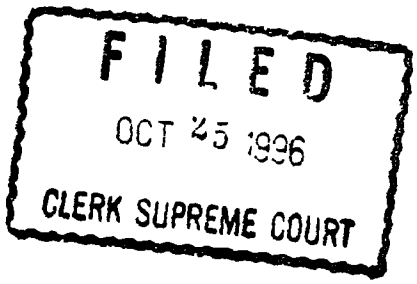
IN THE COURT OF APPEALS OF IOWA

No. 6-162 / 95-501

IN RE THE MARRIAGE OF RANDY FRANCIS ERNST AND MARY SUSAN ERNST

Upon the Petition of
RANDY FRANCIS ERNST,
Appellant,

And Concerning
MARY SUSAN ERNST,
Appellee.



Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Randy (Cal) Ernst appeals the alimony provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Jeffrey P. Taylor of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellant.

Mark H. Rettig of Hines, Pence, Day & Powers, P.C., Cedar Rapids, for appellee.

Considered by Streit, P.J., Vogel, J., and Peterson, S.J.*

*Senior judge from the First District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

The marriage between Randy Francis Ernst (Cal) and Mary Susan Ernst (Mary) was dissolved on March 1, 1995. Cal appeals the alimony provisions and Mary seeks an award of appellate attorney fees.

*I. **Standard of Review.*** In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew the rights on issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Although we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

*II. **Background.*** Cal and Mary Ernst were married on July 28, 1973. Two children were born to this marriage. Emily Nina Ernst was born on June 24, 1978, and Amanda Ruth Ernst was born on April 16, 1982. At the time of trial, Cal was forty-four years of age and Mary was forty-eight years of age. Emily was sixteen years of age, and Amanda was thirteen years of age.

Cal has an undergraduate degree from the University of Northern Iowa in physical education. He has been employed in the area of sales for the majority of his working life. He initially worked for Wilson & Company and then IBM, and in 1989, he began his current job as a stockbroker for Securities Corporation of Iowa. He is paid on a commission basis, and his income fluctuates based upon the quantity of

securities he sells. His gross monthly income is approximately $9,139.00, and his net income is approximately $6,465.00.

Mary has a Master's degree from the University of Iowa in library science as well as a permanent teaching certificate as a result of her undergraduate degree. This was also from the University of Iowa where she majored in elementary education and sociology. She obtained this degree in 1969. At that time she secured a teaching position at Pierce Elementary School in Cedar Rapids and taught there until 1972. It was in 1972 that she returned to the University of Iowa and secured her Master's degree. After securing that degree, she taught for one year at Grant Wood Elementary School in Cedar Rapids and the following year at Arthur Elementary School, also in Cedar Rapids. In 1975, Mary decided to leave teaching and work at Armstrong's Department Store as a sales clerk on a part-time basis. She next worked as a part-time medical research librarian at Mercy Hospital and during that time also obtained a part-time job working for the Cedar Rapids Public Library System. In 1991, she voluntarily left Mercy Hospital and continues now only to work part-time at the Cedar Rapids Public Library. Her salary level is based on an average of no more than forty hours every two weeks. Her gross monthly income is $1,062.00, and her net monthly income is $816.00.

Cal encouraged Mary to work on a full-time basis, but Mary elected to work only part time, desiring to be able to spend more time at home with the children.

The parties agree that they lived a relatively frugal life-style. Because of this, they did accumulate some assets above and beyond the equity in their residence. The parties did, however, belong to a local country club. Cal used the facilities for playing golf, and Mary used the swimming facilities for herself and the children. They, however, did not use the restaurant facilities.

The parties stipulated as to the property settlement, child custody, and visitation and submitted the matter to the court on the questions of alimony, child support, medical hospitalization and health insurance, entitlement to the tax exemption for the children, the division of the refund for the 1994 income taxes, and Mary's attorney's fees.

The stipulation did not set out the value of the assets awarded to the parties. We are unable to establish a value because of an annuity that Cal was to purchase which would equal one-half of the difference between the IBM pension plan that he has and Mary's IPERS plan. However, the parties agree that Mary received a greater value of the assets than Cal. Cal claims the difference in value is $54,254.32, and Mary's financial affidavit shows a difference of $37,961.00. A substantial portion of Mary's share of the assets is the equity of the home at 2230 Windsor Court in Marion, Iowa, which she received. It has an appraised value of $212,000.00, and has a mortgage of $39,505.00. Both parties agree the property settlement was equitable.

Cal and Mary agree that because the custody of the children is split under the stipulation, they should remain in close proximity to each other so that visitation will

not be affected by distance. Mary does have a permanent teaching certificate; however, she would need some additional training at this time because of changes in the profession since she last taught. The Cedar Rapids Public School System has a very low turnover in their teacher pool, and the bulk of the replacements come from substitute teachers in the system. Mary has training in library science; however, there are few positions available in the Cedar Rapids area in that discipline.

Cal claims monthly expenses in the sum of $2,631.67. Mary claims monthly expenses in the sum of $1,948.00.

The trial court awarded Mary the sum of $1,500.00 per month commencing March 3, 1995, and continuing each month thereafter until Mary marries, dies, or reaches the age of sixty-two years, whichever event first occurs. Child support was awarded to Mary for Amanda in the sum of $1,245.15 per month for as long as Emily was attending boarding school during the spring of 1995. The child support changed to $797.17 on March 3, 1995. The reduction was because of the offset of child support Mary would owe as a result of Emily being in the physical custody of Cal. The decree also required Cal to provide medical hospitalization and health insurance for the minor children and any medical expenses not covered by that insurance would be equally divided by Mary and Cal. Cal was awarded the dependency exemptions for state and federal tax purposes for both children beginning with the tax year 1995. The 1994 refund from their tax obligation was to be equally divided and each party was required to pay their own attorney fees.

*III. **Alimony.*** Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. *In re Marriage of Steele*, 502 N.W.2d 18, 22 (Iowa App. 1993). It is not an absolute right, but must be determined based upon the facts and circumstances of each case. *In re Marriage of Vanderpol*, 529 N.W.2d 603, 606 (Iowa App. 1994). The level of child support being paid, as well as the property settlement, are factors to be considered by the court in determining the appropriate level of alimony. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992); *In re Marriage of Debler*, 459 N.W.2d 267,269 (Iowa 1990). The award of alimony is made after considering the factors listed in Iowa Code section 598.21(3). Prior cases have little precedential value because the court on appeal must base its decision primarily on the circumstances of the parties. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

This is a marriage of reasonably long duration (twenty-one years). There is a substantial disparity between the earning capacity of Cal and Mary. Although Mary has training in two disciplines, one will require some additional training and the opportunity for employment in both of the disciplines is limited in the area. Both Cal and Mary feel they should live in the same area in order to make the maximum opportunity for visitation. Although Mary claims only $1,948.00 in monthly expenses, she has been used to a household income of approximately $120,000.00. Mary, however, did receive a larger share of the marital assets. Unfortunately we are unable to determine the exact amount, but it was at least $37,961 more. We believe

the alimony award should be reduced to $1,000 per month until Mary marries, dies, or reaches the age of 62 years whichever event first occurs. We believe that the trial court's award of alimony should be reduced. We assume in establishing the alimony in this amount Mary will not be able to secure full-time employment in her areas of expertise.

IV. Appellate Attorney Fees. The award of attorney fees on appeal is not a matter of right, but rests with the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). In this situation, we feel Mary should be awarded $1,000 in appellate attorney fees.

In summary, we modify the trial court's alimony award and allow Mary $1,000 for attorney fees on appeal.

AFFIRMED AS MODIFIED.