IN THE COURT OF APPEALS OF IOWA

No. 2-411 / 91-1900

FILED
MAR 30 1993
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GWENDOLYN MARIE MAU AND DANNY LOWELL MAU

Upon the Petition of

GWENDOLYN MARIE MAU,

Appellee,

And Concerning

DANNY LOWELL MAU,

Appellant.

Appeal from the Iowa District Court for Hancock County, J. W. Frye, Judge.

The husband appeals the economic provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Philip L. Garland, Garner, for appellant.

Richard A. Allbee of Coonley & Coonley, Hampton, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Gwendolyn (Gwen) and Danny Mau were married on July 8, 1972. The parties have three children: Devon, born on September 7, 1973; Danielle, born on February 16, 1980; and Dillon, born on April 11, 1981. Devon has a learning disability. He was expected to graduate from high school in May 1992. The parties lived in Klemme, Iowa, during most of the marriage.

Gwen was forty-two years old at the time of the hearing. She has a college degree and taught Spanish full-time from 1971 to 1974. From 1975 through 1981 Gwen did some substitute teaching. She has since let her teaching certificate expire. Gwen is currently taking accounting and computer classes, but has no exact employment plans. Gwen has suffered from depression since about 1983 and has at times been on prescription medication for her depression. Gwen has been in counseling with a licensed clinical social worker, Pamela Little. Little testified Gwen would need counseling for at least three more years.

Danny was forty-five years old at the time of the hearing. He is employed as the vice-president and general manager of BMD, Inc., formerly known as Butler Manufacturing & Distribution Company, a company started by Gwen's family. Danny has an annual salary of $20,000 plus he receives a bonus of $65,000 every year. His net monthly income is $5,533. Danny previously had a substance abuse

problem and received treatment. He testified he had been sober for about seven years. Danny has also suffered from depression and was taking anti-depression medication.

The parties separated a number of times and attempted reconciliation. On September 11, 1989, Gwen filed this petition for dissolution. The parties agreed to joint legal custody of the children with Gwen having physical care.

On November 8, 1991, the district court filed a decree dissolving the parties' marriage. The court awarded Gwen alimony of $1,200 per month from December 1991 to December 1999 and then $500 per month for twenty-four months. Danny was ordered to pay child support of $1,940 per month when three children were living with Gwen, $1,660 per month for two children, and $1,250 per month for one child.

In dividing the parties' property, the court set aside to Gwen certain gifts she received from her parents. The court divided the marital property equally. In order to effectuate this equal division, the court ordered Danny to transfer to Gwen a portion of his BMD stock, to transfer a portion of his profit-sharing account to an IRA in Gwen's name, and to pay her $20,000. Danny was awarded the tax deductions for the children. The court ordered Danny to pay a total of $5,000 for Gwen's attorney fees.

Danny has filed this appeal.

I. Our scope of review in this equitable action is de novo. See 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. Danny contends the property division is not equitable to him. He states the court ignored the tax consequences of requiring him to place a portion of his profit-sharing account in an IRA for Gwen. He also claims the court should not have considered a $31,000 savings account as an asset because it was the remainder of his bonus from the previous year and should be considered wages.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1992). The Iowa courts do not require an equal division of percentage distribution. Id. The determining factor is what is fair and equitable in each case. Id.

Danny admits the parties' assets should be divided equally. We agree with the district court that Gwen is entitled to a portion of Danny's profit-sharing account. James Tausz, a certified financial planner, testified that with a proper qualified domestic relations order there could be a rollover into an IRA account with no tax penalty to Danny. The district court ordered the parties to

prepare such an order. We also find the $31,000 savings account should be considered an asset. We affirm the property distribution set forth by the district court.

III. Danny also contends the award of alimony to Gwen is excessive. He asks us to reduce her alimony award to $1,200 per month for five years and then $500 per month for five years.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. Id. Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

We note that during the marriage the parties agreed Gwen would be responsible for caring for the children and would not work outside the home. She testified she would prefer to continue her education on a part-time basis until 1997 and then complete her education. In 1997 the youngest child will be sixteen. Dr. Wayne Newkirk, Gwen's financial expert, testified that Gwen should be completed with her educational rehabilitation by 1999. Based upon these facts, we affirm the district court's award of alimony.

IV. Danny also contends the district court erred in its award of child support. He acknowledges that because his net monthly income is greater than $3,000, the amount is somewhat discretionary with the court. He states, however, that considering the award of alimony to Gwen, his child support obligation is excessive.

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). In the case In re Marriage of Lalone, the supreme court held that alimony may be considered by the court in an attempt to do justice between the parties. 469 N.W.2d 695, 697 (Iowa 1991).

In this case the award of alimony is fairly large and we conclude Danny's alimony obligation should be deducted from his net monthly income in calculating the amount of child support. We also conclude the amount of alimony should represent Gwen's earning capacity for purposes of calculating child support. We modify the dissolution decree to order Danny to pay $1,517 per month in child support until such time as Devon completes his high school education. After that time, Danny should pay $1,300 per month until Danielle attains the age of eighteen or graduates from high school, whichever occurs last. At that time, Danny should pay $975 per month for the support of

Dillon until he attains the age of eighteen or graduates from high school, whichever occurs last.

In the event any of the children decide to pursue a post-high school education and qualify for continued support pursuant to Iowa Code section 598.1(2), the issue of the parents' financial support may be considered upon a petition to modify. See In re Marriage of Lindberg, 462 N.W.2d 698, 701 (Iowa App. 1990).

V. Danny claims the district court abused its discretion in awarding trial attorney fees to Gwen. 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 the award the complaining party must show that the trial court abused its discretion. Id. We conclude Danny has not shown an abuse of discretion here.

VI. Finally, Gwen asks for 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 be responsible for his or her own attorney fees for this appeal.

VII. In summary, we have affirmed the district court on all issues, except we have modified Danny's child support obligation. Costs of this appeal are assessed to Danny Mau.

AFFIRMED AS MODIFIED.