

IN THE COURT OF APPEALS OF IOWA

No. 9-295 / 08-1630

Filed May 29, 2009

**IN RE THE MARRIAGE OF MARJORIE A. WIDENER
AND DAVID H. WIDENER**

**Upon the Petition of
MARJORIE A. WIDENER,**
Petitioner-Appellee,

**And Concerning
DAVID H. WIDENER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D.
McKenrick, Judge.

Respondent appeals the spousal support provision of the parties'
dissolution decree. **AFFIRMED.**

James L. Pillers of Pillers Law Offices, P.C., Clinton, for appellant.

Robert J. McGee of Robert G. McGee, P.C., Clinton, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ROBINSON, S.J.**I. Background Facts & Proceedings**

David and Marjorie Widener were married in 1971. They have three adult children. At the time the parties married they were both sixteen years old and they dropped out of school.

Marjorie was fifty-three years of age at the time of the dissolution proceedings. She never advanced her education during the marriage. She became a certified nursing assistant, working at nursing homes. In 2005, she had surgery to repair a perforated colon, and has had continuing problems resulting in several additional surgeries. Marjorie is currently unable to maintain employment. She receives Social Security disability benefits of \$629 per month.

David was also fifty-three years of age. He had jobs in the construction industry until he was injured in the late 1990s. He went back to school and became a registered respiratory therapist. He works at KSB Hospital in Dixon, Illinois. In 2007, David's income was \$95,446, which included overtime income.

Marjorie filed a petition for dissolution of marriage on January 1, 2008. The parties entered into a stipulation regarding the division of property, with each party receiving a house and vehicle, along with other property. The parties' debts were also divided, with David being made responsible for his student loans. The court ordered David to pay alimony of \$2000 per month until he reaches full Social Security retirement age, or until he dies, whichever occurs first. The court also ordered David to pay \$2000 toward Marjorie's trial attorney fees.

David filed a motion pursuant to Iowa Rule of Appellate Procedure 1.904(2) asking the court to reconsider the award of alimony. The court denied the motion stating:

The principle issue concerns the credibility of the evidence regarding the respondent's [David's] anticipated income. Based on the evidence adduced at trial, the Court determined that the credible evidence supported the Court's determination that [David's] income would remain comparable to the income that he earned in 2007. [David's] testimony to the contrary was not believed by the Court.

David appeals the decision of the district court.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. In our de novo review we examine the entire record and adjudicate rights anew on 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 district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Alimony

David does not dispute that Marjorie should be awarded alimony, but he challenges the amount of the alimony award. He contends that an award of \$750 per month would be much more reasonable. David asserts that the district court improperly determined the amount of his income. He states that his level of income in 2007 was based on many hours of overtime, but that this amount of overtime will not be available to him in the future. Furthermore, David asserts

that Marjorie received more than he did in the property distribution, and for this reason the amount of alimony should be reduced.

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 a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *Id.* In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1) (2007). *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

David earned \$95,446 in 2007. From January 1 through April 18, 2008, he earned \$29,063, which the court found to be \$94,455 on an annualized basis. David testified, however, that he expected his income in 2008 to only be about \$70,000 because there had been a change in staffing with his employer, and he did not expect to receive as many overtime hours in the future as he had received in the past.

The court considered David's testimony on this issue, and found he was not credible. On issues of credibility, we give deference to the district court's factual findings because that court has an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). We note that in ruling on the post-trial motion, the district court made specific credibility findings on this issue, and found David's testimony

was not credible. We conclude the district court properly found David's income would continue to be in the range of \$95,000, as it was in 2007.

We next consider the division of property as it related to the award of alimony. See *Trickey*, 589 N.W.2d at 756. David states that under the decree he was awarded most of the parties' debt. He states that he received a net negative award of \$97,000, while Marjorie received a net positive award of \$70,000. David asserts that because of this discrepancy in the property division, the amount of the alimony award should be reduced.

We do not agree with David's contention that he was given a net negative award of property. In our review of the property division, we find David was awarded more assets than debt. Although the property division favors Marjorie, we find the discrepancy is not such that there should be a reduction in alimony. Marjorie does not have the ability to earn any income, and she depends upon Social Security disability and alimony. After David retires, Marjorie will no longer receive alimony. The difference in the property division takes this into consideration. Under the facts of this case, Marjorie still needs an award of alimony, plus a portion of the property, that will permit her to meet her needs at the current time and in the future.

We give the district court considerable discretion in awarding alimony, and will disturb the court's ruling only when there has been a failure to do equity. *Smith*, 573 N.W.2d at 926. We affirm the award of alimony by the district court.

IV. Attorney Fees

Marjorie seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 767 (Iowa 1997). On a request for appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine David should pay \$1000 toward Marjorie's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to David.

AFFIRMED.