IN THE COURT OF APPEALS OF IOWA

No. 0-596 / 99-1402
Filed February 28, 2001

IN RE MARRIAGE OF MARCIA C. STRANG AND DOUGLAS J. STRANG

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Upon the Petition of
MARCIA C. STRANG,
Petitioner-Appellant/Cross-Appellee,

And Concerning
DOUGLAS L. STRANG,
Respondent-Appellee/Cross Appellant.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

The petitioner appeals and respondent cross-appeals, from property, alimony, child support and visitation provisions of their dissolution decree. **AFFIRMED AS MODIFIED.**

Edward N. Wehr of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Sharon A. Mellon of Mellon & Spies, Iowa City, for appellee.

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

VAITHESWARAN, J.

Marcia and Douglas Strang appeal the property, alimony, child support and visitation provisions of a dissolution decree. We affirm as modified.

I. Background Facts and Proceedings

Douglas and Marcia, ages 42 and 40 at the time of trial, married in 1983. They have five children, ranging in age from six to fifteen at the time of trial. Douglas has a degree in business administration and worked as a stock broker until October 1996. Marcia has a secretarial degree and had begun course work toward a nursing degree before she married Douglas. After the marriage, she served as primary caretaker of the children and home. She worked part-time outside the home in 1988 and 1989 and again beginning in late 1996.

Until 1996, Douglas's income afforded the parties a comfortable lifestyle while allowing them to accumulate significant savings, most in an individual retirement account in Douglas's name. Douglas's financial condition changed, however, when he decided to resign from his stockbroker position after receiving a customer complaint. The parties decided to move from Omaha to Iowa City in an effort to scale down their living expenses, be closer to Marcia's family, live a simpler life, and get away from a lifestyle that fostered abuse of alcohol by Douglas. Douglas invested in a pizza business and Marcia began working as a part-time surgical technician. Douglas compensated for his reduced income by withdrawing funds from his IRA.

After the move, Douglas continued to abuse alcohol. He received three OWI convictions and had his driver's license revoked. In addition, he had to defend a civil lawsuit filed by a person he injured while intoxicated.

The parties separated, with Douglas moving to his parents' home in West Des Moines and Marcia remaining in the parties' Iowa City home with the children. Marcia sought a divorce in the spring of 1998.

In July 1998, the district court issued a temporary order deeming Douglas's IRA a marital asset and authorizing the parties to withdraw funds from the account. At that time, the fund contained $270,000.

The parties agreed Marcia would have sole permanent custody of the children. At trial, the parties addressed issues of property, alimony, child support and visitation. The district court dissolved the marriage, established a visitation schedule, ordered Douglas to pay child support of $1,273 per month, awarded the parties' home to Marcia but required her to assume the mortgage payments, awarded her a car, $6,127 in her retirement account and half of the $191,895 in his IRA, awarded Marcia $1.00 in alimony and declined to order Douglas to pay Marcia's attorney fees. Douglas filed a rule 179(b) motion to enlarge findings and conclusions. In response to the motion, the court amended its decree to provide that alimony would terminate upon death, remarriage, or within ten years, whichever came sooner. The court also ordered the taxes and penalties on withdrawals from the IRA account to be paid out of the account. Marcia appealed and Douglas cross-appealed. Our review is de novo. Iowa R. App. P. 4.

II. Property

The parties' property dispute centers on Douglas's IRA. Pursuant to the parties' agreement, the district court signed a temporary order authorizing Douglas to withdraw $3,000 per month from the account on behalf of himself and

$3,400 per month on behalf of Marcia. In addition, the court ordered Douglas to pay $1,000 per month to Marcia through the clerk of court. This sum was not identified as alimony or child support. The temporary order made no provision for payment of taxes and penalties generated by the premature withdrawal of funds from the IRA. Douglas had not filed income tax returns for 1996, 1997, or 1998, and had not paid any taxes or penalties for his early withdrawals. Marcia filed separate returns for these years. By the time of trial, $191,895 remained in the account.

The district court awarded each party one-half the IRA funds remaining after the July 1, 1999 distribution. The court further concluded, "[e]ach party shall be responsible for any income tax obligations, penalties, and interest, if any, generated as a result of the IRA distributions made prior to this order or pursuant to this Order." In response to Douglas's rule 179(b) motion, the court struck this conclusion and instead ordered:

> All federal and state income taxes, including penalties and interest due and owing on all monies removed from the Respondent's IRA account, and the taxes on the monies removed from the IRA account to pay the taxes shall be paid from the funds remaining in the IRA account, after deducting the $11,000 reserved by Respondent for payment of taxes.

Marcia takes issue with this conclusion and with the property distribution as a whole on the grounds: (1) the parties "unnecessarily incurred" substantial taxes and penalties because the court did not divide the account pursuant to a qualified domestic relations order; (2) none of the interest or late filing penalties should be charged to her, as she filed her own tax returns and Douglas is the only named owner of the account; (3) Douglas dissipated funds through a bad

investment in a limited partnership and expenditures related to the defense of his drunk driving charges; (4) the expert accountant called by Douglas made errors and omitted key facts in his analysis; and (5) it is inequitable to require her to pay taxes and penalties on funds withdrawn from the account to satisfy Douglas's support obligation.

We find Marcia's second argument dispositive. A court is required to consider income tax consequences in allocating assets. Iowa Code § 598.21(1)(j); (3)(g); *In re Marriage of Hogeland*, 448 N.W.2d 678, 680 (Iowa Ct. App. 1989). There is no question the IRA account was always in the name of Douglas and he was the sole party legally responsible to pay taxes and penalties for early withdrawals from the account. Douglas concedes this fact but asserts both parties understood they would share the tax burden. Assuming without deciding that such an understanding could alter Douglas's legal obligation, we are not persuaded an understanding existed. Marcia filed separate income tax returns for 1996, 1997, and 1998 without reporting any of the early withdrawals. Additionally, the temporary custody order agreed to by both parties makes no mention of who would bear the tax burden associated with the account and we are not convinced its designation as a marital asset is sufficient to create an obligation where none previously existed. We conclude Douglas is solely responsible for payment of taxes and penalties associated with the IRA account.[1]

The next question is whether the funds should have been divided before payment of these taxes and penalties or after. Douglas presented expert trial testimony that the tax and penalty burden would range from $93,000 to

[1] We reach this conclusion without considering an expert opinion furnished by Douglas after trial in connection with his rule 179(b) motion.

$105,000, depending on whether the parties filed individual or joint tax returns. Although Marcia strenuously objected at trial to filing joint returns, she now appears to be willing to file an amended joint return for 1996 but separate returns for 1997 and 1998. According to the expert, this would place the taxes and penalties at approximately $95,000. We agree with the district court's amended order requiring payment of these taxes and penalties before division of the balance between the parties. *See Graham v. Graham*, 390 S.E.2d 469, 471 (App. 1990) (holding district court should have deducted penalty and taxes from face value of IRA where account would be fully liquidated and divided between the parties); *Buche v. Buche*, 423 N.W.2d 489, 492 (Neb. 1988) (determining present value of IRA for purposes of marital distribution after deduction of taxes and penalties).

Finally, we must determine whether the district court's equal division of the balance in the account was equitable. Douglas contends he should receive a higher amount to compensate him for the unequal division of the remaining assets. Marcia maintains she should receive more to compensate her for the virtual absence of an alimony award. After carefully reviewing the parties' financial statements and the list of debts outlined in Exhibit 3, we conclude Douglas should not receive more than an equal division of the funds remaining in the IRA after payment of taxes and penalties. At the time of trial, he lived with his parents and had none of the parties' five minor children in his custody. Although Marcia received the parties' home, the district court held her exclusively liable for the mortgage. *See In re Marriage of Goodwin*, 606 N.W.2d 315, 323 (Iowa

2000). Under these circumstances, we affirm the district court's property distribution.

III. Alimony

The district court denied Marcia's request for alimony "because of the severe financial situation of the parties." The court noted Douglas's "ability to pay child support would be compromised if he would also be required to pay alimony." However, the court reserved the question of alimony by providing Marcia would receive one dollar per year.

Marcia contends this decision was inequitable. She seeks additional alimony or, alternately, a substantial increase in her portion of the property distribution to compensate for the absence of alimony. She also challenges the district court's decision to terminate the alimony upon the death of either party, Marcia's remarriage or the expiration of ten years, whichever comes first.

Alimony is an allowance to a former spouse in lieu of a legal obligation to support that person. *In re Marriage of Gonzales*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997) (citation omitted). Alimony awards are appropriate following a marriage of long duration, especially where there is a great disparity in earning capacity. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998). In determining an appropriate alimony award, we consider the factors set forth in Iowa Code section 598.21(3) (1997).[2] Our courts have considered property and

[2] These factors include: the marriage length; the age and health of the parties; property distribution; education of the parties; the earning capacity of the spouse seeking alimony; feasibility of attaining self-sufficiency; tax consequences; mutual agreements by the parties regarding financial or service contributions; terms of a prenuptial agreement; any other factors deemed relevant by the court. Iowa Code § 598.21(3).

alimony in relation to each other. *In re Marriage of Callenius*, 309 N.W.2d 510, 513 (Iowa 1981).

We agree with Marcia that the court's alimony award of one dollar was inequitable. Marcia gave up her nursing education and job for her family, resulting in a loss of social security and retirement benefits. *See Hogeland*, 448 N.W.2d at 682. She almost single-handedly raised five children while Douglas expanded his stock brokerage business. She agreed to continue in the role of sole caretaker after the parties separated and divorced. Although we recognize as the district court did that Douglas had limited funds at the time of trial to meet his obligations, we also note he was to receive half the funds remaining in the IRA after payment of taxes, valued at more than $40,000, and he estimated his income would increase substantially. We believe Douglas has the ability to pay alimony without jeopardizing his support obligation. At the time of trial, he lived with his parents and had minimal debts. Accordingly, we modify the decree to award Marcia reimbursement alimony of $500 per month for five years. In light of our conclusion, we further modify the decree to delete the alimony termination provision set forth in the court's amended ruling.

IV. Child Support

Marcia next argues the district court's child support award was inequitable. Douglas testified he expected to earn $18,000 in 1999 but projected future earnings would be between $40,000 and $60,000. The record also contains evidence his income during the years he worked as a stock broker was substantially more than his income at the time of trial. The district court chose not to use Douglas's actual income to calculate child support. Instead, the court

calculated his earning capacity by averaging the income he earned from 1991 through 1996. His average taxable income for those years was $92,133. The court then found that "half of that amount, or $46,066 is a realistic amount of earning capacity that should be attributable to the Respondent for child support purposes." The court adopted Douglas's calculation of child support based on a net monthly income of $915 for Marcia and ordered Douglas to pay $1,273 per month. Marcia asserts the court should have considered Douglas's retirement benefits as income. She also maintains the district court made a mathematical error in computing the child support award. Finally, she contends the court should require Douglas to annually report his income to permit a modification of the support obligation, if warranted, and should require him to place his portion of the IRA distribution into a trust fund to cover his future support and alimony obligations.

Iowa Code section 598.21(4)(a) creates a rebuttable presumption that the child support prescribed by the child support guidelines is the correct amount to be awarded, unless a court finds it would be unjust or inappropriate to apply the criteria prescribed in the guidelines. We apply the guidelines that became effective on August 1, 2000 to cases pending on appeal as of the effective date. *In re Marriage of Roberts,* 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996).

Addressing Marcia's first contention that the court should have considered Douglas's retirement fund in calculating support, our court has recognized that non-taxable increases in net worth may justify a departure from the guidelines. *In re Marriage of Cossel*, 487 N.W.2d 679, 682 (Iowa Ct. App. 1992). However, the facts do not support deviation from the guidelines on this basis. The district

court appropriately considered the IRA in connection with the property distribution. We see no basis for also requiring the court to consider it in determining child support.

We also find no error in the court's child support calculation. Given the fluctuation in Douglas's income, the district court appropriately averaged his income to avoid inequity to the children. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 52 (Iowa 1999). The court next calculated child support using the then-existing guidelines. As the support amount under the new guidelines is no different than the amount ordered by the court, we affirm the district court's child support award. We find no reason to order Douglas to annually report his income to the court or to place funds in trust to cover future obligations. The law affords Marcia the right to file a modification application if she believes Douglas's earning capacity has changed substantially. Iowa Code § 598.21(8)(a); *In re Marriage of Gilliam*, 525 N.W.2d 436, 438 (Iowa Ct. App. 1994). We believe this provision affords her sufficient protection.

V. Visitation

The district court ordered a liberal visitation schedule, to take effect "[u]nless otherwise agreed by the parties." Under the decree Douglas was to receive visitation every other weekend, holidays in alternating years, Father's Day, and for two two-week periods in the summer.

Marcia challenges this portion of the decree on the ground it is too extensive given Douglas's history of alcohol abuse. She suggests the court should have considered a supervised visitation arrangement or should have prohibited visitation when Douglas was drinking. She also maintains "the

schedule almost makes the custodial parent a permanent babysitter for husband since he has the majority of the prime time (weekends, school spring break, holidays, etc.)" Finally, she asserts the court should have ordered Douglas to provide notice at least forty-eight hours in advance of a scheduled visitation period if he intended not to exercise visitation.

Douglas's history of alcohol abuse is troubling. However, despite this history, the record contains scant evidence suggesting Douglas drank in the presence of the children or drove with them while intoxicated. *See Sulma v. Iowa Dist. Ct.*, 574 N.W.2d 320, 321 (Iowa 1998) (noting custodial father failed to furnish current evidence of ex-wife's drinking and driving sufficient to warrant denial of visitation). To the contrary, the record reveals Douglas took steps to address his alcoholism including attending Alcoholics Anonymous meetings and taking an alcohol avoidance drug known as Antabuse. Additionally, Douglas's father transported the children to and from visits. Accordingly, based on the record before us, we conclude Douglas's prior alcohol abuse does not warrant a reduced visitation schedule or supervised visitation. We also decline to limit visitation to times when Douglas has not been drinking, as our courts have viewed such limitations with disfavor. *See In re Marriage of Fite*, 485 N.W.2d 662, 664 (Iowa 1992).

We are sympathetic to Marcia's assertion that Douglas will see the children during "prime time", whereas she will bear the burden of managing the children's weekly schedule. *See* Iowa Code § 598.41(1)(a) (encouraging parents to share responsibilities as well as rights of raising children). However, the distance between the parties effectively precludes any other type of

arrangement. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996) (noting "a change in residence involving a substantial distance can present significant obstacles to regular and active visitation by the noncustodial parent"); *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa Ct. App. 1991) (affirming district court's order of more limited visitation than requested by parties in light of child's increasing extracurricular activities and distance between parents). Further, Marcia presented no evidence that the liberal visitation Douglas exercised during the year preceding trial disrupted the children's schedules or otherwise caused them physical or emotional harm.

We conclude the district court's visitation schedule serves the statutory goal of assuring the children "the opportunity for the maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a). Accordingly, we affirm that schedule. In doing so, we note the decree permits the parties to agree to an alternate schedule. Should the children's varied and extensive extracurricular activities or the parties' schedules preclude visitation as ordered, we trust the parties will work with each other to accommodate these factors, providing ample advance notice of deviations in the schedule.

VI. Trial Attorney Fees

Marcia contends the district court should have ordered Douglas to pay a portion of her attorney fees. A court is to consider the financial condition of the parties and their relative ability to pay. *Goodwin*, 606 N.W.2d at 324. Our review of this issue is for an abuse of discretion. *In re Marriage of Fall*, 593 N.W.2d 164, 168 (Iowa Ct. App. 1999). Given Douglas's limited income at the time of trial, we

conclude the district court did not abuse its discretion in denying Marcia's request.

VII. Appellate Attorney Fees

Both parties seek appellate attorney fees. An attorney fee award is not a matter of right but rests within the sound discretion of the court. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). 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 district court's decision. *Id.*

Douglas seeks $8,436.73 in appellate fees. Marcia seeks $1,233.50. After consideration of the enumerated factors, we decline to award fees to either party.

The district court's decree is affirmed as modified. Costs are divided equally between both parties.

AFFIRMED AS MODIFIED.