IN THE COURT OF APPEALS OF IOWA

No. 6-757 / 95-1393

FEB 26 '97
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GERALDINE A. HICKMAN AND RONALD C. HICKMAN

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Upon the Petition of
GERALDINE A. HICKMAN,

Petitioner-Appellee/Cross-Appellant,

And Concerning
RONALD C. HICKMAN,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Emmet County, Tom Hamilton, Judge.

Respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

John G. Martens of Sanderson, Ridout & Martens, Estherville, for appellant.

Joseph L. Fitzgibbons and David A. Lester of Fitzgibbons Brothers, Estherville, for appellee.

Heard by Cady, P.J., and Huitink, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Respondent Ronald C. Hickman ("Ron") appeals the alimony and property provisions of the decree dissolving his marriage to the Petitioner Geraldine A. Hickman ("Gerri"). Gerri cross-appeals from the district court's property division and also its denial of her request to purchase a life insurance policy on Ron to secure his alimony obligation in the event of his death. We affirm.

Ron and Gerri, both age forty-five, were married in 1976. There have two teenage children, Kelty and Grant.

Ron obtained a degree in public accounting and passed his CPA exam prior to marrying Gerri. After working for four years in Minneapolis, Ron moved to Estherville, Iowa, in October 1975, and joined the faculty at Iowa Lakes Community College as an accounting instructor. At that time he started a part-time accounting practice. In 1980, Ron went full-time in his accounting business and in 1982, formed a partnership with another accountant, Russ Eckard. The trial court calculated a three-year average of his gross income at $76,710 and a five-year average at $70,747. Subsequent to this appeal, Ron and his partner sold the accounting business for $110,000.[1]

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[1] On appeal, Ron disputed the value assigned to the accounting business by the district court. However, Ron's counsel notified the court at oral argument that the business had subsequently been sold for $110,000, a price that did not significantly vary from the court's valuation of $127,787. Ron has since filed a withdrawal of this issue on appeal

After graduating from high school in Faribault, Minnesota, Gerri received training as a Certified Psychiatric Technician and accepted a position at the Faribault State Hospital. Two years later she moved to Minneapolis and was employed by an insurance company. After marrying Ron, Gerri worked as a receptionist in an Estherville dentist office for one year. The following five or six years she stayed at home to raise the couple's two children. Gerri completed her A.A. degree at Iowa Lakes in 1987 and received a Bachelor of Arts degree from Buena Vista College in 1989. Since that time, she has worked as a manager of a congregate meal organization, as a social worker for the Department of Human Services, and as a case manager in her present employment with the Northwest Iowa Mental Health Center. Her current gross income is $17,658 per year. Gerri is returning to college to complete a two-year nursing home administration program. She anticipates an entry level salary of $30,000 to $33,000 per year in that occupation.

In July 1994, Gerri filed a petition for divorce. The parties disputed the valuation of Ron's interest in the CPA partnership. The court held a proceeding on this issue in addition to a proceeding conducted by the court-appointed Special Master. A third trial was held on the remaining issues in July 1995.

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stating that the costs in attorney and expert witness fees to further pursue the matter would exceed the difference in the trial court's valuation and the actual sale price. Accordingly, we will not consider the arguments submitted by the parties on this issue.

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In its final decree, the district court awarded Gerri $1000 a month in alimony until she reaches the age of sixty-five, dies, or remarries. If, upon reaching age sixty-five, she is still eligible to receive support under the terms of the decree, the award would reduce to $700 per month and continue until age seventy-two. The court cited the significant disparity in earning capacity between the two parties and the high standard of living enjoyed by the family during the marriage as reasons supporting the alimony award. Gerri was ordered to pay $361.75 in child support for Grant. She was also ordered to pay 29.6% of Kelty's college expenses and Ron was ordered to pay the balance. The same percentages were applied to cover the cost of health insurance premiums, uncovered expenses, and deductible items for the children.

The parties' home, valued at $90,000 and encumbered by a $60,525 mortgage was awarded to Gerri. The decree also awarded her the rental house valued at $15,000. The Spirit Lake cottage valued at $32,500 was awarded to Ron. The property division also allocated an Edward D. Jones account valued at $10,800 to Gerri and an IRA valued at $67,333 to Ron. These accounts represented the only substantial liquid assets held by the parties. As part of the property division, Ron was ordered to make annual payments to Gerri in the amount of $6297.60 plus ten percent interest for ten years. Finally, Ron was ordered to pay Gerri $29,915.30 to cover various debts and expenses, including, among other items, several thousand dollars in costs associated with the trial.

Ron appeals from the district court's order arguing that long-term permanent alimony awarded to Gerri was not justified by the circumstances of this case. Ron also asserts that, in light of the tax and cash flow consequences, the district court should have set aside the IRA to Gerri instead of awarding her cash payments.

I. Alimony.

Our review of this equitable action is de novo. Iowa R.App.P. 4. *In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but we do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

The district court awarded Gerri alimony in the amount of $1000 per month until she reaches age sixty-five, dies, or remarries. Upon reaching age sixty-five, if Gerri is still eligible for alimony under the decree, her award will reduce to $700 per month until she reaches age seventy-two.

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). When determining the appropriateness of alimony, the court must consider: "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Miller,* 524

N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Miller,* 532 N.W.2d at 162; *In re Marriage of Whelchel,* 476 N.W.2d 104, 110 (Iowa App. 1991); *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3)(1995). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy the inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil,* 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Earsa,* 480 N.W.2d 84, 86 (Iowa App. 1991). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great. *In re Marriage of Geil,* 509 N.W.2d at 742; *In re Marriage of Hitchcock,* 309 N.W.2d 432, 438 (Iowa 1981).

We consider alimony and property division together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin,* 526 N.W.2d 342, 345 (Iowa App. 1994); *In re Marriage of Griffin,* 356 N.W.2d 606, 608 (Iowa App. 1984). An alimony award is justified when the distribution of the assets of the marriage does not

equalize the inequities and economic disadvantages suffered in marriage by the party seeking the alimony who also has a need for support. *In re Marriage of Weiss,* 496 N.W.2d 785, 787 (Iowa App. 1992). The court should also consider the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *In re Marriage of Debbler,* 459 N.W.2d 267, 270 (1990); Iowa Code § 598.21(3)(f).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis,* 442 N.W.2d 59, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse through a limited period of retraining. *Id.* The duration of this type of award depends on the particular needs of the dependent spouse. *Id.* at 63. Traditional or permanent alimony in contrast is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Id.* at 62. The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to that he or she would receive if the marriage continued.

Ron has cited several factors in support of his argument challenging the award of long-term alimony to Gerri. He argues that Gerri developed her own earning potential throughout the marriage and that she has at least twenty years remaining to earn money for retirement. Ron reasons that the most Gerri is entitled to is two years of rehabilitative alimony to obtain additional education. Furthermore, he contends

Gerri has made no contributions to his efforts to obtain a college degree and to start his own CPA practice. Ron also cites to his other substantial financial obligations resulting from the divorce and Gerri's substantial property award. Finally, he asserts that Gerri does not have custody of the children and, therefore, she is not responsible for maintaining their standard of living.

Our de novo review of the record confirms the district court's reasons supporting its award of traditional or permanent alimony. Gerri is leaving her nineteen-year marriage at a substantial disadvantage as evidenced by the significant disparity between the parties' incomes, with Ron earning four times that of Gerri's current salary. Even if she is successful in increasing her earning potential by obtaining further education, her future income will approach only one-half of that earned by Ron. There is no evidence in the record indicating that Gerri will ever have the means to become self-supporting at a standard of living reasonably comparable to what she enjoyed during the marriage. Rehabilitative alimony would not be adequate to provide Gerri with support comparable to that she would have received had the marriage continued.

We also note that although Ron received his education prior to marrying Gerri, the record indicates he did not pursue his accounting practice full-time until after the parties married. During the early years of the business, Gerri stayed at home with the family while Ron devoted many hours to developing his practice. As a result, the

family was able to enjoy a very comfortable lifestyle throughout the rest of the marriage.

We have considered the trial court's property division in our review of the alimony award. We do not find the amount of Gerri's property award eliminates the need for alimony. The court's division of marital assets and debts arrived at a net award to Ron of $232,183 and a net award to Gerri of $71,071. Ron's obligation to pay Gerri $6297.60 plus ten percent interest per year for ten years was intended to equalize the distribution of the marital assets and does not qualify as a substitute for the support Gerri would have enjoyed had she remained in the marriage.

Finally, the fact that Gerri will not, in Ron's view, be primarily responsible for maintaining the children's standard of living is without consequence. Alimony is an allowance *to the former spouse* in lieu of the legal obligation to support that person, not an allowance intended for the support of the children. We agree with the court's assessment that regardless of what the children's present needs may be, Gerri's lower earning capacity will remain the same.

We affirm the alimony provisions as set forth by the decree.

II. Division of Assets.

A. Tax and Cash Flow Consequences.

Ron appeals the provision ordering him to pay Gerri $6297.60 per year for ten years plus ten percent interest. He cites adverse income tax and cash flow

consequences as reasons supporting his proposal to set aside, in lieu of a cash payment, a portion of his IRA to Gerri in a "Qualified Domestic Relations Order". Ron argues the yearly obligation to be satisfied with "after tax" dollars presents a financial hardship to him. He lists his many other financial obligations resulting from the divorce decree as evidence demonstrating the inequity of the cash payments.

Gerri argues Ron failed to preserve this issue for appeal. We note the pre-trial stipulation submitted by the parties indicates that the tax consequences of the property settlement were not in dispute. Following the entry of the decree, Ron did not file a Rule 179(b) motion under the Iowa Rules of Civil Procedure requesting the district court to address these issues. Accordingly, we will not address this contention because the trial court did not address tax or cash flow consequences as part of the decree and no motion to enlarge was filed by Ron pursuant to Rule 179(b). *See In re Marriage of Rife,* 529 N.W.2d 280, 282 (Iowa 1995).

B. Cross-Appeal - Equalization of Property Awards.

Gerri has also asserted several errors in the trial court's property division. She contends the district court overvalued the Boatmen's Savings account and the furniture awarded to her and undervalued the Edward D. Jones account awarded to Ron.

In the decree, the court attempted to eliminate the differential in the completed allocation of property and debts, $80,556, by ordering Ron to pay Gerri $6297.60 in

cash plus ten percent interest annually for ten years. However, using the corrected valuations submitted by Gerri, the differential is actually $85,342. Thus, in order to arrive at an equal property division ($153,512 to each party), Gerri claims Ron should be ordered to pay her $8534.20 annually for ten years plus ten percent interest.

Finally, Gerri assigns error to the trial court's allocation of trial expenses to Ron. The court required Ron to pay $19,000 to Gerri for costs associated with the trial. However, the court subtracted these expenses from Gerri's property settlement. Gerri asserts equity requires that Ron be responsible for these costs and fees over and above the property settlement, especially in light of Ron's recalcitrance at trial in refusing to realistically value his accounting practice or to pay any amount of alimony, and also his insistence that a guardian ad litem be appointed.

The partners to a 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 or 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). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

We find the values placed on the assets by the trial court to be well within the permissible range of evidence and we will not disturb them on appeal. *See In re*

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Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984). We have considered the arguments made by both parties on these property issues and conclude the trial court made an equitable division of the marital assets. Gerri has been provided with the furnishings of the marital residence awarded to her. She has also been provided with sufficient resources to plan for retirement and to live at a standard comparable to that which she enjoyed during the marriage.

Finally, we affirm the district court's deduction from Gerri's property award of Ron's obligation to pay her trial expenses. The court's order sought to secure payment of the professionals retained at trial to ensure the thorough litigation of the complex issues in this case. We conclude the trial court acted within its discretion to allocate these fees. *See In re Marriage of Miller,* 524 N.W.2d 442, 445 (Iowa App. 1995) (Iowa courts have considerable discretion in awarding attorney fees).

III. Cross-Appeal - Life Insurance Coverage.

Gerri has cross-appealed the district court's refusal to grant her request for to purchase a $100,000 life insurance policy on Ron's life to secure the payment of his financial obligations under the decree. Ron must submit to a physical examination to permit the purchase of the policy.

The justification for ordering life insurance is to guarantee the support obligation imposed by the dissolution decree. *See In re Marriage of Boehlje,* 443

N.W.2d 81, 85 (Iowa App. 1989). However, we note that the trial court's order terminates Ron's obligation shortly after the event of his death (" . . . alimony will terminate on the 14th day of the sixth month following his demise."). Accordingly, we do not find sufficient justification in the record for granting Gerri's request to carry insurance on Ron's life. We will not compel Ron to submit to a physical as required by Gerri's prospective insurer.

IV. Attorney Fees.

Gerri has requested appellate attorney fees. An award for attorney fees is not a matter of right but rests with the court's discretion and depends on the parties' respective financial circumstances and ability to pay. *In re Marriage of Eastman,* 538 N.W.2d 874, 877 (Iowa App. 1995). Although Gerri has the resources available to pay her attorney fees, she has nevertheless successfully defended the district court's decision on appeal. We award her $1000 for appellate attorney fees.

The district court's order is affirmed in its entirety.

AFFIRMED.