

IN THE COURT OF APPEALS OF IOWA

No. 7-432 / 06-1555
Filed August 8, 2007

IN RE THE MARRIAGE OF ROGER D. PINKAL AND VIRGINIA E. PINKAL

**Upon the Petition of
ROGER D. PINKAL,**
Petitioner-Appellant,

**And Concerning
VIRGINIA E. PINKAL,**
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Roger Pinkal appeals the spousal support and property division provisions
of the decree dissolving his marriage to Virginia Pinkal. **AFFIRMED.**

Carrie Coyle, Davenport, for appellant.

Derek Jones, Davenport, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

Roger Pinkal appeals the spousal support and property division provisions of the decree dissolving his marriage to Virginia Pinkal. Roger claims the trial court erred in (1) awarding Virginia spousal support, (2) failing to consider Virginia's dissipation of marital assets, (3) failing to consider Virginia's minimal contributions to the marital estate, and (4) awarding Virginia twenty-five percent of a certificate of deposit (CD) purchased with funds inherited from Roger's mother. We affirm.

I. BACKGROUND FACTS.

The parties were married in January 1974, when Roger was twenty-six years of age and Virginia was thirty-three. They have no children. The parties separated in September 2005 when Virginia came back from a one-week separate vacation and found that Roger had changed the locks on their home and she could not return to it.

Roger had filed a petition for dissolution of marriage just before Virginia returned from the vacation. Trial was held in June 2006 and the trial court filed its ruling in July 2006. The parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The court ruled on the motions in August 2006, and Roger timely appealed in September.

At the time of the parties' marriage Roger was serving in the military, which he continued until receiving disability retirement in 1989. Roger has artificial heart valves, and suffers from emphysema, diabetes, and an irregular heart rhythm. He is considered one-hundred percent disabled and incapable of gainful employment. Roger receives a military pension in the gross amount of

\$1,960 per month and the net amount of \$1,579 per month after deductions for federal and state income tax and a premium for a survivor benefit plan. He also receives Veterans Administration (VA) disability payments of \$2,528 per month. His net income is thus \$4,107 per month. Roger was just a few days short of his sixtieth birthday at the time of trial.

Virginia was sixty-six and one-half years of age at the time of trial. She had worked the prior twelve years at a Best Western Steeplegate Inn, where she works four days per week, earning gross income of \$1,012.55 per month. Virginia began receiving social security old age and survivor benefits when she reached age sixty-two in January 2002, and currently receives gross benefits of \$585.60 per month. Her combined net income from employment and social security benefits is \$1,391.38 per month.

About ten days before leaving on a separate, one-week vacation, in mid-September 2005 Virginia took cash advances totalling \$13,000 on a Chase Visa charge card. On the day she left on the vacation she withdrew \$5,500 from the parties' Rock Island Arsenal Credit Union account.

Roger's mother died in 1999 and he inherited money from her. He purchased a CD for \$50,000. At the time of the dissolution hearing the CD had a value of \$51,404.97.

The parties owned a home with a value of about \$98,000, subject to a mortgage of \$8,000, and a resulting equity of \$90,000; two vehicles; and life insurance policies, a 401(k) account, annuities, bank accounts, and other personal property, all of relatively modest value. They owed approximately \$900 on a Discover charge card, \$2,500 on a Sears charge card, and about \$13,000

on the Chase Visa card on which Virginia had taken the cash advances mentioned above.

II. THE DISTRICT COURT DECISION.

The parties had been married about thirty-two and one-half years. The district court believed the length of the marriage justified an effort to assure that each had a “comparable income.” It awarded Virginia one-half of Roger’s military pension. In order to provide the parties with approximately equal incomes it ordered that Roger pay Virginia spousal support of \$1,361 per month until she started receiving one-half of his military pension, at which time Roger’s spousal support payments would be reduced to \$381 per month.

The district court awarded each party certain “personal property, furnishings, clothing, goods, chattels, and fixture,” and an automobile. It awarded Virginia her small 401(k) plan, and awarded each party his or her annuity, life insurance policy, and bank accounts. The court ordered Roger to be responsible for the Discover charge card balance and Virginia to be responsible for the Sears charge card debt. It stated a belief that with the possible exception of a collection of Hummel figurines (the parties agreed Roger would receive eight of the figurines and Virginia would receive eleven), the personal property each party was awarded was “more or less a wash.” The issues on appeal do not involve or implicate the items mentioned in this paragraph.

The district court ordered that Virginia “reimburse” Roger for \$1,500 of the \$5,500 she withdrew from the parties’ credit union account. It awarded Roger the parties’ marital residence, and ordered that he refinance the residence and pay Virginia one-half of the equity, \$45,000, out of which it required Virginia to

pay the Chase credit card debt of about \$13,000, a debt for which Virginia had agreed to be responsible.

Roger appeals, raising the issues noted at the outset of this opinion.

III. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the record and adjudicate rights anew on the 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 trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

IV. MERITS.

A. Spousal Support.

Roger claims the district court erred in awarding spousal support. He argues Virginia is healthy, able to earn income, and is employed. He argues he is unable to work and has special needs. He also argues Virginia made minimal contribution to the parties' marital assets, she dissipated assets, and she is not being forced to pay back a majority of marital assets she squandered, issues which we address later in discussing Roger's challenges to the trial court's property division.

"[Spousal support] is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1998). Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d

567, 570 (Iowa Ct. App. 1998). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21(5) (Supp. 2005). *Dieger*, 584 N.W.2d at 570. Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only when there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking spousal support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998).

Roger is correct in asserting that Virginia is apparently healthy, is able to work and earn income, and is employed. She has been and is, however, employed only four days per week in a job that pays \$8.25 per hour. Nothing in the record indicates she has more than a high school education or has any substantial job skills that would allow her to earn substantially more than she does at the present time. She is sixty-six and one-half years of age, an age when many have retired and many more are considering retirement. There is no likelihood that without a substantial spousal support award Virginia will be self-supporting at a standard of living reasonably comparable to the one enjoyed during the marriage.

Roger has no capacity to earn through gainful employment. His future is assured, however, through his one-half of his military pension, his VA disability

payments, and periodic increases in both. Roger may have special needs, perhaps as a result of his health problems. The record does not, however, either disclose that he in fact has such special needs or show that any such special needs are not provided for by the VA.

After considering all relevant factors, we find no abuse of discretion or failure to do equity in the trial court awarding Virginia spousal support after the parties' lengthy marriage.

B. Property Division.

1. Dissipation of Marital Assets.

Roger claims the district court erred by failing to consider Virginia's dissipation of marital assets. He raises as issues Virginia's \$13,000 in cash advances on a Chase Visa credit card, her \$5,500 withdrawal from the Rock Island Arsenal Credit Union, \$4,000 from a First Midwest savings account, \$10,000 and \$3,000 from CDs, and some small savings bonds.

The district court ordered that Roger pay Virginia \$45,000 as her one-half of the equity in the marital residence, but further provided that \$13,000 of her \$45,000 be deducted and used to pay the Chase Visa credit debt. The court thus considered and provided for the \$13,000 in question.

When Virginia returned from her one-week vacation in September 2005 she still had all or most all of the \$5,500 she had withdrawn from the Rock Island Arsenal Credit Union. She found herself locked out of the parties' marital residence and facing Roger's recently-filed petition for dissolution of marriage. She explained in her testimony, apparently satisfactorily to the trial court, that she used \$1,000 for an attorney fee retainer and used most of the balance for eleven

days in a hotel, first and last month's rent on an apartment lease, renter's insurance, furnishings for her apartment, and groceries. The court ordered that Virginia "reimburse Roger \$1,500 for excess withdrawals made by her from the RIA Credit Union account." We are satisfied that the court fully considered the \$5,500 and made equitable provision therefor.

Roger complains of almost \$4,000 withdrawn from a First Midwest savings account. Virginia testified that the parties used \$2,000 from the account for a vacation in May or June 2005, she took \$500 or \$600 for her September vacation, and she used the balance of the \$4,000 to pay on credit card debts and a car loan. We are satisfied, as the trial court apparently was, that the \$4,000 in question was not improperly dissipated.

After Roger received his inheritance from his mother he made a gift of \$10,000 to Virginia. She used the money to purchase a \$10,000 CD. In about September 2003 she used \$5,000 of the \$10,000 CD for part of the purchase price of a used vehicle, and reinvested \$3,000 in another CD. In 2005 she cashed the \$3,000 CD and used it to pay off the car-purchase loan. The car was part of the property divided by the trial court's ruling. The evidence does not show what happened to the remaining \$2,000. We find no inequity or error in the trial court not awarding Roger additional property as a result of the \$10,000 and \$3,000 CDs.

Virginia had five bonds, each of fifty dollars face value, that she had received as bonuses through work. She acknowledged having cashed four of them, receiving substantially less than face value. We find the absence of trial court discussion of these bonds to be inconsequential.

2. Contributions to the Marital Estate.

Virginia contributed \$200 per month to a joint account which was used to pay regular, recurring household bills. Roger claims the trial court erred in failing to consider this minimal financial contribution in making its property distribution.

Virginia's monthly contribution to the household account was in an amount agreed to by the parties. The evidence shows that Virginia used her income for other family and household purposes as well. She testified that she used the remainder of her income for, among other things, paying some of the bills, buying groceries, and paying for hair care, dental work, medical expenses not paid by insurance, lawn care, clothes, household furnishings, and landscaping materials.

The district court found, in part: "Roger and Virginia have both substantially contributed all of their efforts toward their common good and goals during their marriage." We agree with this finding and find no error in the trial court not adjusting its property division to account for differing financial contributions to the marital estate.

3. The Certificate of Deposit.

The \$51,404.97 CD at issue apparently consists of \$50,000 Roger inherited from his mother in about 1999 plus \$1,404.97 of interest earnings. Roger claims the trial court erred in awarding twenty-five percent of the CD to Virginia.

Iowa Code section 598.21(6) (Supp. 2005) provides:

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Our supreme court has listed factors to be weighed in considering whether inherited or gifted property should be divided under the exception to the general rule. They are as follows:

- (1) contributions of the parties toward the property, its care, preservation or improvements;
- (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
- (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
- (4) any special needs of either party;
- (5) any other matter which would render it plainly unfair to a spouse or a child to have the property set aside for the exclusive enjoyment of the donee or devisee.

In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989).¹ We find the first three of the listed factors lend no support to a division of the CD. We do find, however, that application of the fourth and fifth factors justifies the limited division ordered by the district court in this case.

Virginia testified that during the parties thirty-two year marriage they discussed retirement planning; that she had asked about participating in a 401(k) plan at work, and Roger said he would rather not because he was going to take care of her, so she did not get into a 401(k) plan; and that she thus expected the two of them would rely on his military pension or VA disability benefits for retirement. Roger denied that their retirement plan included reliance on his VA disability benefits. He did, however, agree that the parties had the discussions

¹ The court further stated that the length of the marriage is an important factor, because with the passage of time the benefits of the inherited property are enjoyed by the married couple, causing a rise in expectations concerning the couple's standard of living. *Muelhaupt*, 439 N.W.2d at 659. We believe, however, that this factor is of little or no significance in this case, as the \$50,000 was invested in a CD and there is no evidence the \$50,000 or any part thereof contributed to an increased standard of living for the parties.

about retirement planning, and acknowledged a plan to rely on his military retirement benefits.

The evidence shows, and the district court found, that Virginia had no retirement plan other than about \$255 in a 401(k) plan through her employer. The court found it was always agreed between the parties that in retirement “they would live off of his retirement.” It found that Virginia “would have put more in the [401(k)] account, except that she expected that Roger would be in a position to take care of her in retirement.” We agree with these findings.

The parties have been married thirty-two and one-half years. Virginia is sixty-six and one-half years of age. The parties’ time for financial planning for retirement has largely passed. When Virginia does retire, which could occur at any time, she will lose her employment income, presently a gross amount of \$1,012.55 per month. At that time her retirement plan will no doubt consist of only her social security income and her 401(k) plan of \$255 plus any additional contributions to and earnings of that plan.

We conclude that under the facts of this case Virginia has special needs, a need for at least some small retirement account, and it would be plainly unfair to her to have the entire CD set aside for the exclusive enjoyment of Roger. See *Muelhaupt*, 439 N.W.2d at 659. We therefore affirm the trial court’s award of twenty-five percent of the CD to Virginia.

C. Attorney Fees and Costs.

Roger and Virginia each requests an award of appellate attorney fees and costs. Such an award rests in this court’s discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the

needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* Upon consideration of the foregoing factors, we award Virginia \$1,000 in appellate attorney fees.

V. Conclusion.

We affirm the district court's decree on all issues presented, award Virginia \$1,000 in appellate attorney fees, and tax costs on appeal to Roger.

AFFIRMED.