

IN THE COURT OF APPEALS OF IOWA

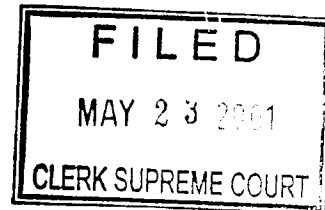
No. 0-827 / 00-635

Filed May 23, 2001

**IN RE MARRIAGE OF THOMAS M. SMITH
AND CAROL G. SMITH**

Upon the Petition of
THOMAS M. SMITH,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CAROL G. SMITH,
Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Linn County, Lynne E. Brady,
Judge.

The respondent appeals from various economic provisions of parties'
dissolution decree. **MODIFIED IN PART, AFFIRMED IN PART AND VACATED
IN PART.**

Christine L. Crilley of Crilley Law Office, Cedar Rapids, for appellant.

Thomas M. Smith, Hiawatha, pro se, for appellee.

Considered by Hayden, P.J., Honsell, and Harris, S.J.*

* Senior judges assigned by order pursuant to Iowa Code section 602.9206
(1999).

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HAYDEN, S.J.

The parties were married on January 5, 1980 and had been married twenty years at the time of trial. Thomas M. Smith (Tom) was born on June 16, 1948 and was fifty-one years old at the time of trial. Carol G. Smith (Carol) was born on May 5, 1951 and was forty-eight years old at the time of trial.

Tom was on active duty in the United States Navy at the time the parties were married. About one year later, Tom was discharged from the Navy and spent an additional twelve years in the Navy reserves. He had served eight years active duty with the Navy.

After discharge from active duty Tom enrolled in college on the G.I. bill. He obtained a bachelor of science degree in electronics technology.

Carol attained a bachelor of science degree in education in 1973. She attended an additional one year and one semester of college and majored in European history after she had obtained her B.S. degree.

There were three children born of this union: Kimberly, age seventeen; Matthew (Matt), age fifteen; and Bradley, age thirteen, at time of trial.

After Tom graduated from college, he obtained employment as a systems safety engineer with General Dynamics, San Diego, California. He worked for General Dynamics for ten years before he was laid off. During this time his salary was between \$30,000 and mid-\$40,000 annually. Carol was employed in a law firm in San Diego and earned \$39,000 annually.

Tom has a pension from General Dynamics. He withdrew \$30,000 from that pension fund and invested in the commodities market. This was without

Carol's knowledge and it was against the advice of Carol's brother who was a commodities broker. This money was lost in the market.

After being laid off from General Dynamics, Tom did odd jobs for about three years and then purchased some vending machines. Carol received \$20,000 for a personal injury settlement from an automobile accident. She gave \$10,000 to Tom to start the vending machine business. This business lost money. Tom was hired by Ratheon Aircraft Company in Wichita, Kansas. Tom sold the vending machine business and used the money for a down-payment on a home in Wichita. He earned approximately \$45,000 annually during the two years he worked for Ratheon. He "hated" working for Ratheon. He contributed to a retirement fund while there. Tom has been working for Rockwell Collins in Cedar Rapids since November 1997. His hourly rate of pay was \$28.96. At time of trial Tom remained employed by Rockwell as a senior engineer and was contributing to retirement plans. He is not yet fully vested in a retirement plan. His annual income is \$60,243. His 1999 income was \$66,554. He had worked over-time on a special project which is now completed.

When the parties were married Tom brought \$5,000 into the marriage and Carol brought a \$5,000 C.D. and a gold coin collection which she sold for \$12,000. When the petitioner lost \$30,000 of retirement funds from General Dynamics, he told Carol the balance of what was left was hers.

Carol is also employed at Rockwell Collins in Cedar Rapids and her annual income is \$38,000. She contributes to a pension at Rockwell.

Carol testified Tom's relationship with the children is difficult. He would get angry and exhibit verbal and physical abuse and then blame his temper loss

to his unhappiness with Carol. Carol has seen Tom hit Brad and threaten the children. She has seen the marks on Matt. Matt refuses to see his father. Matt is diagnosed with depression and is medicated with Prozac. He is undergoing counseling with a licensed psychologist. Tom has struck Matt and a child abuse report was filed against Tom. Tom has been treated for depression for the last twelve years and continues on Prozac medication. He is involved in counseling and is a member of Depressed Anonymous.

The trial court granted Tom and Carol joint legal custody of their children. Primary physical care was awarded to Carol.

There was established visitation for Tom with Kimberly and Bradley. No visitation schedule was established for Matt based on the testimony of Matt's counselor. Tom was permitted to attend Matt's extra curricular activity events and school conferences. He was not to contact Matt unless Matt initiated the contact.

The court ordered Tom to pay child support to Carol for the three minor children in the amount of \$1,263 per month. The child support is to continue until each child attains the age of eighteen or graduates from high school whichever occurs later. When a child is no longer eligible for regular periodic guideline child support, the support shall be re-calculated based on the parties' incomes at that time for the remaining minor children.

The trial court determined the savings bonds in the children's names were the children's property. Also, the court awarded a certain computer to the children and ordered Tom to pay the debt for the computer to Capitol Associates. The parties' homestead was awarded to Carol and she was ordered to assume

the debt against the property. Tom was awarded his mobile home and ordered to pay the debt on it. The parties were awarded certain personal property which is not in dispute on this appeal.

Tom was awarded the joint savings bonds valued at \$1,691; the Fair Winds Credit Union account of \$146; his Rockwell retirement valued at \$7,547 and any checking or savings account held in his own name. He was also awarded the tax loss from his commodity trading, for income tax purposes. Carol was awarded her Rockwell retirement valued at \$5,130 and any checking or savings account held in her own name.

The court determined Carol held certain non-marital property and awarded the piano, the Collins credit union brokerage account valued at \$5,437 and the Liberty IRA valued at \$37,755. In an attempt to equalize the asset division between the parties the court awarded \$8,700 from the Liberty IRA to Tom.

Each party was awarded one-half of the General Dynamics retirement fund and one-half of the Ratheon retirement benefits as of the date of the divorce decree. Tom was awarded eighty-six percent of the Navy retirement points and Carol was awarded fourteen percent.

Tom was also ordered to pay his \$5,000 loan to the credit union, \$125 to Big Sur, \$1,316 to Visa, and one-half of the Discover card in the approximate sum of \$610. Carol was ordered to pay \$516 to her brother, \$220 to Sears and one-half of the Discover card.

Carol was awarded rehabilitative-reimbursement alimony in the sum of \$500 per month for twenty-four months. Tom was ordered to commence these

payments on February 29, 2000. Tom was ordered to pay Carol's attorney an additional sum of \$1,000.

In response to Carol's 179(b) motion, the trial court awarded the Everen IRA held in Tom's name one-half to each party.

Tom filed an application for nunc pro tunc after the decree was filed. In this application Tom requested the references of respondent (Carol) be changed to petitioner (Tom) in regards to visitation of the children.

Tom also requested the decree be corrected to substitute respondent for petitioner in the sentence "however, the bill for the computer to Capitol Associates shall be paid by the Petitioner." A copy of this application was hand delivered to Carol's attorney on the 24th day of March 2000.

Judge Lynne E. Brady presided over three days testimony and evidence during this trial. She wrote and filed the decree.

Tom's application for nunc pro tunc order was filed on Friday, March 24, 2000. It was presented to a different district judge other than Judge Brady. Judge Thomas Horan granted Tom's application for nunc pro tunc in all respects and substituted respondent (Carol), for petitioner (Tom), to pay the bill for the computer to Capitol Associates. This order was filed of record on March 27, 2000.

On appeal, Carol requests her alimony be extended to sixty months; Tom's Everen IRA be awarded to her in total or the tax loss should have been equally divided between the parties. Carol also claims the district court erred by using a nun pro tunc order to change the liability for the Capitol Associates indebtedness from Tom to Carol. She requests attorney fees on appeal.

I. Scope of Review. Our review of this equity case is de novo. Iowa R. App. P. 42. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P.14(f)(7).

II. Rehabilitative and Reimbursement Alimony. Carol argues her rehabilitative and reimbursement alimony should be extended to sixty months (five years).

Alimony is not an absolute right, but instead depends upon the particular circumstances of each case. *In re Marriage of Debler*, 459 N.W.2d 267, 269 (Iowa 1990). Property division and alimony are to be considered together in determining the sufficiency of an alimony award. *Id.*

The criteria to be considered by the courts in making an award of alimony are set forth in Iowa Code section 598.21(3) (1997). This criteria includes, but is not limited to the following: length of the marriage, age, and physical and emotional health of the parties, distribution of the property made to the parties, the educational level of each party at the time of marriage and at the time the action is commenced.

Also, this section directs the court to consider the earning capacity of the party seeking maintenance, including educational background, training, and employment skills, work experience and responsibilities for children under either an award of custody or physical care. See *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). We also consider the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time

necessary to achieve this role. *Id.* An award of alimony is proper when the marriage is of long duration and where the disparity in earning capacity is great. *Id.*

Tom's base rate of pay is \$28.96 cents an hour which equals \$60,243.04 per year. His 1999 income was \$66,554. The trial court found Carol's annual income to be \$38,020. Carol has considered attending law school at the University of Iowa.

We determine Carol's alimony in the amount of \$500 per month be extended for sixty months (five years) commencing from February 29, 2000. The trial court's decree is modified in this respect.

III. Property Division Award. Carol claims the trial court should have awarded her the Everen IRA in total and should not have awarded the full tax loss to Tom. In the alternative she claims the remaining tax loss should be equally divided between the parties.

Parties in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa Ct. App. 1997). 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.* Distribution of property should be made in consideration of the criteria in Iowa Code section 598.21(1). *In re Marriage of Estland*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

A fastidious adherence to equal property division does not bind the courts of this state. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The proper goal of the courts is to achieve an equitable and just award under the

circumstances. *Id.* In discerning a just and equitable distribution, a court should evaluate and consider the factors enumerated in Iowa Code section 598.21(1). *In re Marriage of Mott*, 444 N.W.2d 507, 511 (Iowa Ct. App. 1989). Both the division of property and the division of debts should be equitable. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa Ct. App. 1996).

Iowa Code section 598.21(1) (1997) sets forth many factors to consider in a division of property to the parties in a dissolution action. In considering this appeal we set forth some of those factors as follows: length of the marriage, property brought into the marriage by each party, contributions of each party to the marriage giving appropriate economic value to each parties contribution in homemaking and child care services, the age and physical and emotional health of the parties, the contribution by one party to the education, training or increased earning power of the other, the earning capacity of each party, the desirability of awarding the family home to the party having custody of the children, the amount and duration of alimony, the pension benefits, vested or unvested and future interests, and the tax consequences to each party.

The allocation of marital debts is an intrigal part of property division. See *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980).

It is apparent the trial court was aware of the \$30,000 Tom lost in the commodities market and the \$10,000 he lost in a business venture by him in California.

We determine the trial court made a just and equitable property division between the parties under the circumstances. We affirm the trial court on this issue.

IV. Nunc Pro Tunc Order. A nunc pro tunc entry makes the record show now what was actually done then. See *Feddersen v. Feddersen*, 271 N.W.2d 717, 718 (Iowa 1978). Its purpose is to make the record show truthfully what judgment was actually rendered. *General Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953). It is not for the purpose of correcting judicial thinking, a judicial conclusion or a mistake of law. *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). If a court makes an error of fact or law in arriving at its judgment, the appropriate remedy is not by way of a nunc pro tunc order but by other available procedures such as a 179(b) motion or a motion for a new trial. *In re Marriage of Bird*, 332 N.W.2d 123, 124 (Iowa Ct. App. 1983).

In this case, the trial court, Judge Lynne Brady in her dissolution decree stated: "The computer also belongs to the children. It is awarded to the children. It shall remain with them. However, the bill for the computer to Capitol Associates shall be paid by the Petitioner [Tom]."

After the decree was filed, Tom filed an application for nunc pro tunc claiming the Court made a scrivener's error when ordering the petitioner to pay the computer bill and the court intended Carol (respondent) to pay the bill. This application was filed on March 24, 2000, a Friday afternoon. Judge Thomas Horan entered a nunc pro tunc order on Monday, March 27, 2000. Carol claims she did not receive notice of the application before the court entered the order. Carol argues Judge Horan's nunc pro tunc did not correct a scrivener's error or omission, but re-distributed the debt responsibility for the Capitol Associates bill. This was not a proper use of the nunc pro tunc and essentially modified Judge Brady's decree. Carol asks the obligation for payment of Capitol Associates bill

be re-assigned to Tom. We agree. That part of the nunc pro tunc order effecting the Capitol Associates bill is vacated and shall be of no force or effect. This portion of Judge Brady's decree is re-instated and shall remain in full force and effect.

V. Attorney Fees on Appeal. Carol requests attorney fees on appeal. We award her \$1,000 to apply upon her appellate attorney fees. Costs of this appeal are taxed to Thomas M. Smith.

MODIFIED IN PART, AFFIRMED IN PART AND VACATED IN PART.