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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-297 / 93-1510

IN RE THE MARRIAGE OF SUSAN E. MAGUIRE AND TERRY J. MAGUIRE

Upon the Petition of
SUSAN E. MAGUIRE,

Petitioner-Appellant/Cross-Appellee,

And Concerning
TERRY J. MAGUIRE,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Judge.

Petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

R. Laubenthal of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellant.

A. W. Tauke of Porter & Tauke, Council Bluffs, for appellee.

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

HABHAB, J.

Susan and Terry Maguire were married in 1971. They have one child, Justin, born on August 17, 1977. During the marriage the parties lived in Council Bluffs, Iowa.

At the time of the marriage, Terry worked for his family's business, Maguire Auto Center, which sold gasoline and tires. In 1982 the parties purchased the business from Terry's parents. In 1986 the parties remodeled the building to put in a convenience store. They also began to sell lawn mowers. A much more extensive remodeling took place in 1992, creating a new gasoline bay, convenience store, and car wash. The parties borrowed the money needed for the remodeling. The district court determined the net value of the business was $160,000. Terry is the manager of this operation, and the district court found he had net monthly income of $1700.

From 1971 until 1985 Susan generally worked part-time as a bookkeeper. In 1985 she began to work full-time as the bookkeeper for the family business. At the time of the dissolution hearing she was planning to enroll at the University of Nebraska in an accounting program and eventually become a C.P.A. The district court determined her annual earning capacity as a bookkeeper would be $12,500.

The district court entered a dissolution decree for the parties on August 19, 1993. The court granted the parties joint legal custody of Justin, with Susan having primary

physical care. The court applied the child support guidelines and ordered Terry to pay child support of $382.50 per month.

The court determined the parties' assets should be divided equally. Susan was awarded assets which included her vehicle, an IRA, and a rental house. In addition, Terry was ordered to pay her a cash property settlement of $110,622, which is payable in installments. Terry was awarded the parties' business and was ordered to pay the business debts. He was also awarded the marital residence, which was on a lot next to the business. However, Susan and Justin may live in the house until Justin graduates from high school. Susan was ordered to surrender possession of the house in August 1995. Terry is responsible for all mortgage payments, taxes, and insurance on the residence.

Each party filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). The court determined it had made a mathematical error and reduced the cash property settlement to $105,622. The court also determined interest should accrue on the unpaid principal balance at the rate of ten percent per annum. Susan appealed, and Terry cross-appealed.

I. **Scope of Review.**

Our scope of review in the equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference

because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Property Distribution.

A. Both parties contend the district court failed to properly value the business. Susan claims the net value of the business is $285,000. Terry claims the business is only worth about $12,000. The parties agree to the value of most of the business's assets, but vastly disagree as to the value of equipment and inventory. Susan argues that as the company's bookkeeper, she was in a better position to determine the company's net worth. Terry claims Susan arbitrarily valued all used equipment at fifty percent of the purchase price and all new equipment at one hundred percent of the purchase price. He claims her valuation method was improper because it was not based on fair market value.

The district court considered all of the evidence in the case and determined the net value of the business was $160,000. The court found this value was consistent with the cash flow analysis of the business. The court stated its valuation was somewhat conservative because the remodeled business had only just come into operation when Susan filed a petition for dissolution of marriage.

We note that an appraisal report prepared on March 16, 1992, estimated the fair market value of the business was $160,000. We conclude the value placed on the business by

the district court was well within the permissible range of the evidence, and we will not disturb it on appeal. See In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). We affirm the district court's valuation of the parties' business.

B. Susan contends the district court improperly valued the rental house. The court found the house had a net value of $19,500. Susan states she plans to sell the house. She believes the value of the house should be adjusted to reflect the cost of selling the house and the taxes on the proceeds from the sale.

Terry claims that if the sale and tax consequences are considered for the rental house, the same consideration must be given to the marital residence and the parties' IRAs. Under Terry's calculations this would cause the cash property settlement to be reduced to $20,757.

Under Iowa Code section 598.21(1)(j), the tax consequences to a party may be taken into account in the division of property. However, consideration of tax consequences need not be considered where the court has not ordered a sale of the asset and there is no evidence a sale is pending or contemplated. In re Marriage of Friedman, 466 N.W.2d 689, 691 (Iowa 1991).

There was no evidence here the parties were planning to sell the marital residence or the IRAs. Furthermore, at trial Susan asked to be awarded the rental house because she planned to live there. There was no evidence either

party had any actual plans to sell the house. The district court stated it was awarding the rental house to Susan in an effort to award her an income-producing asset. We affirm the district court's valuation of the rental house, marital residence, and IRAs.

We find the property division is equitable, and we affirm the decision of the district court.

III. Child Support.

Susan claims the district court failed to properly calculate Terry's net monthly income. She states his income is actually $5000 per month, not $1700 as found by the district court. Susan's expert testified the cash flow of the business should be about $107,000 per year. Susan then deducts the principal payments due on the business loans and concludes Terry's net income is $57,000 annually.

Terry asks us to consider his net monthly income to be $800. He admits he has earned more than this in the past. However, he states his income will be reduced in the future because he will need to hire a bookkeeper. In addition, he believes his child support obligation should be reduced because he is paying the mortgage on the home where Justin resides.

There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). The

court must determine the parents' current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parents' income. Id.

In finding Terry had net monthly income of $1700, the district court considered the cash flow of the business, as well as the business's expenses and debt retirement. We find Susan's calculation of Terry's net income to be unreasonable because it does not consider all of the business's expenses. From examining the parties' tax returns, we find the business had net income of $14,890 in 1989, $26,638 in 1990, and $30,727 in 1991.

The parties were paying Susan a salary of $3000 to perform bookkeeping services, and this was deducted as a business expense. While there will be some additional expense to hire a bookkeeper, the company is also expected to have increased profits in the future. Considering the business's net income as Terry's income, we find his average net monthly income is $1700. We decline to reduce this amount by Terry's mortgage payments on the house.

Susan also contends the district court improperly found she had the ability to earn net income of $12,500 as a bookkeeper, which is $1041 per month. She states her income while she is a student will be at most $100 per month. We agree with the district court that Susan's

present earning capacity is $12,500. We determine this amount should be attributed to her in calculating Terry's obligation under the child support guidelines.

In her reply brief, Susan asks that Terry be required to pay for Justin's future college and other educational expenses. The district court stated, "Because it is difficult to predict the type and cost of post high school education for Justin at this time, the court declines to fix the obligations of the parties with respect to such expenses in this decree." We agree with the district court and decline to set any support for college expenses at this time. However, the district court retains jurisdiction to determine post high school education for Justin if and when he qualifies for such payments.

We affirm the district court on the issue of child support.

IV. Alimony.

Susan asks to be awarded permanent alimony of $1000 per month. She states she will need this amount to maintain her standard of living previous to the dissolution. She also states she has been out of the job market for several years and will need retraining to be productive in the work place.

Alimony is not an absolute right; an award depends upon the circumstances of each individual case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court

should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

As we noted above, Susan may live in the marital residence until August 1995, and Terry is required to pay the mortgage, taxes, and insurance on the house during this time. Susan must pay for utilities while she lives in the house. Thus, under the dissolution decree, Susan will have very minimal housing costs for a period of two years. We also note Susan received a substantial cash property settlement. We consider property division and alimony together in evaluating their individual sufficiency. Whelchel, 476 N.W.2d at 110.

Based on these facts, we find Susan is not entitled to alimony. We affirm the decision of the district court on this issue as well.

V. Trial Attorney Fees.

Susan contends the district court abused its discretion in not awarding her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show the trial court abused its discretion. Id. Here, each party received a substantial amount of property. We find no abuse of discretion.

VI. Appellate Attorney Fees.

Susan and Terry seek attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id. We determine each party should pay his or her own attorney fees for this appeal.

We affirm the district court on each issue presented in the appeal and cross-appeal. Costs of this action are assessed one-half to each party.

AFFIRMED.