IN THE COURT OF APPEALS OF IOWA

No. 0-343 / 99-1472
July 26, 2000

FILED
JUL 26 2000
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GARY L. SHORTLEY AND TERESA K. SHORTLEY

Upon the Petition of
GARY L. SHORTLEY,
Petitioner-Appellant/Cross-Appellee,

And Concerning
TERESA K. SHORTLEY,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Lynne E. Brady , Judge.

Respondent-appellant, Gary Lynn Shortley, appeals challenging the economic provisions of the decree dissolving his twenty-three year marriage to petitioner-appellee, Teresa Kay Shortley. He contends the property division was not equitable and he should not have been ordered to pay rehabilitative alimony. Teresa on cross appeal contends she should receive more alimony and Gary should pay her trial and appellate attorney fees. **AFFIRMED AS MODIFIED.**

Curtis A. Ward of Brooks, Ward & Robertson, Marshalltown, for appellant.

Joel T.S. Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

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SACKETT, C.J.

Respondent-appellant, Gary Lynn Shortley, appeals challenging the economic provisions of the decree dissolving his twenty-three year marriage to petitioner-appellee, Teresa Kay Shortley. He contends the property division was not equitable and he should not have been ordered to pay rehabilitative alimony. Teresa on cross appeal contends she should receive more alimony and Gary should pay her trial and appellate attorney fees. We affirm.

We review Gary's challenges to the economic provisions of the decree de novo. *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa App. 1998). While not bound by the trial court's factual findings, we give them weight in considering the credibility of witnesses. *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa App. 1991).

Gary and Teresa were both born in 1955 and married in 1975. They have one adopted child, Adam, who was born June 11, 1990. At the time of marriage neither party had any property. Gary was attending the University of Northern Iowa and Teresa was attending Hawkeye Institute for Nursing. Gary received a pharmacy degree from Creighton University in 1979. Teresa completed her nursing studies and became an LPN; however, her license and certification has expired.

After receiving his pharmacy degree, Gary worked at several Iowa pharmacies. In 1986, Gary and Teresa formed a corporation to purchase a pharmacy in Toledo, Iowa. In 1996, Gary formed another corporation and purchased the Medicap Pharmacy in Eldora, Iowa.

Teresa helped run the day-to-day operations of the pharmacy. She also is employed full-time at a convenience store and part-time at the country club. The parties' 1998 Iowa state tax return showed Gary's taxable income to be $69,110 and Teresa's to be $29,769.

The issues presented to the district court were limited. It was agreed Teresa have primary physical care of Adam. The parties further agreed Gary would pay child support of $1,063.00 a month. In arriving at this figure they filed a combined child support guidelines worksheet showing Gary's net monthly income for purpose of applying the child support guidelines to be $5,808.73 and Teresa's to be $1,285.72. The parties stipulated to the value of all of their assets and liabilities as well as the division of both. Based on stipulated values and the parties' agreed division of assets and liabilities Gary received $508,531.73 in value and Teresa received $351,557.01 in value.

The district court was asked to determine (1) whether Teresa should receive a cash payment from Gary in addition to the property awarded to her and (2) if Teresa should receive alimony, and, if so, in what amount. The district court determined Gary should pay Teresa $78,487.50 with interest at the normal rate payable one-third by December 31, 1999; one-third by December 31, 2000 and the balance by December 31, 2001. The payment resulted in a nearly equal division of property based on the parties' stipulated values. In addition, Gary was ordered to pay Teresa what the district court termed rehabilitative alimony of $500 a month for twenty-four months. The amount was ordered paid in full even if Teresa should remarry. Neither party was awarded trial attorney fees.

The stipulated division resulted in the following basic division of assets.

	Gary	Teresa	Total
Houses and cars	$ 21,855.12	$ 64,020.49	$ 85,875.61
Art prints	15,000.00	10,000.00	25,000.00
Securities (except pharmacy stock); retirement accounts; cash and cash value of life insurance	132,902.51	277,536.52	410,439.03
Pharmacies (value of stock)	356,219.33	-0-	356,219.33
Debt	(34,231.00)	-0-	(34,231.00)
Child's fund	16,785.77	-0-	16,785.77
Total Net Worth	$508,531.73	$351,557.01	$860,088.74

Gary contends this is not a case that calls for an absolutely equal division of assets. He also challenges the award of alimony. We cannot consider these issues in isolation. Iowa is an equitable distribution state, which means the partners in a marriage to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa App. 1995). An equitable division of assets in a dissolution does not necessarily mean an equal division of assets. *Id.* The determining factor is what is fair and equitable in each circumstance. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa App. 1993).

Spousal support is provided for under Iowa Code section 598.21(3). Whether spousal support is justified is dependent on the facts of each case. *See In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). In assessing a claim for alimony, we consider the property division and alimony together in determining their sufficiency. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa App.1982). Entitlement to spousal support is not an absolute right. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976). 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, 787-88 (Iowa App.1992).

Gary's argument focuses on the fact the major portion of the assets he received in the agreed division is stock in the two pharmacies. He argues the assets allocated to Teresa can easily be converted to cash and are not subject to the risks of the businesses while the assets he received are. Gary advances the future of his two businesses is in question because of changes in the medical business climate. He further advances he needs cash in order to support the business and anticipates having to make a substantial investment in a new building to maintain his customers.

Gary contends the alimony award was not equitable because Teresa has an education, has worked outside the home during most of the marriage and has the ability to meet her needs with the income generated by the assets transferred to her in addition to her ability to earn an annual wage of approximately $18,000.

Teresa contends the provisions made by the district court are equitable except she should have additional alimony. She points out she and Gary entered the marriage with no assets. While she admits she received some education during marriage she correctly argues Gary's pharmacy degree, which he acquired during the marriage, provides him an excellent source of income whether or not he actually owns a pharmacy or pharmacies.

The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in

Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App.1983).

Section 598.21(1) of the 1993 Iowa Code, in relevant part, provides:

> The court shall divide all property, except inherited property or gifts received by one party, equitably between the parties after considering all of the following:
> a. The length of the marriage.
> b. . . .
> c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and childcare services.
> d. The age and physical and emotional health of the parties.
> e. The contribution by one party to the education, training or increased earning power of the other.
> f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
> g. . . .
> h. The amount and duration of an order granting support payments to either party pursuant to subsection 3 and whether the property division should be in lieu of such payments.
> i. Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
> j. The tax consequences of each party.
> k. Any written agreement made by the parties concerning property distribution.
> l. . . .
> m. Other factors the court may determine to be relevant in an individual case.

In assessing the award of alimony we look at all the factors of section 598.21(3). We give consideration to the education both parties received during the marriage. *See, In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989); *In re Marriage of Janssen*, 348 N.W.2d 251, 253-54 (Iowa 1984); *In re Marriage of Passick*, 375 N.W.2d 284, 286 (Iowa App.1985).

We cannot say under the record here the district court did not equitably resolve the issues put before her. Despite Gary's arguments to the contrary Teresa was entitled to alimony. Though she received substantial property she has less education than Gary and few good job opportunities. She made substantial contribution to the marriage. While she has held employment outside the home and accumulated F.I.C.A. coverage in her own right, because her contributions have been less than Gary's he will have greater retirement benefits. Gary leaves the marriage with minimal financial responsibilities other than two years of alimony and child support for one child. *See Marriage of Sychra*, 552 N.W. 2d 907, 908 (Iowa App. 1996); *In re Marriage of Miller*, 475 N.W.2d 675, 677 (Iowa App.1991).

We do not agree with Teresa's claim she should have additional alimony. She received substantial income producing property; she currently is a part of the workforce and there are is no valid reason why she will not continue to be. She has the primary responsibility for one child, but Gary is providing over a thousand dollars a month in support for him. We affirm the alimony award in all respects.

We find the property division equitable. However we recognize the fact Gary was ordered to pay it over a short period of time put him in poor cash position. Teresa has no immediate need for the money. We therefore modify to provide the $78,487.50 Gary is required to pay Teresa be amortized over a six-year period at seven percent interest. There shall be one annual payment due on or before December 31 of each year commencing December 31, 1999.

Teresa requests we award both trial and appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests in our

discretion. *In re Marriage of Wendell*, 581 N.W.2d 197, 201 (Iowa App. 1998). The district court did not abuse its discretion in not awarding Teresa trial attorney fees. She is employed, she received a substantial property settlement, she is receiving alimony and child support. She has the ability to pay her own trial attorney fees. In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* We award no appellate attorney fees. Both parties have adequate resources to pay their attorneys and neither was entirely successful in this appeal. Costs on appeal are taxed three-fourths to Gary and one-fourth to Teresa.

AFFIRMED AS MODIFIED.