FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-241 / 89-1151

IN RE THE MARRIAGE OF KAREN D. LEIGHNER AND JOHN W. LEIGHNER

Upon the Petition of
KAREN D. LEIGHNER,

Appellant,

And Concerning
JOHN W. LEIGHNER,

Appellee.

428

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

Wife appeals from a dissolution decree and challenges its economic provisions. She also requests attorney's fees on appeal. **AFFIRMED AS MODIFIED.**

F. E. Ebersold of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellant.

Michael W. Manske of Maher & Manske, Council Bluffs, for appellee.

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

DONIELSON, P.J.

Karen and John Leighner were married February 17, 1962. Two of their three children are adults unaffected by the dissolution proceedings. The third child, Ashley, was born in February 1985. Ashley was placed in joint legal custody and in Karen's primary physical care. The custody arrangements are not challenged on appeal.

John is employed as a route salesman for a beer distributor. He grossed $24,327.55 in 1988. During part of their marriage, Karen was a homemaker and acted as primary caretaker for the parties' children. Beginning in 1969 Karen worked in a variety of low-paying jobs, which included positions in sales and as a teacher's aide. In August 1988 she had to quit her job at the J.C. Penney Company because of a growth on her thyroid gland. She hopes to return to work after surgery to correct the thyroid condition.

Karen filed a petition for dissolution of the parties' marriage on December 13, 1988. The trial court's decree of dissolution was filed May 19, 1989, and its ruling on the parties' motions for enlarged findings was filed on June 28, 1989.

The dissolution decree awarded John the parties' home, valued at $35,000 and subject to a mortgage debt of $22,000. John was also awarded two cars, various items of personal property, and all his interest in his employment pension plans. He was directed to assume most of the

parties' unsecured debts, which totaled approximately $9,000. John was directed to pay Karen child support of $350 per month and alimony of $200 per month for six months. Karen was awarded a car and various personal effects.

Karen has appealed from the dissolution decree. She contends she should have been awarded the parties' house, both to make the division of property more equitable and to allow the minor child in her physical care to continue living in the family home. She argues she should have been awarded a share of John's employment pension benefits. In addition, she asserts the district court should have awarded her attorney's fees, and it should have provided that her alimony award would continue until her thyroid treatment has been successfully completed. Finally, she requests attorney's fees on appeal.

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 rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Family Home

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 Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

Changes in employment and financial difficulties have made the parties' home their only asset of any significant present value. When making a disposition of marital property, a court may consider the desirability of awarding the family home, or the right to live in the family home for a reasonable period, to the party who has physical care of the parties' children. Iowa Code § 598.21(1)(g).

The trial court awarded John the family home because he was allocated responsibility for the bulk of the family's debts. We find this result inequitable and modify it accordingly. Karen is awarded the right to live in the family home with Ashley until John's child support obligations cease. At that time, or if the parties should agree to an earlier time, the home will be sold. From the sale proceeds, after payment of the mortgage, Karen will be entitled to reimbursement for all mortgage payments made subsequent to this decision plus one-quarter of the home's current equity value, which this court finds to be $3,250. The remainder of the proceeds will go to John. Mortgage payments, principle, and interest, subsequent to

this decision, will be borne by Karen, and repair costs, other than routine home maintenance, will be borne equally by the parties.

In reaching this disposition of the family home, this court has considered a number of factors. This was a marriage of twenty-seven years and it was through the contributions of both parties that this home was obtained. There is a strong interest in preserving a custodial parent's right to reside in the family home because it minimizes the disruption which children inevitably endure when their parents divorce. Equity supports awarding the right to live in the family home to Karen. However, since John has been ordered to pay the vast majority of the parties' marital debts, he should be awarded the larger interest in the home's current equity value.[1]

II. Alimony

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347, 350 (Iowa App. 1983).

---

1. Karen has asked that we modify the trial court decree to clarify the "hold harmless" clause included by the trial court is for the "maintenance and support" of Karen. Finding no resistance by John, we grant her request.

When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. Estlund, 344 N.W.2d at 281. Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981).

Karen contends the trial court's alimony award was inadequate and she should have been awarded alimony until such time as she needs no further treatment for her thyroid condition. We affirm the trial court's award.

Karen introduced no medical testimony or conclusive evidence regarding the severity of her condition and her inability to work. When awarding spousal support, the court may consider the length of the marriage, each party's earning capacity, and the physical health of the spouse seeking alimony. Iowa Code § 598.21(3)(a),(b),(e) (1989).

In this case, there is a disparity in the parties' level of earnings. However, any argument for the extension of alimony payments is offset by the distribution of marital property and debts. See Iowa Code § 598.21(3)(c) (1989) (distribution of property is factor to be considered in awarding spousal support). We have also taken into account Karen's age (now forty-six) and her testimony indicating her clear intention to return to work. In light of all of these factors, we find the award of alimony for six months to be equitable and we affirm it.

III. Pension Plans

Karen claims the trial court erred in failing to award her any interest in John's pension plans. In its ruling on the motions for enlarged findings, the trial court stated the record in this case does not support any finding of a substantial present value for John's pension plans.

Pension benefits, whether vested or unvested, are to be considered in the disposition of marital property. Iowa Code § 598.21(1)(i) (1989). Pension benefits are treated as marital property in Iowa and are properly subject to equitable distribution. In re Marriage of Mott, 444 N.W.2d 507, 510-11 (Iowa App. 1989).

The evidence in this case reveals John spent sixteen years working for Guy's Foods. When his position was eliminated, he spent several years trying to become established in the beer industry before he obtained his present job with Western Iowa Wine Distributors. Through this employer, John is covered by the "West Iowa Wine Defined Contribution Plan" and the "West Iowa Defined Benefit Plan." It is these plans from which Karen seeks a portion of John's pension benefits.

This court has previously recognized and discussed the variety of schemes available for the distribution of pension benefits. Mott, 444 N.W.2d at 510-11. Current valuation of a pension plan may be bypassed by providing payment out of future benefits if and when received. Where it is difficult to place a present value on a pension due

to uncertainties regarding vesting or maturity, each spouse may be awarded an appropriate percentage to be paid if and when the pension is payable, apportioning benefits only if and when paid. Id.

After reviewing the factors relevant to a property disposition (i.e., the length of the marriage, the contributions of each to the marriage, and the earning capacity of each party), this court concludes Karen should be awarded an interest in John's pension benefits available through his current employer. Equity warrants application of the formula applied in In re Marriage of Curfman, 446 N.W.2d 88, 90 (Iowa App. 1989), to divide the pension benefits. We modify the decree to provide that when John commences to receive pension benefits pursuant to his present employer's plans, Karen will receive an amount equal to fifty percent of a fraction of his pension; the numerator of the fraction being four, the number of years John worked for West Iowa during the years of marriage, and the denominator of the fraction being the total number of years during which these pension benefits were accumulated prior to being paid.[2]

IV. Attorney Fees

Karen contends the trial court erred in failing to award her attorney fees. Iowa trial courts have

---

2. Contrary to Karen's assertion in her brief, we find the numerator should be four, not eight. John's testimony and his W-2 wage and tax statement indicates he did not begin his employment with West Iowa until 1985.

considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Awards of attorney fees must be for fair and reasonable amounts and must be based on the parties' respective abilities to pay. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). In light of the property disposition and allocation of the parties' debts, we find no abuse of discretion in the trial court's denial of attorney fees in this matter.

Karen seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and depends upon the parties' respective abilities to pay. See In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). In light of the circumstances of this case and our modification of the trial court's decree, we find equity does not warrant awarding appellate attorney fees. The costs of this action are to be divided between the parties.

AFFIRMED AS MODIFIED.

Hayden, J., concurs; Schlegel, J., concurs in part and dissents in part.

SCHLEGEL, J. (concurring in part and dissenting in part)

I concur in all respects in the opinion of the majority, except in its determinations on the issues of alimony and of attorney's fees.

While I do not advocate permanent alimony in this case, because of Karen's present health condition and her inability to maintain employment until thyroid surgery, I would extend the time of John's obligation to pay alimony. I believe that at least one year would be more realistic, in view of the need for surgery and recuperation.

Even during the period of the alimony payments, Karen is unemployed, required to make payments on the home mortgage, and must contribute to the upkeep of the home. For six months, her total income will be $550, made up of $350 in child support and $200 in alimony.

At the present time, Karen has no ability to pay attorney's fees. Although it will be difficult for John to meet all of his obligations, when comparing the parties' abilities to pay, he remains more able than Karen. I would award at least a nominal amount of attorney's fees to Karen.

I approve of the modifications made by the majority. Unfortunately, neither of those modifications provides the needed income for the present.