William for five years prior to their separation. Linda planned to adopt Kalie following entry of the dissolution decree. Linda testified that she quit her second job on the advice of her doctor due to arthritis in one knee and high blood pressure. However, the trial court found Linda to be in good health at the time of the dissolution proceedings.

The parties agreed to the allocation of property and that the physical care of Heather should be placed with Linda. It was also agreed Linda would receive no child support from William because of the Social Security payments Linda received for Heather due to William's disability. At the time of trial the parties agreed to all issues except alimony, the value of the TIAA-CREF and the fees and costs. The only one of these issues before us on appeal is that of alimony.

Trial took place on July 20, 2000 and the dissolution decree was entered September 20, 2000. The decree was based on the trial court's July 27 findings of fact and directions for decree in which it ordered counsel for Linda to prepare an appropriate decree, submit it to counsel for William for approval as to form, and then submit it to the court for approval. The decree awarded William $25 per month in alimony. The court determined that his claimed expenses were at least $600 per month too high. The court also noted that the $572.85 per month Linda claimed to be paying for care of Heather's horse was unnecessary and attributed

that amount to her as available funds. The court further directed Linda to pay $1000 towards William's attorney fees. Linda appealed and William cross-appealed.

Linda argues on appeal that her monthly expenses exceed her income, William's claimed expenses are excessive, and the court therefore erred in awarding William even nominal alimony. She suggests in her appeal brief that if nominal alimony is awarded it should be reduced to $1 per month. In addition, Linda contends the language the court used concerning the procedure for possible future modification of her alimony obligation is confusing, ambiguous, and implies a different, lower standard should be applied than is used in modification actions in Iowa. She argues this language should either be modified or stricken from the decree.

William argues in his cross-appeal that the trial attorney fees awarded him by the trial court were inadequate and asks us to make an additional "fair and reasonable" award of trial attorney fees. William also requests an award of appellate attorney fees.

II. SCOPE OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. 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). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. MERITS

"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). *Id.* "Property division and alimony should be considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

When determining the appropriateness of spousal support, a court must consider, among other things, (1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against the relative needs of the other. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998). In marriages of long duration where the earning disparity between the parties is great, both spousal support and nearly equal property division may be appropriate. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993).

The trial court stated in its ruling, "Respondent is not in need of substantial alimony at this time but may require assistance in the future due to his disability." The alimony provision of the decree which followed stated:

> Petitioner shall pay $25 per month as alimony commencing August 1, 2000. Alimony shall continue in like amount until the death of

> either party or remarriage by respondent. If because of a future change in circumstances related to his ability to find work because of restrictions caused by his disability, respondent deems himself to require financial assistance, he may make application to the court for the same. The matter shall be set for hearing on prior notice to petitioner. The court shall determine at such hearing whether under all of the circumstances then-existing petitioner shall pay any more alimony to respondent than $25 per month.

Based on the parties' relative earning capacities, the length of the marriage, and William's potential need for support in the future because of his disability, we agree with the trial court's determination that William is entitled to the nominal award of $25 per month in alimony. The trial court acted equitably in awarding William this nominal alimony and equity does not require the amount be reduced.

Linda further argues on appeal that paragraph nine of the decree, set forth in full above, should either be modified or stricken from the decree because it is ambiguous and arguably implies a different, lower standard would be applied if William were to apply for a modification of his alimony in the future. We disagree.

Paragraph nine specifically states that William "may make application to the court" in the future for financial assistance if he deems it necessary due to a "future change in circumstances." At that time the court would then make a determination based on the "circumstances then-existing" as to whether Linda would be required to pay additional alimony. The standard in Iowa for modification of alimony provisions is well established. "Modification of the alimony provisions of a decree is justified only if there has been some material and substantial change in circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed." *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). The burden rests on the party

seeking the modification to establish such a change by a preponderance of the evidence. *Id.*

We construe paragraph nine as correctly setting forth the standard used in Iowa for modifying a party's alimony obligation. William would have to meet the same standard as any other party if he sought to have the amount of alimony he receives modified in the future and this paragraph does not set any different or lower standard for him. We view paragraph nine as mere surplusage, not in any manner prejudicial to Linda's rights. Her request to modify or strike this paragraph is denied.

Although not necessary to our decision on the issue concerning paragraph nine, it may be noted that it was Linda, through her counsel, who apparently prepared and presented the very language of which she now complains. The trial court did not use similar language in its ruling. Therefore, even if we were to determine there was error in the standards set forth in paragraph nine, Linda could not now on appeal complain of such error because she proposed and assented to it in the trial court. "Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited or to which he has assented." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989); *see generally* 5 Am. Jur. 2d *Appellate Review* § 713 (1995). "A party cannot lead a trial court into error and then employ the error as a source of complaint on appeal." *In re Marriage of Heirigs*, 34 S.W.3d 835, 840 (Mo. Ct. App. S.D. 2000); *In re Marriage of Perkel,* 963 S.W.2d 445, 452 (Mo. Ct. App. S.D. 1998).

William cross-appeals arguing the trial court should have awarded him further trial attorney fees in addition to the $1000 Linda was ordered to pay. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties' respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993). The trial court correctly assessed the parties' abilities to pay, and we find no abuse of discretion in the amount of the award. We affirm the trial court's order regarding attorney fees.

William seeks appellate attorney fees from Linda. We have discretion to award appellate attorney fees under Iowa Code section 598.36. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). 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. *Id.* William was obligated to defend the trial court's decision due to Linda's appeal and has done so successfully. He did, however, cross-appeal, Linda was obligated to defend the trial court's decision on the issue he appealed, and she has done so successfully. We award William $500 in appellate attorney fees.

IV. CONCLUSION

Based on our de novo review of the record, we affirm the award to William of $25 per month in alimony. We construe paragraph nine of the decree as correctly setting forth the standard for modification of alimony and decline to modify or strike it. We conclude the trial court did not abuse its discretion in its

award of trial attorney fees to William. We award William $500 in appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED ON APPEAL; AFFIRMED ON CROSS-APPEAL.