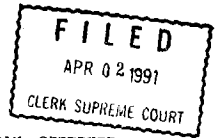


IN THE COURT OF APPEALS OF IOWA

No. 7-590 / 87-110



IN RE THE MARRIAGE OF LEO A. MUNDAY AND JOAN GERTRUDE
MUNDAY

Upon the Petition of

282

LEO A. MUNDAY,

Appellant,

And Concerning

JOAN GERTRUDE MUNDAY,

Appellee.

Appeal from the Iowa District Court for Johnson County,
Lynn E. Brady, Judge.

Petitioner appeals and respondent cross-appeals the
economic provisions of the divorce decree. **AFFIRMED AS
MODIFIED.**

William L. Meardon of Meardon, Sueppel, Downer & Hayes,
Iowa City, for appellant.

C. A. Frerichs, Waterloo, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

The parties, Leo A. Munday and Joan Gertrude Munday, were married January 4, 1958. Their marriage was dissolved in December 1985; those matters relating to the division of property, alimony, and attorney fees were reserved until a later date. Trial on the reserved matters was held in August of 1986, and the decree was filed on January 13, 1987. Following the resolution of the economic provisions in January of 1987, an appeal was filed. At respondent's request, the supreme court remanded the case to the district court to resolve issues raised in her motion for supplemental orders.

The case was subsequently transferred to this court. Again at respondent's request, the matter was given a limited remand to allow the trial court to rule on matters raised in her motion for remand. After the trial court ruled, the parties included in their appeal the trial court's rulings on the remanded issues.

It would be of little, if any, benefit to the judicial process to set forth all that has taken place in this dissolution action since the marriage was dissolved in December of 1985.¹ We will focus our attention primarily as to how the trial judge dispersed the property of the parties.

1. We note that a substantial part of the delay in the appellate proceedings must be attributed to the stay stemming from respondent's bankruptcy action.

When the parties' marriage was dissolved in December of 1985, they had been married almost twenty-eight years. At the time of trial in 1986, the petitioner was fifty-one years old and the respondent fifty-six. Both are college graduates. Joan has a B.A. degree in art education and has taken some graduate courses. Leo has a Master's degree from the University of Northern Iowa and a Ph.D. from the University of Iowa.

Petitioner's Ph.D. from the University of Iowa is in measurements and testing. In February of 1983, he purchased the test division of Scott Forsman. Thereafter, he established his own corporation and named it American Testronics.

During the pendency of this action he sold American Testronics to Scan-Tron Corporation without the respondent's knowledge. From that sale he received a cash amount of approximately \$70,000, Scan-Tron stock, and employment with Scan-Tron. However, he was obligated to Scan-Tron for the debt which was still owed under the purchase agreement with Scott Forsman. At the time of trial in 1986, he was yet employed by Scan-Tron with an annual salary of \$70,000, plus an automobile allowance, bonus plans, and stock purchase plans.

The trial court initially awarded the respondent, Joan Munday, the homestead and the responsibility for debts due thereon. She was also awarded the Lakewood Hills apartment complex and duplex properties, but had to pay their

remaining debts. She was granted judgment against the petitioner in the amount of \$75,000. Additionally, she was awarded \$3,000 per month in alimony, as well as \$5,000 in attorney fees. Each party was awarded the antiques in his or her possession.

The petitioner was awarded the Scan-Tron stock valued at approximately \$1,600, a 1985 Cadillac with little, if any, equity, items of furniture, and certain antique pieces. He also had about \$21,000 in cash remaining from the amount he received from the sale of American Testronics. He is obligated to pay Scan-Tron \$174,000 as the debt yet owed Scott Forsman under his purchase agreement.

Under the first remand, the court found that the petitioner should be held accountable for the arrearages he allowed to accumulate with regard to the rental properties awarded to the respondent from the period from March 1, 1985, to January 13, 1987. This is the period of time petitioner managed the property under court order.

The second remand, ordered by this court, was limited in nature, and dealt primarily with the petitioner's loss of employment and to allow consideration of the effect of the respondent's pending bankruptcy proceedings. With regard to the petitioner's employment, the trial court found the petitioner's loss of employment was "either voluntary or based on willful actions on his own part violating his employment agreement." It further found that

although the debt of the rental properties had been discharged as to the respondent in bankruptcy, it would not amend the condition which made the petitioner financially responsible for the debt on the properties for the period of time they were in his control. We now review the rulings in total and determine whether the final disposition as to the property was just.

In this equity action, our review is de novo. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). 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). In so doing, 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).

The petitioner initially argues that the amount of alimony awarded to Joan is excessive. "When considering an award of alimony, the Court must consider the earning capacity of each party, their present standard of living, the ability of one to pay balanced against the relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

During trial the court found Leo's salary to be \$70,000. After the trial, but prior to the entry of the decree, Leo lost his job. He filed a motion to reopen to offer proof on his job loss, but the trial court declined

that motion. However, on limited remand the trial court found that the petitioner's loss of employment was either voluntary or based on willful actions on his own part violating his employment agreement.

The petitioner argues that when fixing the alimony award the trial court did not consider the fact that the respondent received the bulk of the marital assets. In this respect, we note the trial court found the rental property awarded the respondent to be substantially financially distressed and under threat of foreclosure. From the remand order, we find the respondent was unable to renegotiate the mortgages on the rental properties and finally succumbed to bankruptcy.

The petitioner additionally contends that he was subject to a no-compete clause following his loss of employment and suggests he has been unable to find employment for the five-year period in which the no-compete clause has been in effect. He further claims when he does find employment he then will only be able to earn between \$25,000 and \$30,000 per year since he has been out of the industry for an extended period of time.

While that may be true, the record demonstrates the petitioner has not been altogether honest in the past with regard to his assets. The parties had been married for twenty-eight years, and Joan has not been employed outside of the home for some time. Her needs are evident and it cannot go unnoticed that the trial court specifically found

that petitioner's loss of employment was due to a willful act on his part.

Nonetheless, after considering all relevant factors, we are inclined to agree that the \$3,000 monthly alimony award is excessive, and we accordingly modify the decree by reducing the monthly alimony award to \$2,000 per month until February 2, 1997, at which time it shall be reduced to \$1,000 per month. This payment shall be made to the respondent until either the petitioner or the respondent dies or the respondent remarries.

The second issue raised by respondent involves the property settlement made by the trial court. After reviewing the division of the marital property we find equity requires that the property settlement be adjusted. Iowa has rejected any exact mathematical formula for a trial court to follow in making a division of marital property although the court's goal should be an approximately equal division. In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979).

At the time of the dissolution, the respondent received the homestead, the rental properties, the majority of the antiques, and a cash judgment of \$75,000. The rental properties proved to be of no value. The homestead has an equity of at least \$20,000. Although we are reluctant to place a value on the antiques, we do believe the respondent's share of those items is substantial. On the other hand, the petitioner received assets of at least

\$22,600, but did incur liabilities including the \$75,000 cash judgment of about \$187,000.

As pointed out earlier, the petitioner did receive some \$70,000² from the sale of his corporation. But the record shows a primary part of this amount has been utilized for legal fees for both parties as well as for support for his spouse. Although we realize the petitioner has not paid alimony continuously, it appears the division will be more equitable if the judgment is eliminated. Thus, we modify the trial court's division by striking the \$75,000 cash judgment awarded the respondent.

As to the \$5,000 in attorney fees awarded by the trial court, we affirm. Additionally, respondent has requested 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). Keeping the above in mind, we order the petitioner to pay \$1,000 towards respondent's attorney fees as well as one-half of the costs for this appeal. The other one-half is assessed to the

2. In addition, he received shares of stock and an employment contract.

respondent. Except for the modifications above, we affirm the trial court in all other respects.

AFFIRMED AS MODIFIED.

Hayden, P.J., and Habhab, J., concur; Sackett, J., specially concurs without opinion.