IN THE COURT OF APPEALS OF IOWA

No. 8-484 / 97-1874

FILED
NOV 30 1998
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KATHRYN L. SEVERSON AND GARY L. SEVERSON

Upon the Petition of
KATHRYN L. SEVERSON,
Plaintiff-Appellee,

And Concerning
GARY L. SEVERSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Gary L. Severson appeals various provisions of the parties' dissolution decree.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

Michael M. Lindeman of Dolezal, Lindeman, Davison & Skelton, Cedar Rapids, for appellant.

Judy L. Goldberg of Maher & Nidey Law Firm, Cedar Rapids, for appellee.

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

PER CURIAM.

Gary and Katherine Severson were married on November 10, 1984. They have five children whose support is involved on appeal: Dylan, born September 15, 1982; Sarah, born February 12, 1987; Curtis, born April 18, 1989; and Ian and Rachel, both born July 1, 1994. Katherine filed a petition to dissolve the parties' marriage in July 1996. Gary was thirty-six years old, and Katherine was thirty-nine years old at the time of trial.

Both Gary and Katherine are high school graduates. Each party attended Kirkwood Community College during the marriage. Gary obtained an RN license, and Katherine completed a program in graphic arts. At the time of trial, Gary worked a twenty-four-hour weekend shift each week at Marshalltown Medical & Surgical Center, and Katherine worked approximately thirty-five hours per week at the Cedar Rapids Gazette. Gary's hourly wage was $18.72; Katherine's was $7.95.

Early in the marriage, Gary suffered symptoms of agoraphobia and Katherine was the only one to work. Gary then worked in a clothing store. After obtaining his RN license, Gary was employed at the Veteran's Administration Hospital in Iowa City from 1993 until his unit closed. He then worked at Mercy Hospital until he was terminated for cause on January 10, 1997. Gary worked at Tanager Place for a few weeks and was terminated for failing to reveal a prior arrest for domestic abuse involving Katherine. Katherine has been employed at the Gazette since she was ordered by the court to seek full-time employment in the court's November 1996 order regarding temporary allowances.

The parties built a home and purchased it in June of 1996 on contract from Gary's parents, who financed its construction. The parties appear to agree that at the time of the dissolution, they had built up $10,000 in equity. They also had $7618.66 in a Thrift Savings Plan accumulated through Gary's employment with the VA (Katherine uses the figure $7058.39). In July, 1996, during the pendency of the dissolution action, Katherine obtained an order enjoining Gary from dissolving the thrift account. Gary nevertheless cashed in the plan, receiving approximately $5647, after taxes. Also during the pendency of the dissolution action, the $500 monthly payments on the home became delinquent. Gary left the home in June 1996 under a no-contact order and stopped making payments. Katherine attempted to sell the home but did not obtain Gary's approval. She filed a declaratory judgment action seeking injunctive relief to stop the forfeiture and eventually settled with Gary's parents for $7000. The parents retained $1000 of this for rent prior to Katherine's departure.

The parties filed a partial stipulation on matters concerning custody, visitation, health insurance, and tax deductions. The remaining issues were tried to district court on August 12, 1997. The court entered a ruling that incorporated the partial stipulation and ordered Gary to pay $854.22 per month in child support, basing its calculation of Gary's income on a forty-hour work week. The court was critical of Gary's decision to work only twenty-four hours per week. The court also ordered him to pay Katherine $150 per month in alimony for three years. In the property division, the court awarded to Katherine, among other things, the settlement proceeds, and ordered Gary to pay her an additional $2491.50 within ninety days. Gary was

also obligated to pay $5000 for Katherine's attorney fees. The court denied Gary's motion to amend the decree.

The issues presented by this appeal are:

I. Whether or not the trial court determined the appropriate amount of child support to be paid by respondent Gary.

II. Whether or not the trial court erred in awarding alimony to petitioner Katherine for rehabilitative and reimbursement purposes.

III. Whether or not the trial court erred in requiring respondent to pay $5000 of the petitioner's attorney fees and his own attorney fees.

IV. Whether or not the trial court erred in requiring the respondent pay the petitioner a property settlement in the amount of $2491.50.

In addition, the respondent requests he be allowed six months to pay the property settlement.

Standard of Review

The standard of review for the court in an equity action is de novo. Iowa R. App. P. 4; *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995). The court has a duty to conduct an examination of the entire record, and as to properly presented issues, adjudicate the rights of the parties anew. *Id.* (citing *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981)). However, the appellate court gives considerable weight to the sound judgment of the trial court as the trial court has

had the benefit of hearing and observing the parties first hand. *In re Marriage of Kleist*, 538 N.W.2d 273, 278 (Iowa 1995).

Ruling

The trial court based the amount of child support upon Gary's earning capacity rather than upon his actual income. The trial court found and we agree that Gary could and should work more than two days a week. His net earnings would be $1898.27 if he worked a forty-hour week. Katherine's net monthly income is $1219.04. The court applied the child support guidelines and correctly fixed the support for Gary to pay at $854.22 for the five minor children. *See In re Marriage of Hester*, 565 N.W.2d 351, 354 (Iowa App. 1997); *In re Marriage of Dawson*, 467 N.W.2d 271; 275 (Iowa 1991).

Gary was educated during the marriage to become a registered nurse. Katherine desires the opportunity to further her education in order to increase her earnings. The trial court fixed alimony at $150 per month for a period of three years. The evidence in the record clearly justified this award. We agree with the trial court. *In re Marriage of Peterson*, 491 N.W.2d 535, 538 (Iowa App. 1992).

The court explained its award of $5000 in trial attorney fees through a review of the court file which showed Gary's actions and inactions caused additional attorney fees to be incurred by Katherine. Attorney fee awards should be fair and reasonable and based upon the respective abilities of the parties to pay. To overturn an award a party must show that the court abused its discretion. *In re Marriage of*

Guyer, 522 N.W.2d 818, 822 (Iowa 1994). We find no such abuse of discretion in this case.

The trial court in fixing the property settlement at $2491.50 did not allow Gary a deduction of $706 as his share of the penalty for early withdrawal penalty from the Thrift Savings Plan. This withdrawal was made by Gary in violation of a court order. We agree with the trial court in this regard. After a careful consideration of the record, we find the trial court has applied the proper standards for a division of property as set forth in section 598.21(1) of the Code of Iowa. The court has made a fair and equitable distribution. *In re Marriage of Plasencia,* 541 N.W.2d 923, 925 (Iowa App. 1995).

We affirm the decree. Gary nevertheless asks he be allowed six months rather than ninety days to pay the property settlement. We feel Gary should be allowed this six-month period. We remand to the trial court with directions to have the record reflect the additional time to pay the property settlement.

Kathryn is awarded $1000 for attorney fees on appeal. Costs are assessed to Gary.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.