

IN THE COURT OF APPEALS OF IOWA

No. 7-648 / 06-2042
Filed December 12, 2007

**IN RE THE MARRIAGE OF STEVEN DENNIS MOORE AND MICHELLE
LEORA MOORE**

Upon the Petition of

STEVEN DENNIS MOORE,
Petitioner-Appellee,

And Concerning

MICHELLE LEORA MOORE,
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

Respondent appeals from the spousal support and attorney fee provisions
of a dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Timothy Pearson and Alexander Rhoads, Des Moines, for appellant.

Andrew Howie, West Des Moines, and Christine Hunziker of Payer,
Hunziker, Oeth & Rhodes, Ames, for appellee.

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

MILLER, J.

Michelle Moore appeals the spousal support and attorney fee provisions of the decree dissolving her marriage to Steven Moore, and seeks an award of appellate attorney fees. We modify to increase the spousal support award, affirm the award of trial attorney fees, and award Michelle appellate attorney fees.

I. BACKGROUND FACTS.

The parties were married in August 1986, when each was twenty-three years of age. They have two children, a son who was sixteen years of age at the time of trial and a daughter who was fourteen years of age. The parties separated in November 2005. Steven filed a petition for dissolution of marriage in September 2005. Trial was held in June 2006 and the trial court filed its ruling in October 2006. Michelle filed a post-ruling motion and Steven filed a resistance. The court ruled on the motion in November 2006 and Michelle timely appealed in December.

Steven was forty-three at the time of trial. He acquired a bachelor's degree in computer science in December 1986. Steven has accumulated a few credit hours toward a master's degree, but none within the last several years. He has been employed by ING as a computer information security officer for the last ten years. Steven earns a salary of \$106,000 per year, normally working fifty to sixty hours per week. He is eligible for an annual bonus, based on company performance and individual rating. His bonuses have averaged \$15,000 per year over the period of 2002 through 2006, and have averaged \$21,000 per year for the most recent three of those years. Steven expects to continue his employment with ING and expects to continue to receive annual bonuses.

Michelle was forty-three at the time of trial. She acquired a bachelor's degree in special education shortly before the parties' marriage. Michelle has accumulated some credit hours toward a master's degree, but none within the last several years.

Michelle was diagnosed as suffering from multiple sclerosis in 1986 or 1987. She worked as a teacher until 2001, when her symptoms were advanced and exacerbated when she was stuck by a car. Until that accident Michelle was able to walk with the aid of a walker. Since then she generally requires the use of a wheelchair. Michelle suffers not only physical disability, but also impairment of cognitive function, described by her physician as "mild, associated dementia." She requires handicapped-accessible living quarters, and assistance with cooking, housekeeping, and transportation. She is medicare eligible, but has out-of-pocket expenses for medications.

Michelle's income at trial was \$1,709 per month, consisting of social security disability payments of \$1,308 and a teachers' disability insurance payment (UNUM) of \$401 per month.¹ Michelle, with the assistance of her mother who Michelle has given power of attorney, was taking steps to replace the UNUM disability payments with IPERS disability payments, which would be \$730 per month. Michelle would then have income of \$2,038 per month.²

¹ The trial court found that Michelle's income from social security and UNUM totalled \$1,575 per month. However, Steven's testimony was that she received the \$1,308 and \$401, Michelle's mother testified that she received \$1,309 and \$401, and the parties' briefs on appeal confirm the figures of \$1,308 and \$401.

² The trial court found that Michelle would then have combined social security disability payments and IPERS disability payments totalling \$1,654 per month. However, Steven testified the IPERS disability payments would be \$730 per month; Respondent's Exhibit "K" appears to confirm that amount; Steven's affidavit of financial status states that Michelle's income will be social security payments of \$15,692 per year (\$1,308 per

Steven has a defined benefit pension plan through ING. Pursuant to the parties' agreement the trial court ordered that the pension be divided equally between the parties by a qualified domestic relations order (QDRO).³ The evidence showed that Michelle can receive benefits from the pension when Steven reaches age fifty-five.

The parties stipulated to many matters, a stipulation accepted and incorporated into the trial court's decree. As relevant to the issues on appeal, the issues presented to the court were the amount and duration of spousal support to be awarded to Michelle, and Michelle's request for an award of trial attorney fees.

II. THE DISTRICT COURT DECISION.

The district court's decree placed the parties' children in their joint legal custody, with responsibility for their physical care placed with Steven and with Michelle having visitation rights. No child support was ordered as Steven is to receive the \$343 per child per month of social security benefits payable as a result of Michelle's disability. Steven had established an account for each child, from funds he received as gifts and inheritances, with an initial deposit of \$22,000 for each child. The accounts are to be used for postsecondary education, and Steven is to continue to manage the accounts and provide annual statements to Michelle, so no additional order for a postsecondary education

month) and IPERS payments of \$8,760 (\$730 per month); Michelle's affidavit of financial status states she will have social security payments of \$15,692 per year and IPERS payments of \$9,432 per year (\$786 per month); and nothing in the portions of the evidentiary record presented on appeal indicates that Michelle will not receive the \$1,308 of social security and at least \$730 of IPERS. We thus find that Michelle will receive approximately \$2,000 per month in combined social security and IPERS disability benefits.

³ If Steven remained employed by ING until age sixty-five the plan would then pay monthly benefits of \$4,242.25.

subsidy was made. Steven receives the income tax dependency deductions for the children. The decree requires him to provide health insurance for the children, and it provides for payment of uncovered medical expenses.

The trial court set aside to Steven \$22,832 of additional gifts and inheritances he had received. It set aside to Michelle her IPERS retirement accumulation, which had a date-of-trial value of some \$35,000 to \$36,000. The court provided that Michelle would be responsible for a certain debt incurred in Steven's name alone, the proceeds of which had been used by Michelle's sister. The loan was being repaid by Michelle's sister. Pursuant to the trial court's order the loan was to be administered by Michelle and Michelle would be responsible for paying any part of the debt not paid by her sister.

The trial court divided the remaining property of the parties equally, with each to receive about \$155,000 in vehicles, life insurance, securities, and other retirement benefits; each to receive one-half of the anticipated net sales proceeds of about \$100,000 from the sale of their residence and a rental property; and each to receive one-half of any 2005 income tax refund.

The trial court ordered Steven to pay spousal support of \$1,200 per month, decreased to \$800 per month "[w]hen Michelle reaches age 55 and becomes eligible to collect her (albeit reduced) share of the ING pension benefit," and further reduced to \$575 per month when Steven reaches age sixty-five. It ordered that the spousal support obligation terminate when the first of the parties dies or Michelle remarries.

III. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the 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.

A. Spousal Support.

Michelle claims the trial court erred in ordering inadequate spousal support. She argues that her disability; her limited, fixed income; and Steven's income of substantially more than \$100,000 per year, support an award of permanent spousal support of at least \$2,000 per month.

"[Spousal support] is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulín*, 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 598.21A(1) (Supp. 2005). *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 when 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 § 598.21(5), as well as the tax consequences to each party, *id.* § 598.21(5)(j).

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). In marriages of long duration, both spousal support and nearly equal property division may be appropriate, especially where the disparity in earning capacity is great. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

The property division divides the parties' property approximately equally. The parties were married for twenty years. Steven is forty-three, in apparent good health, holds a bachelor's degree, has a demonstrated high earning capacity, and would appear likely to have many remaining years of high-income employment. Michelle is also forty-three and has a bachelor's degree. However, by way of marked contrast she is disabled, her bachelor's degree is of no apparent remaining income-producing value, she has no earning capacity, she has no income other than disability payments, and she has no remaining years of employment. Even with an award of spousal support Michelle is and will remain unable to become self-supporting at a standard of living reasonably comparable

to that the parties enjoyed during their marriage. Steven's spousal support payments will be includable in Michelle'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 their normal retirement ages Steven will receive much larger social security retirement benefits than Michelle will.

Michelle argues not only that the trial court's spousal support award is inadequate, but also apparently takes the position that any increased award should not be reduced upon certain milestones as ordered by the trial court. Steven acknowledges that an award of traditional spousal support is appropriate, but argues the award made by the trial court is adequate and equitable.

Traditional or permanent alimony is usually payable for life or for so long as the dependent spouse is 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.

We find no inequity in the trial court's determination that the amount of permanent spousal support awarded should be reduced at the times ordered by the court. However, after considering all relevant factors, with some emphasis

on the parties' greatly differing earning capacities and incomes, we conclude the amounts awarded should be increased as hereafter ordered.

B. Trial Attorney Fees.

Michelle claims the trial court abused its discretion by failing to award her reasonable attorney fees. She argues the award should be increased from \$2,600 to \$5,296.45. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties' respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993).

Michelle received property of approximately \$205,000, plus \$35,000 to \$36,000 of IPERS accumulation, plus one-half of any 2005 income tax refund. She had already paid \$5,000 of attorney fees out of marital assets. The trial court assessed the parties' abilities to pay in awarding the \$2,600. We find no abuse of discretion and affirm the court's decision on this issue.⁴

C. APPELLATE ATTORNEY FEES.

Michelle requests an award of \$3,500 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

⁴ We do note that our modification to increase Michelle's spousal support will increase her ability to pay attorney fees, and decrease Steven's ability to pay, thus weakening any argument that the trial court's award is inadequate.

merits of the appeal. *Id.* Upon consideration of the foregoing factors, we award Michelle appellate attorney fees as hereafter ordered.

V. DISPOSITION.

We modify the trial court's decree to award Michelle spousal support of \$1,600 per month, reduced to \$1,000 per month when Michelle reaches age fifty-five, and further reduced to \$750 per month when Steven reaches age sixty-five. In all other respects we affirm the trial court's decree.

We award Michelle \$2,500 in appellate attorney fees. Costs on appeal are taxed two-thirds to Steven and one-third to Michelle.

AFFIRMED AS MODIFIED.