

IN THE COURT OF APPEALS OF IOWA

No. 3-836 / 12-2249
Filed October 2, 2013

**IN RE THE MARRIAGE OF PAULA J. BURKE
AND MICHAEL V. BURKE**

**Upon the Petition of
PAULA J. BURKE,**
Petitioner-Appellee,

**And Concerning
MICHAEL V. BURKE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Michael Burke appeals from the district court's award of spousal support at the rate of \$1000 each month for 120 months. Paula Burke cross-appeals.

AFFIRMED AS MODIFIED.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Robert B. Deck of Deck Law, L.L.P., Sioux City, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

VOGEL, P.J.

This appeal arises from the dissolution decree dissolving the marriage of Michael and Paula Burke. They were married on May 3, 1995, and separated in August 2011. Both parties appeal the district court's award of spousal support.

At the time of trial, September 26, 2012, Paula was fifty-seven years old with a high school degree. She was not employed outside the home during the marriage, and there is no evidence she will be able to work in the future. She applied for social security disability and was awarded benefits for mental health related matters, effective September 7, 1994. She was given a lump sum payment in the amount of \$15,000, and receives \$454 each month. Paula also has health issues relating to osteoporosis. Her expenses total \$2430 each month.

Michael was sixty-eight years old and also has a high school degree, as well as some trade school education. He is retired from his job as a supervisor at Phillips Kiln. Michael receives social security benefits in the amount of \$1788 each month and \$243 per month in VA disability benefits; however, he will not receive the \$243 until the balance of a delinquent VA mortgage is paid in full, which had an unpaid balance of \$15,883.65. Michael also has an IRA account with TD Ameritrade, which was valued at \$141,914.93.¹ Michael's expenses total \$2925 each month, which include two mortgage payments.

There are also several real properties owned by the parties in Sioux City. Three properties, known as the Concordia Street, Orleans Street, and South

¹ In its original order the district court valued the IRA at \$120,218; however, when granting in part Michael's motion to amend or enlarge, the court changed the valuation to \$141,914.93.

Judd Street properties, have been sold on contract. The income from these properties is approximately \$551.65, \$496.91, and \$473 each month, respectively.² The family home is located on Prescott Street, which is valued at \$85,700, and is still subject to monthly mortgage payments in the amount of \$673.94 and \$456, which Michael pays. The fifth property is on West Street, which is valued at \$60,000 and is unencumbered. Additionally, there are two promissory notes held by the Burkes, one from Robert Barbee in the amount of \$3000, and the second from Ashley Jacobson for \$2500.

During trial, Paula alleged Michael misappropriated various items belonging to her, and sold them without her permission or knowledge. The district court acknowledged the challenge to Michael's credibility, stating:

The court is not unmindful and wary of some of Michael's credibility. Michael has a felony criminal conviction in Iowa for claiming to be a South Dakota resident and not paying Iowa withholding taxes; he acknowledged signing Paula's name on a real estate document and has acknowledged cashing in his boilermaker's pension claiming to be a single individual when he was, in fact, married.

The district court in reviewing the income, expenses and assets, ordered the following: Paula is to receive \$1000 each month in spousal support for 120 months,³ as well as the income from the three real estate contracts for the Concordia Street, Orleans Street, and South Judd Street properties. Michael is to receive the two properties on Prescott Street and West Street, his IRA account, and the two promissory notes. Michael was also ordered to pay

² The amortization schedules varied in dollar amount, as changes were made when the buyers made additional lump sum payments, or when Michael was collecting taxes or insurance on the properties. Thus, these amounts are an approximation of the amount received each month.

³ The initial decree awarded spousal support for the duration of Paula's life, but was later amended to 120 months, or until her death, remarriage, or termination as a matter of law.

\$32,286 as a property settlement.⁴ Both are to retain the vehicle currently in their possession and their individual bank accounts. With regard to misappropriated items, the court ordered Michael to pay Paula \$16,166 as an additional property settlement.

Both parties appeal the district court's award of spousal support. Michael argues it should be decreased to \$250 because it is inequitable, and he is not able to pay this amount each month. Paula asserts the award should be increased to \$2400, which she should receive for the rest of her life. Paula bases her argument on the fact that, after the 120 months have passed and the contracts from the three properties are paid in full, she will only have an income of \$900 each month, whereas Michael will have substantially more income and income producing assets. Paula further asserts she should have been awarded trial court attorney fees of \$6697.50, as well as attorney fees on appeal.

In this equity action our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(g). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

An award of spousal support is not an absolute right, but instead depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Any form of spousal support is

⁴ The court also gave Michael the option of paying this amount in monthly installments of \$500.

discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). When determining whether spousal support is appropriate, the court must consider the statutory factors enumerated in Iowa Code section 598.21A (2011). These factors are: (1) the length of the marriage, (2) the age, physical, and emotional health of the parties, (3) the property division, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking support, and (6) the feasibility of the party seeking support becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A. The court also considers each party's earning capacity, and each party's present standard of living and ability to pay, balanced against the relative needs of the other. *In re Marriage of Hitchcock*, 309 N.W.2d 432, 436–37 (Iowa 1981). “Even though our review is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity.” *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

Upon review of the record, we find the award of spousal support to be inequitable. The district court incorrectly calculated Michael's monthly expenses as \$1178, when, with the addition of the mortgages, it is \$2925. However, some of Michael's expenses are calculated at a higher rate than Paula's—for example, Michael's food budget is listed as \$420 plus \$210 for dining out, whereas Paula's total food budget is \$250. Therefore, we believe an equitable conclusion is for Michael to pay Paula a spousal support award of \$450 each month for 120 months, instead of the \$1000 the district court ordered.

With this amount of spousal support, the award of assets achieves equity. Concerned with Paula's ability to handle her own income, the district court constructed an income stream for Paula rather than simply transferring assets to her, in the hopes she could adequately manage her finances. Therefore, the district court gave Paula, who has a lesser income, the properties sold on contract. However, though the cash flow from the contracts will eventually expire, she was awarded a property settlement of either \$48,452 in a lump sum or \$500 each month with an additional \$16,166 in a lump sum. Moreover, as the district court found, she "will be entitled to claim social security, when eligible, using Michael's contributions." This would be in addition to an undisclosed portion of pension benefits from her second husband's retirement account.

Furthermore, we agree with the district court Paula should be responsible for paying her trial attorney fees. We review the award of attorney fees for an abuse of discretion, and whether the fees should be awarded depends on the parties' ability to pay. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Given the lump sum payment made to Paula, we cannot say the court abused its discretion in deciding the parties should pay their own attorney fees. For the same reason, we decline to grant Paula attorney fees on appeal.

For the reasons stated above, the award of spousal support is modified to \$450 each month for 120 months, though we affirm the district court's conclusion regarding attorney fees. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.