

**IN THE COURT OF APPEALS OF IOWA**

No. 8-916 / 07-2057  
Filed December 17, 2008

**IN RE THE MARRIAGE OF RICHARD SHERWIN TOON  
AND MARY DE FRANCISCO TOON**

**Upon the Petition of  
RICHARD SHERWIN TOON,**  
Petitioner-Appellant,

**And Concerning  
MARY DE FRANCISCO TOON,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

Petitioner appeals from a district court order finding him in default of a prior order by not maintaining the proper value of a life insurance policy and owing back alimony. He also appeals the court's awarding of attorney fees.

**AFFIRMED AS MODIFIED.**

Charles A. Coppola of Coppola, McConville, Coppola, Hockenbergs & Scalise, P.C., West Des Moines, for appellant.

Patricia A. Shoff and Lance W. Lange of Belin, Lamson, McCormick, Zumbach & Flynn, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

**SACKETT, C.J.**

Richard Toon appeals, contending the district court erred in determining (1) the death benefit of a life insurance policy he was required to maintain under his dissolution decree should be \$1,233,123 not the \$1,000,000 called for in the decree dissolving his marriage to Mary Toon, and (2) he owes back alimony of \$2096.91. He also contends the district court abused its discretion in ordering him to pay \$20,717.63 of his former wife's attorney fees. We affirm in part and reverse in part.

The parties were divorced in 1999. In dissolving the marriage the district court approved a stipulation of an agreement that the parties had reached. The provisions of that decree relevant to this appeal are the provisions awarding alimony and requiring Richard to maintain life insurance with Mary as the beneficiary. Mary was to receive monthly alimony in an amount equal to one-twelfth of forty percent of Richard's gross income from his medical and surgical services. The alimony was to continue until the remarriage of Mary Toon or the death of either party. The decree indicated, based on Richard's then current earning, the alimony would be about \$11,000 a month. The alimony payment increased for a period but in the four years prior to this action Mary's alimony was somewhere in the range of \$6500 a month.

The provision for life insurance was as follows:

Richard Toon will keep in force the New York Life insurance policy in the amount of \$1,000,000.00 with Mary Toon as beneficiary for \$1,000,000.00<sup>1</sup> during the period of time alimony is payable. Mary

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<sup>1</sup> While the \$1,000,000 is defined in different ways throughout the proceedings, it appears that this is the death benefit Mary is to receive if Richard predeceases her.

Toon will receive a credit for the cash surrender value, which amount will be \$43,357.00. Any policy proceeds over \$1,000,000.00 will go equally to the children.

On April 20, 2007, the district court entered a ruling on a petition for modification. The court set the alimony Richard was to pay at \$10,000 a month until Mary's death or remarriage, or Richard's death. The court ordered that Richard should pay the increased alimony retroactively to August 1, 2006.

Evidence was shown that the death benefit on the New York policy had decreased because Richard had taken loans against the policy to pay premiums and to obtain cash.<sup>2</sup> The court ordered him to restore it to \$1,000,000 in coverage and ordered that no loans be taken against the policy including loans used to pay policy premiums. The court also ordered Richard to pay \$38,500 of Mary's attorney fees. No appeal was taken from this modification.

On September 7, 2007, Mary filed an application for a rule to show cause why Richard should not be found in contempt, contending he had only paid \$34,614 in alimony when in fact pursuant to the April ruling of that year he owed \$37,819. She further contended that he had not restored the \$1,000,000 death benefit to New York Life policy. The matter came on for hearing. The district court filed a subsequent ruling finding that (1) Richard owes an additional death benefit on the New York Life Insurance policy in the amount of \$229,884, which amount the court found to be a lien on Richard's share of a home he owned with Mary that is to be sold in 2009, (2) that Richard owes Mary back alimony and

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<sup>2</sup> While Richard had substituted what appears to be term insurance to meet the difference, the district court determined that was not sufficient because of the terms of the decree.

interest of \$2096.91, and (3) Mary should be awarded \$20,717.63 in attorney fees and costs. The court found Richard not in contempt of court but in default.

Richard filed a petition for writ of certiorari with the Iowa Supreme Court, which Mary resisted. The Supreme Court, in a single justice order, determined the matter to be an appeal from the district court's order finding Richard in default of a previous order and awarding attorney fees. The court found the order was appealable by filing a notice of appeal and said Richard's application would be treated as a notice of appeal.

**STANDARD OF REVIEW.** Our standard of review is for correction of errors at law. Iowa R. App. P. 6.4. The trial court's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a). We review the court's award of attorney fees for an abuse of discretion. *In re Marriage of Colby*, 569 N.W.2d 157, 159 (Iowa Ct. App. 1997).

**NEW YORK LIFE INSURANCE POLICY.** "A provision in a dissolution of marriage decree to maintain life insurance is enforceable." *Stackhouse v. Russell*, 447 N.W.2d 124, 125 (Iowa 1989). Spousal support payors may have to maintain a former spouse as a beneficiary on a life insurance policy for as long as the obligation for spousal support continues under the decree. See *In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990). Richard contends that under the decree and the modified decree he was only required to restore the death benefit of the New York Life insurance policy to \$1,000,000. There appears to be no dispute that he had restored it to that figure by the time the order to show cause was heard. He had written a check on September 7, 2007,

for \$126,000 to restore the death benefit to \$1,003,239. Mary contends it should be restored to \$1,233,123; for, if Richard had not borrowed against its cash value and had continued to pay the premiums, it would be in that amount. We find no basis to her argument.

We are to construe a divorce decree to effectuate its intent. *In re Marriage of Goodman*, 690 N.W.2d 279, 283 (Iowa 2004); *In re Marriage of Russell*, 559 N.W.2d 636, 637 (Iowa Ct. App. 1996). We attempt to give effect to provisions both express and implied in the decree. *Goodman*, 690 N.W.2d at 283. “Of course, in determining this intent, we take the decree by its four corners and try to ascertain from it the intent as disclosed by the various provisions of the decree.” *Id.*; *Russell*, 559 N.W.2d at 637. Both the original and modified decree expressly provided that the policy shall pay \$1,000,000. The question was what was owed under the original and modified decree. We find no basis for the district court’s increasing the amount of the death benefit as the original and modified decree show no intention to require Richard to provide a policy in a greater sum than \$1,000,000. Substantial evidence does not support its finding that the benefit should be restored beyond \$1,000,000.

**BACK ALIMONY.** Richard contends he has overpaid his alimony obligation. Mary contends substantial evidence supports the district court’s determination of his delinquency. She specifically points to the testimony of a forensic accounting expert who testified at trial and who opined that Richard owed \$2096.91 in back alimony. The record is far from clear but there is substantial evidence, though contradicted, that Richard owes the \$2096.91 the

district court found. A party found to be delinquent in alimony payments may be ordered to pay the deficiency. See *In re Marriage of Jacobo*, 526 N.W.2d 859, 867 (Iowa 1995) (finding party responsible for back alimony owed even though his failure to pay was not in willful violation of the decree). We therefore affirm on this issue.

**ATTORNEY FEES.** Richard contends that he was not found in contempt and should not be required to pay Mary's attorney fees and that the amount he was ordered to pay was excessive. The Iowa Code allows, but does not require, a court to award attorney fees in these types of actions:

When an action . . . is brought on the grounds that a party to the decree is in default or contempt of the decree, and the court determines that the party is in default or contempt of the decree, the costs of the proceeding, including reasonable attorney's fees, may be taxed against that party.

Iowa Code § 598.24 (2007). However, the attorney fee award must be in a fair and reasonable amount and based on the parties' abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993).

We have searched the file and are unable to find an itemized billing of attorney services rendered in preparing the rule to show cause and representing Mary at the short one-day hearing. We recognize that the firm that represented her has a good reputation and their hourly charge may be higher than some firms. Yet we are unable to justify the fee awarded. Considering the fact that Richard has won the major issue on appeal and the limited issues involved, we reduce the fees Richard is required to pay to \$5000.

Mary and Richard request appellate attorney fees. Appellate attorney fees are not awarded as a matter of right but instead rest in our discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). In making our decision we consider the requesting party's needs, the other's ability to pay, and the merits of the appeal. *Id.*; *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). Mary was successful on appeal on one issue. She has substantial assets and receives some \$120,000 a year in alimony. We have affirmed \$5000 of the amount the district court awarded her. She has the ability to pay her own fees and we deny her request for attorney fees. We also deny Richard's request for appellate attorney fees.

Costs on appeal are taxed equally between the parties.

**AFFIRMED AS MODIFIED.**