FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF GARRY LEE FOSTER AND DEANNA FOSTER

Upon the Petition of)
GARRY LEE FOSTER,) Filed January 29, 1985
Petitioner-Appellee/Cross-Appellant,)
And Concerning) 4-492
DEANNA FOSTER,) 84-808
Respondent-Appellant/Cross-Appellee.)

Appeal from the Iowa District Court for Floyd County - John F. Stone, Judge.

Respondent-wife appeals and petitioner-husband cross-appeals from the decree dissolving the parties' marriage. AFFIRMED.

Normand C. Klemesrud of Klemesrud & Huegel, Charles City, Iowa, for respondent-appellant/cross-appellee.

Larry J. Handley of Handley, Berry & Eisenhauer, Ankeny, Iowa, for petitioner-appellee/cross-appellant.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Respondent-wife appeals and petitioner-husband cross-appeals from the decree dissolving the parties' marriage.

Petitioner, Garry Foster, and respondent, Deanna Foster, were married in 1965. The parties have three children: Starr, born in 1966; Laura, born in 1967; and Garry David, born in 1971.

On April 18, 1980, Garry was severely injured in a motor vehicle accident. He and Deanna filed suit against multiple defendants in New Jersey. In 1982 they received $10,000 from one of the defendants which was used for clothing, furniture, and living expenses. On April 19, 1983, approximately six months after the parties' final separation, Garry settled the lawsuit and received a net payment of $51,000. Deanna was not a party to the settlement and the release executed by Garry did not mention her consortium claim. Out of the $51,000 Garry remodeled his mother's house at a cost of $13,000, purchased a new van for $18,000 which is titled in the name of the woman with whom he is living, purchased a pickup truck for $1,100, took a vacation costing $1,500, spent $1,500 on Christmas presents for the children of the woman with whom he lives, purchased new tools, and paid medical bills and department store charge accounts. The trial court found that none of the money was left and none of it was expended for the benefit of Deanna and the two children in her custody.

When the parties separated Deanna retained custody of Laura and Garry had custody of Starr and Garry David. On Memorial Day, 1983, Garry David was involved in an accident and has since resided with Deanna. Garry has had little contact with Laura and Garry David since that time.

Garry is employed earning a net monthly salary of $1,048. He and Starr reside with a widow and her two children who receive $1,200 per month in Social Security benefits. Deanna is unemployed and receives $360 per month ADC and $122 per month in food stamps.

The trial court placed Laura and Garry David in Deanna's custody and Starr in Garry's custody. Garry was awarded the 1973 pickup truck, his guitar and amplifier, his tools, and Starr's bedroom set. Deanna was awarded all other items of furniture owned by the parties. Garry was ordered to pay child support of $100 per month per child until each child attains the age of eighteen, marries, or becomes self-supporting. He was also ordered to pay $50 per month alimony with the provision that as each child attains the age of eighteen, marries, or becomes self-supporting, the alimony shall be increased by $100 per month. Deanna was awarded $500 towards her attorney's fees.

In response to Garry's motion for enlargement, the trial court ordered Deanna's alimony to terminate upon her death or remarriage.

On appeal Deanna asserts: (1) the trial court should have awarded her part of the $51,000 settlement Garry received from the personal injury action; (2) the trial court should have guaranteed her alimony to continue for ten years; and (3) that her child support and attorney fee awards are inadequate. She also requests attorney fees on appeal. Garry's cross-appeal contends: (1) the trial court should not have awarded alimony; and (2) the trial court should have given him custody of all three children.

Our review of this proceeding in equity is de novo. Iowa R. App. P. 4. We are not bound by the findings of fact of the trial court; however, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I. Settlement of the Personal Injury Litigation. The factors to be considered by the trial court in dividing the parties' property are found in Iowa Code section 598.21(1). An assessment of the parties' net worth for purposes of division is made at the time of trial. Locke v. Locke, 246 N.W.2d 246, 252 (Iowa 1976). However, if one party transfers assets prior to the time of trial in order to avoid an obligation of support, the transferred assets may be considered by the court. In re Marriage of Cerven, 335 N.W.2d 143, 146 (Iowa 1983).

In Cerven, the husband was 75 and the wife was 73 years of age at the time of the marriage. Both had been married previously. They executed an antenuptial agreement preserving their separate properties, but the court did not consider this agreement since it was conceded to be invalid due to lack of full and fair disclosure by the husband of his assets. Id. at 144-45. After several years of marriage the wife's physical and mental condition deteriorated to such an extent that her daughter by a previous marriage placed her in a nursing home. A guardian and conservator was appointed for her and in that probate proceeding the husband was ordered to support her. Id. at 144. Approximately three years later the husband transferred the bulk of his assets to his children by his first wife and a year later ceased to make the support payments to his wife ordered by the probate court. He then petitioned for dissolution of the marriage. Id. The supreme court held that part of the transfer of assets was a "sham gift" made to shield his assets from present and future support obligations. Id. at 146. Consequently, the court considered those transferred assets in determining the husband's ability to pay alimony and in assessing the equitability of the property settlement. Id.

In the present case, after the parties had separated Garry settled a lawsuit to recover for personal injuries he sustained. Deanna's claim in the suit was not addressed in the settlement. Garry then spent all of the money he received. Some of it was used for debts and medical expenses and some of it was to purchase gifts for other people. Although we may not approve of the extravagance, we cannot say that the gifts were fraudulently made in order to deprive Deanna of a share in the settlement in the same way the gift in Cerven was a sham to avoid an obligation of support. Therefore, we affirm the property division of the trial court.

II. Alimony. The factors to be considered when awarding alimony are found in Iowa Code section 598.21(3). We reject Garry's contention that the trial court erred in awarding Deanna alimony. His earning capacity is greater than hers

and she is entitled to support. We also reject Deanna's claim that the trial court erred in ordering the alimony to terminate on her death or remarriage rather than termination after ten years.

III. Child Custody. The paramount concern in deciding child custody is the best interest of the child. Iowa R. App. P. 14(f)(15). We are convinced that the trial court's decision that it would be in the best interest of Laura and Garry David to remain with Deanna and that it would be in the best interest of Starr to reside with Garry is correct. We are not as concerned with the separation of siblings in this case because Starr has, during the pendency of this appeal, become eighteen years of age.

IV. Child Support. We affirm the trial court's award of child support. Deanna argues that the award of $200 in child support is inadequate. However, her affidavit of financial status requests $250 per month child support and no alimony. The trial court awarded her $50 in alimony to supplement the child support and provided for an increase in alimony as child support decreases. We cannot say the trial court erred in making this provision.

V. Attorney's Fees. Considering the relative economic positions of the parties, we affirm the trial court's award of $500 for Deanna's attorney's fees. We also order Garry to contribute $500 to her attorney's fees incurred in this appeal.

AFFIRMED.

Donielson, J., concurs; Sackett, J., dissents.

The child support and alimony approved by the majority are not equitable. Garry received some $61,000 from personal injury litigation which he claims to have spent on certain items, including an addition to his mother's home and an expensive van for his girl friend. I refuse, as did the majority, to say to Deanna and two minor children of the marriage that your ex-husband and father was extravagant, but Garry spent all the money, so there is none to consider. I would modify the decree and increase child support to $200 per month per child and increase Deanna's alimony to $100 per month. While I recognize Garry will have difficulty paying this amount from his salary, perhaps it is time for him to seek a return favor from his mother to whom he gave the $13,000 and his girl friend to whom he gave the $18,000.