

IN THE COURT OF APPEALS OF IOWA

No. 1-099 / 10-1274
Filed May 25, 2011

**IN RE THE MARRIAGE OF MICHAEL J. SMARIO
AND MARALENE E. SMARIO**

Upon the Petition of

MICHAEL J. SMARIO,
Petitioner-Appellee,

And Concerning

MARALENE E. SMARIO
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Greg W. Steensland, Judge.

Appeal from the alimony provision of a decree of dissolution. **AFFIRMED AS MODIFIED.**

Robert Laubenthal of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellant.

Norman Springer Jr. of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

Maralene E. Smario appeals from the decree dissolving her twenty-five year marriage to Michael J. Smario, contending that the district court should not have denied her claim for alimony. We modify the decree to award her alimony of \$400 a month.

Scope and Standard of Review. We review decrees of dissolution of marriage de novo. Iowa R. App. P. 6.907. We give weight to the findings of the district court, but are not bound by them. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). Prior cases have little precedential value, and we base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). “We consider alimony and property division together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another.” *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994). An award of alimony depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). When determining the appropriateness of alimony, the court must consider the statutory factors enumerated in Iowa Code section 598.21A (2009). The court also considers each party’s earning capacity, as well as the parties’ present standards of living and ability to pay, balanced against the relative needs of the other. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Although our review of the district court’s alimony award is de novo, we afford that court considerable latitude in making the determination. *In re Marriage of Anliker*, 694

N.W.2d 535, 540 (Iowa 2005). We will disturb that determination only when there has been a failure to do equity. *Id.*

Proceedings and Background. Michael and Maralene were married in 1985. The parties had one child and Maralene had two children from a prior marriage. These children who lived with the parties are all now adults.¹

Michael filed a petition in June of 2009, asking for dissolution of the marriage and an equitable division of the parties' assets and debts. Maralene answered, asking also that the marriage be dissolved and seeking an equitable division of the property and debt. She also made an application for temporary attorney fees and suit money in addition to a request for permanent alimony and attorney fees.

The matter came on for hearing on May 21, 2010. The evidence was Michael was fifty-one years old at the time of trial and Maralene was fifty-six. At the time of marriage Michael was employed with the Burlington Northern Railroad and was so employed until 1991. At that time, his annual salary was about \$45,000. Michael recognized he might lose his job so he quit and took a buyout from the railroad of \$60,000 and a disability settlement of about \$24,000. He used this money to discharge the parties' debt including a mortgage on the then family home. He also made a down payment on the property where the parties lived prior to separation, and where Michael was still living at the time of the dissolution hearing. Michael took a two-year auto mechanics program at

¹ Both parties made reference to the fact that the parties' daughter and one of Maralene's sons lived with her at the time of the dissolution hearing. We do not consider this fact relevant to the issue before us.

Southeast Community College and received a Certificate in 1993. He had a number of jobs working for automobile dealerships and in 2007 took a job at Iowa Interstate Railroad. His base salary there is currently about \$45,000 but in 2009 he made \$62,649 by working overtime.

At the time of marriage Maralene was working in a grocery store. She had her own daycare business for several years. There was a year she did not work outside the home. She then went to work for the Underwood School System, first as a cook, and then as an employee in the school daycare program, a position she still held at time of trial. She does not work during the summer school vacation, but is paid on a twelve-month basis. She testified she made about \$22,300 in 2009.

The parties owned their home and an adjoining twenty acres subject to debt.² They also had motor vehicles, tools, and household furnishings. Both had retirement accounts.

The district court gave each party the personal property in their possession that was not otherwise valued and divided. It then valued the parties' personal property other than pensions and determined the parties' debt other than the mortgage on their personal residence. The court gave personal property it valued at \$22,175 to Michael and ordered that he pay \$15,050 of the parties' debt and in addition that he pay Maralene \$6062.50. Marlene received

² The record is not entirely clear on the twenty acres. It is not listed separately on either party's financial statement, so we assume it was valued with the homestead. It was farmed and Michael testified he earned \$3000 a year from the land. However the parties joint income tax returns show net farm income in 2004 of (\$547); in 2005 of (\$877); in 2006 of \$368; in 2007 of \$849; and 2008 of \$423.

no personal property but was ordered to pay \$5000 of the parties' debts. The result of this part of the property division is that each party received equities of \$1062.50.

The court ordered the parties' homestead to be sold but until the sale determined "Michael will live on the property and pay the mortgage payments, taxes, insurance, maintenance, and expenses related to the property."³ The court ordered that the property be listed for six months at \$175,000 and, if not sold in that period, that it be sold at public auction. The court ordered all costs of sale, existing mortgage, liens and judgments first be paid from the proceeds and the remaining proceeds be divided equally. The court further provided that Michael should reimburse Maralene from his share for any payments made on the judgments to Mastercard and Discover for which he already has been credited.

An estimate from Heartland Properties indicates that if the property were sold for \$169,000 after the payments of a mortgage of \$144,000, closing costs and transfer fees, prorated taxes and real estate costs the parties would net \$10,261.60. Maralene's financial statement valued the property at \$175,000 and showed an encumbrance of \$147,428; Michael valued the property at \$160,000 and showed an encumbrance of \$147,428.

³ No provision was made for allocation of any income from the twenty acres.

The court ordered that the parties prepare Qualified Domestic Relations Orders that divide equally the value of Maralene's⁴ IPERS and Michael's Tier 2 Railroad Retirement⁵ at the time of the entry of the decree.

No alimony was awarded. The district court denied Maralene's claim, finding that she had one-half of the retirement accounts and a payment from Michael of \$6062.50 and would share the money from the sale of the homestead.

Michael was ordered to pay \$1000 towards Maralene's attorney fees and all of the court costs.

Alimony. Maralene contends that she should have alimony. We agree. This is a long-term marriage. Michael received some education during the marriage. Michael's income is substantially more than Maralene's. There is little property to be divided. Maralene nets little more than \$1000 from the division of personal property and the debt other than the real estate mortgage. It is not realistic to assume that she will receive more than \$5000 from the sale of the homestead. We modify to award Maralene alimony of \$400 a month until she is sixty-five. The alimony shall also terminate in the event of the death of either party and on Maralene's remarriage.

Attorney fees and costs. Maralene requests appellate attorney fees. In considering such a request, we look to the needs of the party making the request, the ability of the other party to pay, and whether the party making the

⁴ She valued this on her financial statement at \$20,753.41, which we assume probably reflects her contributions.

⁵ Michael valued it at one dollar. He also has Tier 1 Railroad Retirement, which is mandated by federal regulation as a substitute for social security. Like Maralene's social security, it is not divisible.

request was obligated to defend the trial court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Michael is ordered to pay \$350 of Maralene's appellate attorney fees. The costs of appeal are taxed to Michael.

AFFIRMED AS MODIFIED.