IN THE COURT OF APPEALS OF IOWA

No. 7-639 / 06-1739
Filed December 28, 2007

IN RE THE MARRIAGE OF LYLE N. ANDREAS AND JULIE A. ANDREAS

Upon the Petition of

LYLE N. ANDREAS,
Petitioner-Appellant,

And Concerning

JULIE A. ANDREAS,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Lyle Andreas appeals the property division, health and life insurance, and spousal support provisions of the decree dissolving his marriage to Julie Andreas. **AFFIRMED.**

Jay Schweitzer, Columbus Junction, for appellant.

Robert DeKock, Muscatine, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Lyle Andreas appeals the property division, health and life insurance, and spousal support provisions of the decree dissolving his marriage to Julie Andreas. Julie requests an award of appellate attorney fees. We affirm.

I. BACKGROUND FACTS.

The parties were married in March 1986, when Lyle was twenty-one years of age and Julie was twenty-three. They have one child, Dustin, born in September 1987.

Lyle filed a petition for dissolution of marriage in December 2005. Trial was held in September 2006 and the trial court filed its ruling in late September 2006. Lyle timely appealed in October 2006.

Lyle was forty-two at the time of trial, and apparently in good health. He has a high school diploma and attended a year and a semester of community college. Lyle began working for Muscatine Power and Water in January 1984 as a heavy equipment operator. He later took a pay cut in order to begin a program of training and work as a lineman, a position that apparently held more opportunity for the future. At the time of trial he continued to work as a lineman for Muscatine Power and Water. Lyle works forty hours per week, and overtime when needed. His gross income from Muscatine Power and Water was $59,105.94 in 2003, $57,839.97 in 2004, and $58,081.29 in 2005.

Lyle also worked a second, part-time job, beginning in about 1996, driving trucks for Hull Enterprises. He performed this work largely in the evenings, sometimes working until midnight or after. Lyle's gross earnings from his employment with Hull were $14,119.53 in 2003, $15,331.48 in 2004, and

$16,453.85 in 2005. Lyle quit working for Hull in May 2006, after earning about $3,400 up to that point in the year. He quit because of stress and difficulty sleeping. As found by the trial court, "[h]e simply cannot continue at the pace at which he has driven himself through the years."

Julie was forty-three at the time of trial, and has significant medical and physical problems. She acquired a high school equivalency diploma a few months after the parties married. Julie was not employed outside the home at the time of the marriage. Until 1992 she was a stay-at-home mother for her son from a previous marriage and the parties' son, Dustin. In 1992 Julie began working part-time at a preschool. She left that job in 1996 to become a substitute teacher's aide for the Muscatine Community School District. In March 1998 Julie became a regular, part-time employee of the district. She later completed numerous classes that led to and maintained her current certification as a para-educator.

Julie works part-time, about thirty hours per week, during the school year as a para-educator in the school district's preschool early childhood program. Her gross earnings were $10,462.38 in 2003, $12,705.89 in 2004, and $13,075.09 in 2005.

Julie fell while at work in 1998, causing injury to her right arm. She at times has numbness in her right hand, and at times has difficulty using her right hand and arm. Julie has chronic, intermittent pain in her neck and back, and at times in her legs, and uses a TENS unit to help alleviate pain. She takes medications for a variety of mental and physical health problems, including Alprazolam for insomnia and anxiety/panic attacks, Wellbutrin for endogenous

depression, hydrocodone for back pain and neck pain, ibuprofen for osteoarthritis, and Premarin for post-menopausal symptoms.

Julie's job with the school district provides no fringe benefits, because such benefits are available only to employees who hold positions involving work of seven or more hours per day. Julie is not eligible for a "full-time" para-educator's position, as such positions require the holder to be bilingual and she is not. Occasionally a full-time secretarial or clerical position becomes open for which Julie qualifies by reason of seniority. However, some of those positions require typing skills that Julie does not possess, and typing would aggravate the bilateral carpal tunnel syndrome from which she suffers.

Julie chose not to seek any different positions until this dissolution of marriage case was "over." The trial court found that she does intend to bid on school district positions that have benefits as they become available in the future. The court assumed Julie is capable of earning about $24,000 per year if she were to try to obtain full-time employment with the school district or elsewhere.

II. THE DISTRICT COURT DECISION.

The trial court's property division resulted in Lyle receiving about $75,000 and Julie receiving about $65,000.[1] The court ordered that Lyle pay traditional spousal support of $1,000 per month until Julie remarries, Julie dies, Lyle dies or reaches age sixty-five or retires, at which time the spousal support is to end. It ordered the Lyle name Julie as the beneficiary of a $50,000 term life insurance policy he receives through his employer, "to protect [her] continuing need for

[1] In addition, each party is to receive "50% of marital pension (*Benson* formula)." We presume, from language in the trial court's findings, that the pension in question is one that Lyle has earned through his employment with Muscatine Power and Water. Further, Julie's IPERS retirement account is to be divided equally between the parties.

[spousal support] should Lyle pass away." The court ordered that Lyle pay Julie $450 per month, to cover her cost for COBRA health and dental insurance through Muscatine Power and Water, and provided that the monthly payment continue until Julie is able to obtain such insurance through her employer, or thirty-six months, whichever period is shorter. Based on its property and spousal support awards it denied Julie's request for an award of trial attorney fees. The court ordered each party to pay one-third, after Dustin's expected contribution, of the cost of Dustin's postsecondary education.

III. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

IV. MERITS.

Before addressing the issues presented, we note briefly some general principles concerning property division and spousal support. Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In*

re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria codified in Iowa Code section 598.21(1) (Supp. 2005). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). Property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

A. Property Division.

1. Property Brought to the Marriage.

Lyle presented evidence that he brought to the marriage about $31,000 in assets, about one-half of which was bank accounts and the remainder of which was vehicles and tools. Julie brought a small amount of property to the marriage. Lyle requested that the value of the property he brought to the marriage be set off to him. The trial court denied his request "with one exception," the portion of his pension he earned before the marriage and that would be set off to him by application of the *Benson* formula. Lyle claims the court erred in not setting aside the $31,000 to him as his property.

What has been stated in prior cases concerning property brought to a marriage is relevant to the issues concerning property division presented on appeal in this case.

> Property which a party brings into the marriage is a factor to consider in making an equitable division. Iowa Code § 598.21(1)(b). In some instances, this factor may justify a full credit, but does not require it. Antenuptial agreements are available to preserve premarital assets. *See* Iowa Code § 598.21(1)(*l*). A premarital asset is not otherwise set aside like gifted or inherited property. Instead, it is a factor to consider, together with all the other circumstances, in making an overall division. Its impact on

> the ultimate distribution will vary with the particular circumstance of each case. . . . Financial matters make up but a portion of a marriage, and must not be emphasized over the other contributions made to a marriage in determining an equitable distribution.

In re Marriage of Miller, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996).

> All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property. Importantly, "the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party."

In re Marriage of Sullins, 715 N.W.2d 242, 247 (Iowa 2006) (citations omitted) (quoting *In re Marriage of Shriner*, 694 N.W.2d 493, 497 (Iowa 2005)).

The parties' marriage lasted over twenty years. Each party contributed to the marriage, financially and otherwise, to the extent of their abilities and as their decisions and circumstances, including child care and homemaking responsibilities, permitted. None of the assets brought to the marriage by Lyle remain in existence. All were used, or perhaps in some instances replaced, during the marriage. We find no inequity in the trial court's refusal to set aside all or some of the $31,000 to Lyle.

2. "Gifts."

Lyle presented evidence that he received $20,000 from an uncle during the parties' marriage. He asserts these funds were gifts to him, and claims the trial court erred in not setting aside $20,000 to him.[2]

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not

[2] We do not believe that Lyle has preserved error on this issue, as nothing in the court's ruling addresses a question of gifts to a party, or of setting aside gifts to a party. We nevertheless briefly address the issue.

subject to property division except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage. Iowa Code § 598.21(6). The requirement to set aside to a party the property which has thus been inherited or received as a gift is not absolute, and division may nevertheless occur to avoid injustice. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). The length of the marriage and the length of time the property was held after it was devised or given may indirectly bear on the question, for their effect on this and other relevant factors. *Id.*

Lyle received the $20,000 during the early years of the marriage, $10,000 in 1988 and $10,000 in 1989. The record provides little if any evidence as to what was done with the $20,000 or any part of it. None of the $20,000 remains separate, intact, or identifiable, and none of the parties' present assets are directly traceable to the $20,000 or any part of it. It appears most likely that the money was used for some combination of living expenses and acquisition of property the parties have used during the seventeen years after the money was received. Thus, only some uncertain portion of the parties' present assets may be indirectly attributable to the money.

We note in addition that Lyle received about $10,000 more in property than Julie received, and despite her much lower income and earning capacity Julie and Lyle are each required to contribute equally to Dustin's postsecondary education expenses and Julie's request for trial attorney fees was denied.

Under the circumstances involved in this case we find no inequity in the trial court's perhaps implicit decision on this issue, and upon our de novo review

find that it would be inequitable to set aside $20,000 to Lyle. We therefore affirm on this issue.

B. Health Insurance.

Lyle claims the trial court abused its discretion by requiring him to pay $450 per month, for perhaps as long as three years, to cover Julie's cost for COBRA health and dental insurance. He argues she has health insurance readily available by simply taking a full-time clerical or secretarial position with her present employer.

Although Julie may apply for and acquire a position with benefits, the evidence shows that positions for which she is qualified occur fairly rarely and even then her relative lack of seniority may well be an obstacle. She has numerous, substantial, well-documented health problems and associated expenses. It may be difficult or impossible for her to acquire, at any reasonable cost, individual insurance that covers her pre-existing conditions. We find no inequity in the trial court's order that for three years or until Julie earlier acquires insurance Lyle pay the cost of Julie's continuation of health and dental insurance through his employment and COBRA.

C. Spousal Support.

Lyle claims the trial court abused its discretion in awarding traditional spousal support. He argues Julie is capable of self-support.

"[Spousal support] is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1998). Spousal support is not an absolute right; an award 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 discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 589.21A(1). *Dieger*, 584 N.W.2d at 570. Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only where there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking spousal support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). We also consider the distribution of property, Iowa Code § 598.21A(1)(c), as well as the tax consequences to each party, *id.* § 598.21A(1)(g).

The parties were married for over twenty years. Lyle is forty-two, in apparent good health, has one and one-half years of post-high-school education, has been employed by his current employer for twenty-two years, has a demonstrated earning capacity of almost $60,000 per year, has substantial fringe benefits, has in recent years earned an additional $14,000 to $16,000 per year, and would appear likely to have many remaining years of high-income employment. Julie is forty-three and holds only a high school equivalency diploma. By way of marked contrast with Lyle she has substantial health problems, has never held full-time employment, has no fringe benefits, has only fourteen years of part-time employment outside the home, and has earned only

$12,000 to $13,000 per year. The property division awards Lyle somewhat more than Julie. Lyle's spousal support payments will be includable in Julie's gross income and deductible from his gross income. *See* I.R.C. §§ 61(a)(8), 71(a), 62(a)(10), and 215(a) (2002). Finally, based on the parties' past employment histories, together with their reasonably anticipated future prospects, it appears reasonable to assume that at normal retirement ages Lyle will receive much larger social security benefits than Julie will.

Traditional or permanent alimony is usually payable for life or for so long as the dependent spouse in incapable of self-support. *Hettinga*, 574 N.W.2d at 922.

> [T]he spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible, to the extent that that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well.

In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). The economic provisions of a dissolution decree are "not a computation of dollars and cents, but a balancing of equities." *Clinton*, 579 N.W.2d at 839.

After considering all relevant factors, we find no abuse of discretion or inequity in the trial court's award of traditional spousal support and thus affirm on this issue.

D. Life Insurance.

Lyle claims the trial court abused its discretion by requiring him to maintain life insurance with Julie as the beneficiary. He argues the requirement "is a back-handed method of requiring him to pay [spousal support] after his death,

contrary to the general rule that [spousal support] payments terminate on the death of the payor."

A provision in a dissolution decree that requires a party to maintain life insurance is enforceable. *Stackhouse v. Russell*, 447 N.W.2d 124, 125 (Iowa 1989). A spousal support payor may be required to designate the spousal support payee as the beneficiary of the payor's life insurance policy for as long as his spousal support obligation continues. *In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990). Iowa Code section 598.21A(1) is broad enough to permit spousal support payments after death. *In re Marriage of Weinberger*, 507 N.W.2d 733, 736 (Iowa Ct. App. 1993).

The record shows that Lyle's employer provides, at no cost to Lyle, $50,000 of term life insurance insuring Lyle's life. The trial court's order requires only that Lyle name Julie as a beneficiary of the $50,000 policy as well as any term life insurance policy to which he becomes entitled through any new employer.

We determine that under the specific facts and circumstances of the case at hand the trial court's order is appropriate. Julie's limited education, limited employment experience, and fairly extensive medical problems suggest that she in all likelihood will need spousal support for the period ordered by the court. Thus, there are significant reasons for providing such security to her. Furthermore, the cost to Lyle of providing such insurance is known and not burdensome because it is provided at no cost to him. Under the facts and circumstances of this case we believe it would be unfair and inequitable to leave

Julie without the protection and security she needs, and can in part receive from Lyle's life insurance, and thus affirm on this issue.

E. Appellate Attorney Fees.

Julie requests an award of $4,000 appellate attorney fees and costs. Such an award rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* Upon consideration of the foregoing factors, we award Julie appellate attorney fees as hereafter ordered.

V. DISPOSITION.

We affirm the trial court's decree in all respects. We award Julie $2,500 in appellate attorney fees. Costs on appeal are taxed to Lyle.

AFFIRMED.