

**IN THE COURT OF APPEALS OF IOWA**

No. 6-641 / 06-0239  
Filed December 13, 2006

**IN RE THE MARRIAGE OF TARA LEE MANN DAVID  
AND TIMOTHY RAY DAVID**

**Upon the Petition of  
TARA LEE MANN DAVID,**  
Petitioner-Appellee/Cross-Appellant,

**And Concerning  
TIMOTHY RAY DAVID,**  
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Linn County, Thomas M. Horan,  
Judge.

Timothy Ray David appeals and Tara Lee Mann David cross-appeals from  
the alimony, property division, and attorney fee provisions of the decree  
dissolving their marriage. **AFFIRMED AS MODIFIED ON APPEAL, AFFIRMED  
ON CROSS-APPEAL, AND REMANDED.**

Karen Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

Sherry Schulte of Crawford, Sullivan, Read & Roemerman, P.C., Cedar  
Rapids, for appellee.

Heard by Huitink, P.J., Vogel, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**HUITINK, P.J.**

Timothy Ray David appeals and Tara Lee Mann David cross-appeals from the alimony, property division, and attorney fee provisions of the decree dissolving their marriage. We affirm as modified on appeal, affirm on cross-appeal, and remand.

***I. Background Facts and Proceedings.***

Tara and Tim were married in October 2001. Their relationship began in July 1997 when Tara and her co-employee, John Havelock, rented rooms in Tim's Cedar Rapids home. At that time Tara's divorce from Steve Harvey was pending. Their divorce was final in December 1997. Tara, John, and Tim resided together until Tara and Tim were married in October 2001.

At the time this case was tried in December 2005, Tim was thirty-five years old. He is a high school graduate. In 1993 Tim founded Executive Home Care (EHC), a Cedar Rapids based residential cleaning, maintenance, and commercial snow removal business. Tim operated EHC as a sole proprietorship until July 1997 when EHC was incorporated. Tim is EHC's only shareholder. In his December 7, 2005, "Affidavit of Financial Status," Tim stated EHC's market value was \$220,000, its encumbrances were \$107,967, and its resulting net value was \$112,033. Tim additionally stated that his estimated gross monthly income from employment (presumably at EHC) was \$5000 and his net monthly income was \$3573.85. Tim's income from EHC has fluctuated depending on the volume of business and his personal needs.

Tara was thirty years of age at trial. She has a substantial medical history, including a January 2005 diagnosis of fibromyalgia and chronic fatigue syndrome for which she was being treated with medication and therapy as of the trial date.

At the time she met Tim in 1997, Tara was an engineering student at the University of Iowa. Tara was hired as a part-time painter at EHC, making seven dollars an hour. In 1998 Tara began working for EHC as an account specialist. Her earnings at EHC increased to \$28,488 in 1998. Tara was eventually elected to the board of directors and named EHC's vice president and chief financial officer. By the end of 2003, Tara's salary at EHC increased to \$65,613.

After Tara and Tim separated in August 2003, Tara continued to work part-time at EHC while pursuing an accounting degree at Mount Mercy College. Tara's employment with EHC ended when she filed for a dissolution of marriage in February 2004. Tara was unemployed from February 2004 through December 2004 when she found work as a part-time intern at Aegon in Cedar Rapids. Aegon paid Tara fifteen dollars an hour for an average of twelve to fifteen hours per week. As of November 2005, Tara's earnings were \$6693.75. Her internship at Aegon was scheduled to end in January 2006. As of the December 2005 trial, Tara was three hours short of finishing her bachelor's degree in accounting.

At trial the fighting issues included alimony, division of property, and attorney fees. The trial court's decree includes the following findings of fact related to those issues:

The Petitioner is in poor health. She suffers from severe Fibromyalgia, chronic fatigue syndrome, anxiety and depression. Her physician, Dr. Nicole Nisley of the University of Iowa, testified that she has recommended that due to Petitioner's severe Fibromyalgia that she is limited to working 15 to 20 hours per week.

The Petitioner was under a good deal of stress during the marriage and cohabitation with the Respondent.

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The Court further finds that because the parties have lived together for approximately seven years, the fact that both parties were gainfully employed until the Petitioner was terminated from her job at EHC, Inc., and the Respondent currently has a far greater earning capacity than the Petitioner and in order for the Petitioner to complete her education and receive a Master's Degree in accounting, which would allow her to support herself, she should be granted rehabilitative alimony for a period of three years in order to further her education and be in a position to secure a job in the accounting field.

The Petitioner and Respondent are owners of real estate property located at 5865 Robinwood Lane, Marion, Iowa, where the Petitioner is currently residing. This real estate has a fair market value at the date of this hearing of \$169,000, encumbered by a mortgage in the amount of \$129,610, leaving a net equity in said property of \$39,390.

The Court finds that the Petitioner and Respondent are owners of homestead property located at 7700 Jandel Court, Toddville, Iowa. Said property has a fair market value of \$378,500, encumbered by a first mortgage in the amount of \$223,593, and also a second mortgage in the amount of \$80,000. Neither the note nor the second mortgage were signed or consented to by the Petitioner, Tara Lee Mann David. Therefore, this second mortgage is void. See Section 561.13, Iowa Code 2005. Consequently, the net equity of the parties in their homestead real estate is the sum of \$155,007.

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The Court specifically finds that EHC, Inc., has a fair market value on December 31, 1997, of \$90,000. The Court further finds that on the date of the filing of this Marriage of Dissolution Decree, EHC, Inc., had a fair market value of \$119,000. The value of EHC, Inc., has increased in the amount of \$29,000 during the time the parties were cohabitating and living with each other.

Based on these findings of fact, Tara was awarded \$2750 per month as rehabilitative alimony for three years. The trial court made the following division of the parties' real estate:

The Petitioner, Tara Lee Mann David, is awarded all interest of the parties in the real estate located at 5865 Robinwood Lane, Marion, Iowa, and legally described as Lot 4, Prairie Ridge Estates First Addition to the City of Marion, Linn County, Iowa.

The value of the above-referenced real estate is the sum of \$169,000, encumbered by a mortgage in the amount of \$129,610, leaving a net equity in the property of \$39,390, which is awarded to the Petitioner, Tara Lee Mann David. Petitioner Tara Lee Mann David shall assume and pay all of the mortgage on said property and all other liens and encumbrances and hold the Petitioner Tara Lee Mann David harmless thereon.

The Respondent, Timothy Ray David, is awarded all interest of the parties in their homestead property located at 7700 Jandel Court, Toddville, Iowa and legally described as Lot 2 and Lot 3, Wildwood Third Addition to Linn County, Iowa.

The value of said real estate is the sum of \$378,500 on the date of the filing of this Dissolution Decree, encumbered by a first mortgage in the amount of \$223,593, leaving a net equity in the property of \$155,007.

Respondent shall assume and pay the first and second mortgages on said property and all other liens and encumbrances and hold the Petitioner harmless thereon.

The Petitioner, Tara Lee Mann David, in order to compensate her for her interest in the homestead property and in order to equalize the property settlement, is granted a lien and judgment against the Respondent, Timothy Ray David, and the above-referenced homestead property in the amount of \$77,503. This lien and judgment shall accrue interest at the rate of 10 percent per annum until paid.

Tara was ordered to pay debts totaling \$210,118. Tim was ordered to pay debts totaling \$284,316. In addition, Tara was awarded

One-half of the increase of value of EHC, Inc., computed between 12-31-97 and the date of the filing of this Dissolution Decree is \$14,500 and the Petitioner, Tara Lee Mann David, is granted a judgment against the Respondent, Timothy Ray David, for the sum of \$14,500. Interest on this judgment shall accrue at the rate of 10 percent per annum until paid.

Tim was ordered to pay \$2500 of Tara's attorney fees and all of the court costs.

On appeal, Tim raises the following issues:

- I. The court's award of rehabilitative alimony to the petitioner was not equitable in view of the respondent's income, the petitioner's education and the short duration of the marriage.
- II. The trial court failed to include the equity in the petitioner's residence in calculating the petitioner's property settlement.

- III. The trial court should have used the date of the marriage, and not the date of cohabitation, for purposes of determining whether the respondent's premarital property had increased in value during the marriage.
- IV. The trial court's order that interest accrue at the rate of 10% per annum on the property settlement judgments are punitive in nature and do not provide the respondent with a fair opportunity to pay the judgments without accruing interest.

On cross-appeal, Tara raises the following issues:

- I. Tara should be awarded alimony for a greater duration of time and the court should order the respondent to maintain a life insurance policy benefiting the petitioner.
- II. Tim should have been ordered to refinance [the house in Toddville] within ninety days and/or have the property sold.
- III. Tara should be awarded attorney fees on appeal.

## ***II. Standard of Review.***

Dissolution actions, as equitable proceedings, are reviewed de novo. Iowa R. App. P. 6.4; *In re Marriage of Benson*, 545 N.W.2d 252, 253 (Iowa 1996). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but we are not bound by these findings. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999).

## ***III. Alimony.***

An award of alimony is a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Alimony is not an absolute right. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). Alimony is a discretionary award that depends upon each party's earning capacity and present standard of living, as well as the

ability to pay and the relative need for support. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App.1998), *overturned on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197 (Iowa Ct. App. 1998). Iowa Code section 598.21(3) (2003) provides factors for the court to consider when awarding alimony. The factors include the length of the marriage, the parties' ages and health, the earning capacity of the spouse seeking support, and that spouse's ability to become self-sufficient. Iowa Code § 598.21(3). Rehabilitative alimony is awarded for a limited period of time to allow and provide incentive for an economically dependent spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Rehabilitative alimony is designed to assist "an economically dependent spouse through a limited period of education and retraining." *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

Although Tara has a substantial education and employment history, her medical issues and termination at EHC weigh in favor of an award of rehabilitative or transitional alimony. The length of the parties' marriage, Tara's age, employment experience, and education weigh against an award of traditional or permanent alimony. We, like the district court, find Tara needs financial support from Tim to make the transition from newly divorced person to self-sufficiency. *See, e.g., id.* at 927.

We also find Tim's past and current earnings enable him to pay substantial alimony. However, neither Tara's needs nor Tim's ability to pay justify the amount of alimony awarded. We accordingly modify the decree to reduce the amount awarded to \$1500 per month. For the same reasons cited

earlier, we find the duration of the award is equitable and deny both parties' requests to modify the duration of the award.

#### ***IV. Property Division.***

Upon the dissolution of marriage, the court must divide the property of the parties equitably, taking into consideration, a number of factors, including the length of the marriage, property brought to the marriage by either party, each party's contribution to the marriage, and the parties' ages, physical health, and earning capacities. Iowa Code § 598.21 (2003). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). "If a marriage lasts only a short time, the claim of either party to the property owned by the other prior to the marriage . . . is minimal at best." *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995). In addition, "[a]n equitable property division of the appreciated value of the property should be a function of the tangible contributions of each party and not the mere existence of the marital relationship." *Id.* at 893. In other words, "we consider whether the appreciation which occurred during the marriage was fortuitous or due to the efforts of the parties." *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). We, however, do not limit our focus to the direct contribution to the increase. Instead we broadly consider the contributions of each spouse to the overall marriage. *Miller*, 552 N.W.2d at 465.

***EHC.*** As noted earlier, Tim argues the trial court's use of EHC's premarital value was inequitable because the value of EHC arguably declined



after the date the parties were married. Tara argues that failure to recognize her premarital contributions ignores the fact that EHC increased in value from the time the parties first cohabited in 1997 until the time of trial. Both arguments miss the essential point. There is no dispute concerning Tara's contribution to the overall marriage, as well as her direct contributions to EHC's daily operations. Under these circumstances, we find Tara is entitled to at least the \$14,500 awarded by the trial court, regardless of any increase or decrease in EHC's value. See *In re Marriage of Garst*, 573 N.W.2d 604, 606-07 (Iowa Ct. App. 1997) (contribution of party not change in value of asset is a critical consideration). We accordingly affirm on this issue.

**Home Equity.** The gist of Tim's argument is that it is not equitable to divide the equity in his house and award Tara all of the equity in her house. More specifically, Tim claims the equity in Tara's home is traceable to the profit he made on the sale of the home he purchased in 1997. Under our interpretation of the trial court's decree, division of the equity in Tim's home was necessary to achieve an equitable division of the parties' property. Additionally, Tim's argument ignores the fact that without the resulting cash payment to Tara, her share of the property division would be (\$32,618), while his share would be \$108,317. We accordingly affirm on this issue.

**Judgment Interest.** Tim argues that he should be allowed to make any cash payments required by the trial court's decree in installments or that he should have at least ninety days from the date of the entry of our decision to arrange necessary financing. He also argues that the rate of interest imposed on any judgments resulting from the trial court's decree is excessive. We agree.

Cash payments ordered as part of a property division are money judgments and, unless otherwise provided, bear interest at the rate allowed by Iowa Code section 668.13. See Iowa Code § 535.3; *Hunt v. Kinney*, 478 N.W.2d 624, 626 (Iowa 1991); *In re Marriage of Dunn*, 455 N.W.2d 923, 925 (Iowa 1990). Because the interest rate ordered by the trial court exceeds the allowable statutory rate on money judgments, we modify the decree by limiting the interest rate on any cash payments to the rate allowed by section 668.13. We also modify the decree by granting Tim ninety days from the date procedendo issues herein to make the ordered cash payments to Tara. Interest shall begin to accrue on the ninety-first day after procedendo issues.

#### **V. Attorney Fees.**

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa 1994); *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Scheppele*, 524 N.W.2d at 680. Tara's limited earning capacity in light of her medical problems and desire to continue school compromises her ability to pay attorney fees. Because Tim enjoys a greater earning capacity, he is able to contribute to Tara's attorney fees. The trial judge did not abuse his discretion by ordering him to do so.

Tara requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *Kurtt*, 561 N.W.2d at 389. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to

defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Because of the mixed results obtained by the parties on appeal, we deny their respective requests for appellate attorney fees. Costs are to be shared equally by the parties.

**AFFIRMED AS MODIFIED ON APPEAL, AFFIRMED ON CROSS-APPEAL, AND REMANDED.**