IN THE COURT OF APPEALS OF IOWA

No. 7-284 / 06-1212
Filed August 22, 2007

IN RE THE MARRIAGE OF KATHLEEN A. McFADDEN AND JOHN L. McFADDEN

Upon the Petition of
KATHLEEN A. McFADDEN,
Petitioner-Appellee,

And Concerning
JOHN L. McFADDEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Emmet County, David A. Lester (stipulation, decree, associated motions) and Don E. Courtney (trial), Judges.

John L. McFadden appeals from the trial court's ruling on the enforceability of a stipulated settlement and resulting dissolution decree awarding Kathleen A. McFadden spousal support. **AFFIRMED AS MODIFIED.**

Joseph L. Fitzgibbons and Kevin Sander of Fitzgibbons Law Firm, Estherville, for appellant.

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

John McFadden and Kathleen (Kathy) McFadden were married in 1992. This is John's second marriage. Kathy has been married three times. Both have adult children from their earlier marriages.

John is sixty-nine years of age. He has a college degree and is a stockholder/employee of an Estherville bank. His undisputed annual net income is $63,931, including social security benefits. Kathy is fifty-seven years of age. She has a tenth-grade education and a G.E.D. Kathy was last employed as a pastoral visitor at an Estherville church. At the time Kathy resigned in May 2005, her annual salary was $20,000. Kathy's stated reasons for resigning her employment were health related. At the time this case was tried in July 2005, Kathy's income was limited to social security disability and $500 temporary monthly alimony she received from John.

Kathy filed for divorce in April 2003. The trial court's ruling on temporary matters entered on August 11, 2004, ordered John to pay Kathy $500 per month temporary alimony, as well as the monthly mortgage payment, real estate taxes, and insurance on their residence.

The parties' pretrial settlement negotiations resulted in a stipulation and settlement. The terms of the settlement required John to pay Kathy $950 monthly alimony from July 15, 2005, until she reached age sixty-two unless sooner terminated by the death of either party or Kathy's remarriage. The stipulation was incorporated in a decree signed by the court on May 5, 2005. For

reasons not entirely clear from the record, the court's decree was not filed with the clerk of court.

On May 6, 2005, Kathy filed an "Application to Withdraw Stipulation and Proceed to Trial." In her application, Kathy alleged that on May 6, 2005, she was informed by the Social Security Administration that her benefits at age sixty-two would be $590 based on John's earnings or alternatively $620 per month if she were eligible for social security disability. She further alleged that her settlement with John was based on her assumption that she would receive $590 monthly retirement benefits in addition to $620 monthly disability benefits at age sixty-two. The trial court's ruling on Kathy's motion states:

> Because the amount of Social Security benefits she thought she would receive at age 62 was an essential fact that Kathy relied upon in agreeing to the alimony provisions and property settlement terms set forth in the stipulation, the court finds and concludes that her mistaken belief was a material consideration for the contract. Accordingly, the court further concludes that Kathy's mistaken belief constitutes sufficient grounds for setting aside the parties' stipulation.
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> In addition to the foregoing, a second legal principle justifies the court's granting Kathy's application to set aside the parties' stipulation.
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> . . . .
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> While the court was, in fact, presented with the parties' stipulation and property settlement on the evening of May 5, 2005, and entered a decree approving that stipulation on that same date, neither stipulation nor the decree were ever filed with the clerk of court. Such a filing is a necessary prerequisite to the stipulation, which becomes merged into the decree, being enforceable as a final judgment of the court. . . .
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> The court would further point out, however, that John's failure to get the stipulation and decree filed before Kathy filed her application to set it aside is but one of two mutually exclusive grounds upon which the stipulation is unenforceable and must be set aside. Even if John had filed the stipulation and decree, Kathy's unilateral mistaken belief about the amount of Social Security to which she would be entitled is the more compelling of the two grounds justifying the court's decision to set aside the stipulation.

The trial court accordingly granted Kathy's application, and the case proceeded to trial. The trial court's decree included a property distribution awarding Kathy property valued at $103,064. John's share of the property distribution was $205,523. John was ordered to pay Kathy $15,000 within three months for the bank stock awarded to her. The court also ordered John to pay Kathy $1500 permanent monthly alimony beginning September 1, 2006, continuing until Kathy remarries or dies, or if John dies. John was also ordered to name Kathy as the beneficiary on all of his life insurance policies to compensate her for lost alimony in the event of his death. John was also ordered to pay $7000 of Kathy's trial attorney fees.

On appeal, John argues:

> I. The trial court erred in failing to enforce the stipulation and settlement agreement executed by the parties
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> II. The trial court erred in awarding alimony to the petitioner. In the alternative, the trial court erred in the amount of alimony awarded and the trial court erred in awarding life time alimony.
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> III. The trial court erred in awarding attorney fees to the petitioner.

II. Standard of Review.

Our standard of review for dissolutions of marriage is de novo. Iowa R. App. P. 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We have a duty to 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).

III. Enforceability of Stipulation and Settlement.

As noted earlier, the trial court cited two mutually exclusive grounds upon which the stipulation was unenforceable. On appeal John's challenge to the trial court's ruling is limited to the refusal to enforce the stipulation because of Kathleen's mistaken assumptions concerning her social security entitlement. John's failure to appeal from or otherwise address the other ground upon which the trial court relied in refusing to enforce the settlement constitutes a waiver of that issue on appeal. *See* Iowa R. App. P. 6.14(1)(*c*). We therefore affirm on this issue.

IV. Alimony.

> Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. Alimony is not an absolute right, and an award thereof depends upon the circumstances of a particular case. When making or denying an alimony award, the trial court considers the factors set forth in Iowa Code section 598.21(3). Although our review of the trial court's award 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 Spiegel, 553 N.W.2d 309, 319 (Iowa 1996) (citations omitted). Traditional alimony is "payable for life or so long as a spouse is incapable of self-support." *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989).

The trial court's stated reasoning for awarding traditional alimony in this case was a follows:

> Kathy has a high school education whereas John attended college. The court has no confidence that Kathy can obtain employment in the future, nor can she be re-trained to find appropriate employment. Her financial affidavit itemizes her monthly expenses of $2,347. Of those expenses, John should not have to contribute for tithing, COBRA health insurance and payment on her personal loan. This reduces her monthly expenses

> to $1,697 per month. Kathy will, however, when she vacates the marital home, have rent or house payments to make. The sum of $500 per month appears reasonable for rent in the Estherville, Iowa, area. Kathy then has monthly personal expenses of $2,197 per month. The court finds that after factoring in the property distribution and disability benefit of $620 per month as reflected in Petitioner's exhibit 34 that an alimony award of $1,500 per month beginning September 1, 2006, is appropriate under the circumstances of this case. Said alimony payments will terminate if Kathy remarries or dies or if John dies. John shall continue with an alimony payment of $500 per month until September 1, 2006.

With one exception, we agree with the trial court's reasoning and adopt the foregoing findings of fact as our own. Like the trial court, we conclude the length of the parties' marriage, their ages, physical and emotional health, as well as their comparative educations and earning capacity, weigh in favor of an award of traditional alimony. We, however, disagree with the trial court's assessment of John's current and future ability to pay the amount awarded. Based on our de novo review of the record, we conclude John's earning capacity justifies a traditional alimony award of $1000 per month until Karen reaches age sixty-two, at which time the amount shall be reduced to $600 per month. We modify the trial court's decree accordingly. In all other respects, the trial court's alimony award is affirmed.

V. Attorney Fees.

The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent a finding of abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Whether fees ought to be awarded depends, in part, on the ability of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (1994). We find no abuse of discretion and affirm the trial court's award.

Similarly, this Court also has the authority to award appellate attorney fees. *See* Iowa Code § 598.26 (2003); *Maher*, 596 N.W.2d at 568. In arriving at our decision, we consider the parties' needs, ability to pay, and obligation to defend the trial court's decision on appeal. *Maher*, 596 N.W.2d at 568. None of these factors justify an award of appellate attorney fees in this case. The trial court's decree is therefore affirmed as modified. Costs are taxed equally to the parties.

AFFIRMED AS MODIFIED.