FILED
AUG 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-598 / 93-33

IN RE THE MARRIAGE OF DIANNE R. HEATH AND GREGORY D. HEATH

Upon the Petition of
DIANNE R. HEATH,

Appellee,

And Concerning
GREGORY D. HEATH,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly, Judge.

The husband appeals the visitation and economic provisions of the dissolution decree. **AFFIRMED.**

Jay P. Roberts and Carter Stevens of Beecher, Rathert, Roberts, Field, Walker & Morris P.C., Waterloo, for appellant.

David H. Correll of Correll & Sheerer, Cedar Falls, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

DONIELSON, C.J.

Greg and Dianne Heath were married on August 18, 1979. They have two children, Ryan, born in 1980, and Erin, born in 1982. Dianne filed a petition for dissolution of marriage on August 15, 1991. On March 18, 1992, the district court enjoined Greg from residing with Dianne at their home. Greg filed a motion to quash the injunction. The district court denied the motion. Following an application for rehearing, the district court again refused to quash the injunction. Following trial on the dissolution, the district court entered its decree on December 1, 1992.

In fashioning the property award, the district court noted Greg and his father had so intertwined Greg's assets with those of Vacationland it was difficult to determine the value of the assets. The district court also stated Greg appeared to be very concerned with protecting his assets from Dianne. The district court awarded Dianne her John Deere savings plan valued at $43,028, the marital home with equity of $29,000, $5000 in household furnishings, a $4000 boat, and a $1500 attorney trust fund. Dianne was awarded $38,077 of marital debt, leaving her with a net award of $53,000.

Greg was awarded property with a net value of $110,000, including a $25,000 interest in Vacationland, in which Greg claimed he had no interest, and a $26,776 interest in the Rural Cable Company, in which Greg maintained he only had a

$2000 interest. Greg was awarded his plane, on which there was an encumbrance of $48,937, and a 1988 pickup, valued at $11,500 with a $5517 encumbrance. The district court also placed a value of a gun collection at $2500, even though both Greg and his father testified that the gun collection belonged to Greg's father. Greg subsequently filed a rule 179(b) motion which the district court denied. Greg has appealed.

Our review of dissolution decrees is de novo. Iowa R. App. P. 4. We 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 are not bound by the fact findings of the district court, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying and to assess their credibility. Iowa R. App. P. 14(f)(7); In re Marriage of Sires, 506 N.W.2d 813, 814 (Iowa App. 1993); In re Marriage of Winnike, 497 N.W.2d 170, 173 (Iowa App. 1992). The district court "'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (quoting In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974)).

Greg first asserts the district court divided the marital property inequitably. The partners in 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. Prior case precedent is of little value because the circumstances of each case differ. In re Marriage of Mayfield, 477 N.W.2d 859, 863 (Iowa App. 1991).

The parties dispute the value and ownership of several items. The district court concluded from the evidence introduced and after assessing the credibility of the witnesses Greg had so intertwined his affairs with those of his father it would be difficult to untangle them and determine values precisely. There was some evidence the intermingling was done to protect Greg's assets if the marriage were dissolved. During the marriage, Greg purchase numerous expensive items for himself. In 1990, Greg purchased a $65,000 airplane, making cash payments totaling $14,726. Greg also purchased race cars, motorcycles, and trucks. Greg, however, kept the title of these items with Vacationland and his father. Greg also used $4625 taken from a settlement won on behalf of Ryan in a dog bite case to secure the loans on his boat and airplane. Greg also failed to file tax returns for the years 1984 to 1989. Dianne had to borrow an additional $10,237 for the payments, interest, and penalties on the delinquent taxes. We agree with the assessment of

credibility made by the district court. We find the value placed on the assets by the district court to be well within the permissible range of evidence and will not disturb it on appeal. See In re 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 also find the district court divided the marital assets equitably under the circumstances of this case.

Greg next argues the district court should have awarded him alimony. He asserts the court's refusal to order alimony demonstrates gender bias. We disagree. 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). 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 relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). 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). The award is made without consideration of gender. In re Marriage of Bethke, 484 N.W.2d 604, 608 (Iowa App. 1992).

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

The record reflects Dianne contributed more to the marriage than Greg. The district court awarded Greg more than half the property accumulated during the marriage. Greg's living expenses are less than Dianne's. Dianne's income does not adequately cover her expenses. Dianne also has physical care of the children. Under these circumstances, we do not find an award of alimony appropriate. We also do not find any evidence in the record of gender bias by the district court.

Finally Greg argues the court's visitation schedule is inadequate. The court granted Greg visitation on alternate weekends from Friday evening to Sunday evening, alternate holidays, and four weeks during summer vacation. Greg asserts this schedule does not meet the statutory requirement of "liberal visitation" and "maximum continuing physical and emotional contact." Iowa Code § 598.41(1) (1991). We disagree. In establishing visitation, our governing consideration is the best interest of the children. Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). The schedule set by the district court is not unlike visitation schedules determined on appeal to meet the statutory requirements. See In re Marriage of Miller, 390 N.W.2d 596, 602 (Iowa 1986); In re Marriage of Stepp,

485 N.W.2d 846, 849 (Iowa App. 1992). We find the visitation set by the district court under the circumstances of this case meets the statutory requirements. We also note this schedule does not prohibit the parties from agreeing to increased visitation.

Dianne asks for attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We conclude, after considering the parties' needs and abilities, no award of attorney fees is appropriate on appeal.

For the reasons discussed we affirm the decision of the district court. We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

AFFIRMED.