

IN THE COURT OF APPEALS OF IOWA

No. 0-794 / 10-0271
Filed January 20, 2011

**IN RE THE MARRIAGE OF TERRY WAYNE FIEDLER
AND MARY K. FIEDLER**

**Upon the Petition of
TERRY WAYNE FIEDLER,**
Petitioner-Appellee,

**And Concerning
MARY K. FIEDLER,**
Respondent-Appellant.

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

Mary Fiedler appeals from various economic provisions of a dissolution
decree. **AFFIRMED.**

Teresa A. O'Brien, Sioux City, for appellant.

Craig H. Lane, Sioux City, for appellee.

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

DANILSON, J.

Mary Fiedler appeals from various economic provisions of a dissolution decree. She contends she should have been awarded alimony and alleges Terry Fiedler received the vast majority of the parties' assets. Mary also argues she should have been awarded trial attorney fees. Upon our review, we affirm the district court's property division and agree with the court that alimony is not appropriate in this case. We reach this conclusion after considering many factors, including the parties' respective earning capacities, Terry's child support obligation, Mary's needs, and Mary's financial decisions during the pendency of these proceedings.

I. Background Facts and Proceedings.

Mary and Terry Fiedler married in 1999, separated in 2006, and divorced in 2009. Terry is forty-seven years old, and is in good health. Mary is forty-eight years old, and is also in good health. In August 2007, Mary had some cancerous lymphoma on her tonsils removed. She had some chemotherapy treatments ending in January 2008, and has had no reoccurrences since that time.

The parties stipulated to joint legal custody and primary physical care of the parties' three children with Mary. The parties adopted the children (ages seven, five, and five) during their marriage.¹ Mary also has another child (age thirteen) that she adopted in 1996, during her marriage to her second husband.² After her divorce from Terry was finalized, Mary also planned to adopt a foster

¹ Mary receives an adoption subsidy of \$1500 per month for the three children paid to her by the State of Iowa.

² Mary receives \$550 per month in child support for this child paid to her by her second husband.

child (age three) who was in her care.³ The four youngest children have been determined to be special needs children by the Iowa Department of Human Services, with issues of varying degrees that include autism, Aspergers, fetal alcohol effect, and sensory deficit problems. None of the children require medical treatment for their special needs. The district court ordered Terry to pay Mary \$920 per month in child support for the three children he adopted.

Terry has a college degree in agricultural business and worked for a number of years as a production floor supervisor for Iowa Beef Products, earning approximately \$25,000 per year. In 2000, Terry began working as a pilot for Tyson Foods. He was employed in that capacity until he was laid off in June 2009, due to company downsizing. Terry's ending salary for Tyson was approximately \$92,000. He received severance pay through September 2009. Terry's salary at Tyson was significantly higher than he had earned in any previous employment. Terry now receives \$423 per week as unemployment, for a maximum of twenty-six weeks. He takes occasional odd jobs to supplement his income. Terry continued to search diligently for new employment without success. The district court determined Terry should be capable of earning fifteen dollars per hour on a full-time basis, in addition to approximately \$4000 per year in self-employment income, for a total of \$32,500 per year.

Mary has a college degree in accounting that she obtained several years after the parties were married.⁴ Mary has primarily been a stay-at-home mother,

³ Mary receives \$425 per month in foster child support for this child.

⁴ The parties stipulated that Mary would pay her student loan debt of \$33,483 that she incurred in connection with obtaining her accounting degree. The court

although she has worked part-time for Plymouth County and has done seasonal tax referrals. All of the children are now in school, except for the youngest child whom Mary adopted after the parties divorced. Mary estimated that if she were to work full-time, she may have to pay over \$1000 per month in childcare expenses. Even if she continued to stay home, Mary estimated she would still have at least some childcare expenses. The court determined Mary has an earning capacity of \$20,000 per year.

The parties purchased a home (2512 Jackson Street) in May 2000, shortly after they were married. Terry moved out of the home in November 2006 when the parties separated and rented an apartment. However, Terry continued to pay more than \$1200 per month for the mortgage, property taxes, and other bills for 2512 Jackson Street after he moved out. He also gave Mary \$660 per month for gas and groceries. Mary alleged 2512 Jackson Street “needed much renovation to make it livable” and that Terry left several projects unfinished when he moved out which made the home a dangerous place for her to live with the children. In November 2008, Mary borrowed money from her father to purchase a different home (3323 Jackson Street), where she moved with the children. The parties’ home at 2512 Jackson Street remained vacant after that time, and Terry continued to make the payments.⁵ The court determined that “the purchase of [3323 Jackson Street] incurred by Mary should be her sole and separate responsibility,” and further found that an \$18,000 loan to Mary from her father in 2008 after the parties’ separation was a nonmarital debt.

determined that \$10,000 of that total amount should be considered solely Mary’s responsibility.

⁵ The parties agreed Terry should receive 2512 Jackson Street.

The district court set aside several other assets and liabilities as inherited or nonmarital property and divided the remaining assets between the parties. The court's property division resulted in Mary receiving net assets of \$8936 and Terry receiving net assets of \$115,276, a disparity of \$106,340. To make the division equitable, Terry was required to pay to Mary a property settlement in the amount of \$53,170, resulting in each party receiving net assets of \$62,106.

The court denied Mary's request for alimony and noted that Mary was "less than credible in her alimony request and it was made more as an attempt to help her out of the poor financial decisions she has made [during the dissolution proceedings]." The court further denied Mary's request that Terry be required to pay her trial attorney fees⁶ and ordered each party to pay his or her own attorney fees. Mary now appeals.

II. Scope and Standard of Review.

An action for dissolution of marriage is an equitable proceeding, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). However, we recognize the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our determination

⁶ The record shows that in December 2006, Terry gave Mary \$2500 for her legal fees.

depends on the facts of the particular case, so precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Property and Alimony Issues.

Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1) (2009). See *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

A. Property Division.

The ultimate goal of the property division is to divide all property equitably between the parties. See Iowa Code § 598.21(5). “Equitable distribution depends upon the circumstances of each case.” See *In re Marriage of Hansen*, 733 N.W.2d 683, 702 (Iowa 2007). An equitable division is not necessarily an equal division. *Anliker*, 694 N.W.2d at 542.

Mary contends the court’s distribution of the parties’ assets and debts is inequitable and alleges that Terry received “the vast majority of the assets.” She contends the court improperly considered her financial decisions during these proceedings and failed to consider Terry’s “failure to help her fix up the house so it was not a danger to her children” and his waste of assets “by not moving back into the home for over a year and paying rent and utilities at two locations.” Mary sets forth a number of specific requests for this court to modify in the property division in order to make the distribution equitable.

We begin by noting the evidence in the record does not support Mary's contention Terry received the vast majority of the assets. After the court set aside various assets and liabilities as being inherited or nonmarital property, the court divided the remaining assets evenly. This can be evidenced by the court's order for Terry to pay a property settlement to Mary in the amount of \$53,170 so each party received net assets of \$62,106.

Some of Mary's contentions on appeal relate to her financial decisions during the parties' separation, the most obvious being her decision to borrow money from her father to assist in purchasing a new home during these proceedings while Terry was still paying for the family home. The evidence also reflects Mary purchased a hot tub, pool, decorative waterfall, shed, new beds for the children, area rugs, and has given away at least \$3000. In regard to this issue, the district court noted:

This action has been pending for a significant length of time. It has allowed the respondent to be treated for and maintain health insurance coverage for a health concern she experienced but has now also gone on long enough that the petitioner, who has been the primary wage earner in the family, has lost his job. Accordingly, the court is asked to divide up assets and liabilities and assess child support for two individuals, neither of which is employed or employed outside of the home. While this matter has been pending, Respondent has made some financial decisions that make little sense. She has lived beyond her means and but for her loans from her father, would have been unable to meet her obligations. Her decision to move out of the family residence and to purchase another home and incur additional indebtedness against it makes no sense. She has borrowed money and given money to friends and radio stations that she did not have. Despite her degree in accounting, she has behaved irresponsibly. She seems at time to have ignored the necessity of making decisions or the consequences of her decisions.

Mary requests this court modify the distribution of assets as follows: add 3323 Jackson Street (\$100,000) to Mary's asset ledger; add half (\$296.50) of Terry's Tyson stock to Mary's asset ledger; and add half (\$1224) of Terry's Prudential Life Insurance to Mary's asset ledger. Mary further requests this court modify the distribution of liabilities as follows: add the mortgage for 2512 Jackson Street (\$37,260) to Terry's liability ledger; add the nonmarital portion of Mary's student loans (\$10,000) to Mary's liability ledger; add the mortgage for 3323 Jackson Street (\$86,000) to Mary's liability ledger; and add Mary's personal loan from her father (\$18,000) to Mary's liability ledger.

Upon our review, we agree with the district court's determination that 3323 Jackson Street, as well as the associated debt⁷ was properly awarded and allocated to Mary. We agree the district court was in error in describing the property as a nonmarital asset and the associated debt as nonmarital liabilities. See *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989) (rejecting argument that stock purchased with borrowed money after separation was a nonmarital asset). However, Mary purchased 3323 Jackson Street in November 2008, after the parties had been separated for two years. Terry had moved into an apartment in 2006. The home at 3323 Jackson Street was never intended to be a marital home, and Terry never approved of its purchase as such. Although it was purchased during the marriage, it was not an asset accumulated by their joint efforts in the marriage. See *In re Marriage of Russell*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995). Mary also made the sole decision to incur these debts. In

⁷ The associated debt includes the \$18,000 loan from her father, the \$86,000 debt owed to Nationwide for the first mortgage, and monies owed to Security Bank relating to the second mortgage.

these circumstances, allocating the property and associated debt to Mary without adjustment to the remaining property division was equitable.

We acknowledge Mary's allegation that she and the children were forced to move because 2512 Jackson Street was "a dilapidated mess" and too dangerous to reside in. In support of this contention, she argues the condition of the residence was the reason why Terry never moved into the residence when she moved out. After Mary's move, Terry continued to pay the \$1200 mortgage payment, property taxes, and other bills for the home at 2512 Jackson Street, but did not move back in because Mary still had many possessions in the residence—a situation that continued to the trial date. We agree the home was in need of some repairs, but the evidence in the record does not support Mary's allegation that she and the children were forced out of the home and required to buy a new residence.

Mary requests that she receive half of Terry's Tyson stock and Prudential Life Insurance. The parties' pretrial stipulation provides that the award of these assets was disputed. The district court awarded them to Terry. However, the court ultimately divided the parties' assets evenly, and Terry's receipt of the stock and life insurance increased the property settlement he was ordered to pay to Mary by half of their respective amounts. We therefore find the court's award of these assets to Terry to be equitable.

Mary also urges that it was error to treat a portion of her student loans as nonmarital debt. Mary incurred a total of \$33,483 in student loans in obtaining her accounting degree, which the parties stipulated she would pay. Of that amount, \$10,000 was incurred prior to the parties' marriage. We find the district

court's decision to treat \$10,000 of Mary's loans as a nonmarital debt was both proper and equitable, particularly in light of the fact that Mary was in school at the time the parties met, and the majority of her loans (\$23,483) were incurred during the marriage and considered marital property.

Finally, Mary requests the mortgage for 2512 Jackson Street be added to Terry's liability ledger. Our accommodation of this request would only serve to decrease the amount of the property settlement payment Terry is required to make to Mary. Terry has not objected to this portion of the decree. We conclude the court's decision to this issue was equitable.

Upon our de novo review of all issues Mary has raised on appeal, we conclude the district court's property division is equitable under the facts and circumstances in this case. After setting aside the home at 3323 Jackson Street that Mary purchased two years after the parties' separation, this distribution of property and allocation of debt divides the net worth of the parties equally and is equitable in this case.

B. Alimony.

Mary argues the district court erred in failing to grant her request of \$700 per month in alimony until she reaches age sixty-two. Mary contends an award of alimony is appropriate in this case, considering her limited time to work due to the care the children require; the fact she has been out of the job market for many years as a result of the parties' mutual decision that she be a stay-at-home mother; and because of her treatment for cancer.

The alimony Mary requests is best characterized as traditional spousal support, payable so long as Mary is "incapable of self-support" to allow her to

“maintain the same standard of living she enjoyed during the marriage.” See *In re Marriage of Becker*, 756 N.W.2d 822, 826-27 (Iowa 2008). Although our review is de novo, the district court is given considerable latitude in determining spousal support. See *Anliker*, 694 N.W.2d at 540. “We will disturb that determination only when there has been a failure to do equity.” *Id.*

Mary receives an adoption subsidy of \$1500 per month for the parties’ three children paid to her by the State of Iowa; \$550 per month in child support for the oldest child paid to her by her second husband; and \$425 per month in foster child support for the youngest child. The district court ordered Terry to pay Mary \$920 per month in child support. Mary’s monthly stipend from these sources totals \$3395. Subsidized adoption assistance is to be used as reimbursement to the adoptive parent “to assist in covering the cost of room, board, clothing, and spending money” for the children.⁸ Iowa Admin. Code r. 441-201.2 (2009). Foster child support is to be used similarly. See Iowa Code § 237.1(4). Although these provisions expressly provide that Mary is to use the funds for the children, it is inevitable that the funds also serve to reduce Mary’s financial needs for housing and utilities. We also observe that the record lacks Mary’s financial affidavit and testimony to identify her total monthly expenses.

Mary alleges that the subsidized adoption assistance she receives does not cover the costs of raising the children and contends an award of alimony would help satisfy her expenses. Mary testified that her monthly expenses include costs for daycare, insurance, counseling, and evaluations, as well as

⁸ The subsidy is not limited to covering special need expenses. Iowa Admin. Code r. 441-201.1 et. seq.

normal housing and food costs. She also stated there are extra costs for the children's bedding, pajamas, and pull-ups that are not normally associated with children of their age because the children are not potty-trained at night.

We acknowledge and appreciate Mary's selfless acts in providing care for five children, four of whom are special needs children. Mary's devotion to the children is clear, and the time and energy associated with that commitment is no small feat. Unfortunately, the fact remains that "[w]hen a marriage is dissolved, neither party usually has as much money available for self support as was true before the breakup." *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988). As a result, "both parties, if they are in reasonable health, need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for permanent support." *Id.* We therefore agree with the district court's determination that "[t]here is no doubt that Mary will need to be a wage earner in some capacity for these children."

Earning capacity of each party can be considered in determining whether alimony should be awarded in a dissolution proceeding. *Id.* at 398. This is especially true in this case, where neither party is employed. Here, we have a marriage of approximately ten years, although the parties' dissolution action had been pending for nearly three years before the trial. Mary is forty-eight years old, and Terry is forty-seven years old. Both parties are healthy and capable of full-time employment. Terry has a college degree in agricultural business and experience working as a pilot and a production floor supervisor; Mary has a college degree in accounting and has some experience working in that field. For purposes of calculating child support, the district court determined Terry's

earning capacity to be \$32,500 per year and Mary's earning capacity to be \$20,000 per year.

Mary alleges Terry has a "much higher earning capacity" than she does and points to Terry's pilot license, college degree, and work experience. She further argues the parties' "large disparity in potential earnings" warrants an award of alimony to her. Courts will ordinarily not impute a higher earning capacity to a party unless it is shown that the party "voluntarily reduces his or her incomes or decides not to work." *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997) (determining earning capacity for child support calculation).

Here, sufficient evidence in the record supports the finding that Terry conducted a diligent search for employment after he was laid off by Tyson Foods. Terry submitted numerous applications for employment and took several part-time or temporary jobs. As the district court noted, Terry "has been looking for employment, but no jobs have been offered." We find Terry has not voluntarily reduced his income or decided not to work. Further, Terry's diligent but unsuccessful search for employment as a pilot supports the conclusion that it would be inappropriate to impute a \$90,000 yearly earning capacity to him.

Despite the parties' mutual decision that Mary primarily stay home with the children during the marriage, we agree an award of alimony is not appropriate in this case. Mary received her degree in accounting several years after the parties were married, and she will likely have to work in some capacity to help support her children. Mary also has a cash flow stream from the subsidized adoption assistance, foster child payment, and child support payments, not for the benefit of her support, but which will reduce her financial needs. There is little disparity

between the parties' earning capacities, and considering the assets and realistic needs of the parties, it is not equitable for Terry to be required to pay spousal support to Mary in this case. See Iowa Code § 598.21A(1); *Becker*, 756 N.W.2d at 826; *In re Marriage of Stark*, 542 N.W.2d 260, 262-63 (Iowa Ct. App. 1995) (balancing recipient's need with payor's ability to pay). We conclude the court's decision was equitable.

III. Attorney Fees.

Mary argues the court should not have ordered her to pay her own attorney fees. An award of trial attorney fees is reviewed for an abuse of discretion. *Sullins*, 715 N.W.2d at 255. Considering the parties' respective financial conditions and abilities to pay attorney fees at the time of trial, and the fact Terry gave Mary \$2500 for her legal fees in December 2006, we conclude the district court did not abuse its discretion in ordering the parties to pay their own fees. See *id.*

IV. Conclusion.

We affirm the property division and agree that alimony is not appropriate in this case. We reach this decision after considering many factors, including the parties' respective earning capacities, Terry's child support obligation, Mary's needs, and Mary's financial decisions during the pendency of these proceedings. Costs are assessed equally to each party.

AFFIRMED.