

IN THE COURT OF APPEALS OF IOWA

No. 4-207 / 93-1091

IN RE THE MARRIAGE OF SUZANNE McKINLEY AND TIMOTHY McKINLEY

Upon the Petition of
SUZANNE McKINLEY,

Petitioner-Appellant,

And Concerning
TIMOTHY McKINLEY,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

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

Victoria L. Herring, West Des Moines, for appellant.

Thomas P. Lenihan, Des Moines, for appellee.

Heard by Hayden, P.J., and Habhab and Cady, JJ.

PER CURIAM

Former wife, Suzanne McKinley appeals the economic provisions of the parties' dissolution decree. We affirm as modified.

Tim and Suzanne McKinley were married on November 25, 1972. Suzanne obtained her Bachelor's degree from Iowa State University in 1974. Tim worked for Midwest Equipment from 1973 until 1982. During this time, Suzanne was a homemaker and worked part-time. In 1977, Suzanne began work on her Master's degree, and became a graduate teaching assistant in English at Iowa State University. However, in 1979, Suzanne began suffering from panic attacks. After leaving her teaching position, Suzanne obtained part-time employment with Iowa Network of Community Youth Services.

Tim and Suzanne's first child, Kelly, was born in October 1980. In November 1982, Kelly was diagnosed as suffering from alopecia areata, an auto immune disease which results in a complete loss of body hair. At this time, Tim quit his job with Midwest Equipment and became a salesman for R/B Sales.

In June 1983, Suzanne began working for the National Alopecia Areata Foundation on a volunteer basis. Due to Kelly's condition, Tim and Suzanne purchased a hairpiece for Kelly that cost $2650. In 1986, Kelly developed lumps on her legs, and was treated for cancer.

A second child, Megan, was born in 1985. In 1986, Tim and Suzanne bought a home in West Des Moines for $120,000.

The monthly mortgage payments amount to $1038. In December 1986, Suzanne reentered the work force, obtaining employment with the Jewish Federation. Suzanne claims she was sexually harassed by her employer.[1] She was diagnosed as suffering from posttraumatic stress disorder. Suzanne sought treatment at the Menninger Clinic in Topeka. Suzanne was hospitalized from July 1991, until October 1991. Her treatment at the clinic cost over $26,000. In order to pay for continued treatment, Suzanne borrowed $8000 from her sister.

After treatment, Suzanne continued her therapy with Bonnie Theisen. Theisen recommended that Suzanne not work full time. Suzanne began receiving $1000 per month in disability insurance. Tim's income increased significantly over the years, earning $57,000 in 1988. In January 1992, however, Tim was promoted to a sales management position, and his income was reduced to $48,000 per year.

On January 28, 1992, Suzanne filed a petition for dissolution of marriage. Tim and Suzanne agreed that Suzanne should be awarded custody of the children. On February 12, 1993, after a trial, the district court entered its decree. The court ordered Tim to pay Suzanne $980 per month in child support, and one-half of all medical expenses not covered by insurance. Tim was also ordered to pay the deductible in regard to Kelly's

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1. In November 1991, Suzanne entered into an Agreement and Covenant Not to Sue confidentially resolving this claim with the Iowa Jewish Federation.

hairpiece. Tim was granted tax exemptions for both children. The district court also awarded Suzanne $210 per month alimony for thirty-six months. As of February 1, 1993, Suzanne was to take over the $1038 per month payments on the marital home. The marital home was ordered to be sold immediately and the proceeds equitably divided after paying off debt owed to Suzanne's father. Tim was also ordered to pay one-half of the loan on the parties' 1988 Volvo.

Suzanne was awarded her Merrill Lynch IRA, valued at $9600, a 20th Century Fund, valued at $7737, and her TSA Lincoln Fund, valued at $7126. Tim was awarded his IRA valued at $11,349, his 20th Century Select IRA valued at $6000, and R/B Keyman insurance, valued at $7265. Suzanne was also to assume debts in the amount of $50,149, including the $26,375 owed to the Menninger Clinic. Tim, however, was ordered to pay only $3512 of marital debt. Suzanne appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

I. Property Division.

Suzanne asserts the division of the parties' property is inappropriate. The partners in the 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 of 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) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

Suzanne contends the district court improperly considered fault when determining the property division. Our de novo review is based on the criteria codified in Iowa Code section 598.21(1) (1991). We do not reward or punish either party on the basis of fault. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977); In re Marriage of Helmle, 514 N.W.2d 461, 463 (Iowa App. 1994).

Suzanne specifically objects to the division of the marital debt. She claims she was ordered to pay debts totaling over $50,000 while Tim was ordered to pay approximately $3500. A large portion of the debt assigned to Suzanne was for medical treatment and counseling Suzanne received during the marriage for her psychological disorder. Tim argues he should not be held liable for

these debts because of the settlement agreement Suzanne entered into with her former employer already compensated her for these debts.

After reviewing this agreement, we disagree. We determine it is inequitable to assign Suzanne her entire medical bills. We modify the decree to require Tim to pay one-half of Suzanne's bills to the Menninger's Clinic and the College of Osteopathic Medicine in Des Moines which were not covered by insurance and which were incurred during the parties' marriage.

Suzanne next argues the district court erred in ordering her to assume mortgage payments on the family home. In the February 12, 1993, decree, the district court ordered the family home to be sold immediately and Suzanne to hold Tim free of any liability with respect to the real estate effective February 1, 1993. Prior to this, Tim was paying the monthly mortgage payment of $1038 in accordance with a Temporary Order. Given the circumstances of this case, we believe Tim should continue to pay the mortgage payment up to and including May 1, 1993, unless the home was sold prior to that date. If Tim is required to make mortgage payments in the months of March, April, or May 1993, he will be reimbursed from the proceeds of the sale an amount equal to that part of those mortgage payments attributable to the principal. If the house was not sold by May 1993 and Suzanne is required to make additional mortgage payments, she will be entitled to reimbursement

from the proceeds of the sale an amount equal to that part of these additional mortgage payments attributable to the principal. We modify the dissolution decree accordingly.

Suzanne also claims the district court erred in awarding Tim the income tax exemptions for both children. We have reviewed this issue and find no reason to modify the district court in this regard.

II. Spousal Support.

Suzanne next argues the district court erred in only awarding her alimony for a period of thirty-six months. She claims she should receive permanent alimony.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). 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 (Iowa App. 1983).

Suzanne's emotional health has hindered her ability to find and keep employment. She has not worked since 1991. At the time of trial, Suzanne was receiving disability benefits from Fortis Insurance Company for her psychological disability. These benefits were scheduled to terminate in January 1994. Suzanne has applied for social security disability benefits, but at the time of trial she had not yet received a decision on whether she would be entitled to them. Her therapist testified Suzanne could be employed part-time in approximately a year. The therapist

did not know when Suzanne would be capable of returning to full-time work. The district court awarded Suzanne spousal support of $210 per month for thirty-six months. We modify the decree to increase the duration of the spousal support to sixty months. Should Suzanne remarry or either party die prior to expiration of the sixty months, spousal support shall terminate.

III. Child Support.

Suzanne next claims the district court erred in calculating child support. Suzanne claims that Tim voluntarily reduced his income from $57,000 to $48,000 after the divorce proceedings began. See In re Marriage of Foley, 501 N.W.2d 497, 500 (Iowa 1993) (a party may not claim inability to pay child support when the inability is self-inflicted or voluntary). Tim's employer testified Tim's income was reduced because the company was in financial trouble. He added that Tim requested to move from a commission sales position to a salaried sales management position because Tim wanted more stability. We determine the district court correctly determined Tim's net income should be based on his sales management position and not his previous commissioned sales position.

In addition, Suzanne asserts special circumstances warrant an increase in the child support ordered by the district court. Suzanne states the parties' oldest daughter Kelly has significant special expenses such as the care of her hairpiece, counseling and dental work. We find

the district court's allocation of these costs fifty percent to Tim and fifty percent to Suzanne is equitable.

IV. Attorney Fees.

Suzanne was awarded $1500 in trial attorney fees. Suzanne believes she should have received more. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We affirm the district court on this issue.

Suzanne also requests appellate attorney fees. We award her $1000.

Costs of this appeal are assessed to Tim.

AFFIRMED AS MODIFIED.