IN THE COURT OF APPEALS OF IOWA

No. 8-474 / 97-1638
Filed November 30, 1998

IN RE THE MARRIAGE OF KIMBERLY GLADYS HERRIG AND RONALD JOHN HERRIG

Upon the Petition of
KIMBERLY GLADYS HERRIG,
Petitioner-Appellant/Cross-Appellee,

And Concerning
RONALD JOHN HERRIG,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, John Bauercamper, Judge.

The petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Robert L. Day, Jr. of Law Office of Robert L. Day, Jr., Dubuque, for appellant.

Robert J. Murphy of Heckmann & Murphy, Dubuque, for appellee.

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

HUITINK, J.

I. Background Facts and Proceedings.

Ronald and Kimberly Herrig were married in 1977. Each has adult children from earlier marriages. They have one adult child, R.J., whose welfare is not implicated by these proceedings.

Kimberly is forty-nine years old. She is a high school graduate. Her work experiences are limited to clerking in a grocery store before she married Ronald, and painting and wallpapering during the marriage. Her average net monthly earnings are $800.

Ronald is fifty-six years old. He has been a self-employed insurance agent since 1964. He owns Herrig Real Estate and Insurance from which he draws a net monthly income of $2433.

The disputed issues at trial included division of property and Kimberly's alimony entitlement. Ronald initially claimed the parties' net worth was $373,000, but reduced this amount to $283,252 at trial. Kimberly, citing Ronald's December 1993 financial statement, claimed their net worth was $607,000.

The district court found the parties' net worth was $433,200. The court concluded the parties' assets should be divided equally and distributed them accordingly. In order to equalize this division, Ronald was ordered to pay Kimberly $50,000, in five equal installments, without interest if timely paid and ten percent interest on the entire unpaid balance if any installment is delinquent.

Kimberly was awarded $500 monthly permanent alimony, terminating on the death of either party, her remarriage, or her cohabitation with another man. Each party was required to pay their own attorney fees.

On appeal, Kimberly claims her alimony award is inadequate and it should not terminate automatically if she cohabitates with another man. She also argues the district court understated the parties' net worth and her property award should be increased accordingly.

On cross-appeal, Ronald disputes Kimberly's entitlement to permanent alimony. He also argues the property division in inequitable. Both parties demand an award of attorney fees.

II. Standard of Review.

Our review is de novo. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996). We are obliged to examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). No hard and fast rules govern the economic provisions in a dissolution action; each decision turns on its own uniquely relevant facts. *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). Thus we accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling only when there has been a failure to do equity. *Benson*, 545 N.W.2d at 257.

III. Alimony.

A. Cohabitation. Kimberly contends the district court erred by mandating Ronald's obligation for alimony automatically terminate upon her cohabitation with a member of the opposite sex. She contends the automatic alimony termination provisions violate her due process and freedom of association rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution and conflict with out earlier pronouncements on this issue.

We recently addressed this issue. *In re Marriage of Wendell*, 581 N.W.2d 197 (Iowa App. 1998). In *Wendell*, we held cohabitation with a member of the opposite sex is not a proper basis for district courts to impose an automatic termination of alimony in the original decree. Cohabitation, unlike remarriage, is not an easily identifiable triggering event. *Id.* at 200. Cohabitation has too many variables to be adequately defined in a dissolution decree. *Id.* The question of whether circumstances amount to a cohabitation are more properly addressed in an action to modify the dissolution decree. *Id.* We therefore modify the decree to delete the provision relating to automatic termination of alimony upon Kimberly's cohabitation with a member of the opposite sex. We decline to address either of Kimberly's constitutional claims relating to this issue.

B. Amount of Alimony. Kimberly contends her alimony award is insufficient. She requests an award of $1200 per month, citing her needs and Ronald's ability to pay.

We consider alimony and property division together to determine their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1984).

Kimberly has been awarded one-half of the parties' net assets. The value of this award is $216,600. The award includes income-producing assets. Additionally, Kimberly will receive cash payments totaling $50,000 over a five-year period.

Under these circumstances, we conclude an award of $500 per month is sufficient. We affirm on this issue.

C. Ronald's Cross-Appeal. Ronald contends the district court erred in awarding Kimberly permanent alimony. He asserts an award of rehabilitative alimony for a period of four years would allow Kimberly to retrain in a different field and become self-sufficient. We disagree.

When determining the appropriateness of alimony, the court must consider: "(1) the earning capacity of each party; and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). The spouse with the lesser-earning capacity is entitled to be supported for a reasonable time in a manner as closely resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well. *In re Marriage of Hayne*, 334 N.W.2d 347, 351 (Iowa App. 1983).

Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining. *In re Marriage of O'Rouke,* 547 N.W.2d 864, 866 (Iowa App. 1996). Its objective is self-sufficiency. *Id.* Cases in which rehabilitative alimony is awarded are those where the spouse to receive alimony needs to redevelop previous skills, receive new training, or develop potential supportive skills. *In re Marriage of Peterson,* 491 N.W.2d 535, 538 (Iowa App. 1992).

Traditional alimony or permanent alimony is payable for life or for so long as a dependent spouse is incapable of self-support. *Id.* Traditional alimony is awarded when "[t]he feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage." Iowa Code § 598.21(3)(f)(1997); *In re Marriage of Debbler,* 459 N.W.2d 267, 270 (1990). Traditional alimony is typically awarded when a spouse is financially dependent on the other, there is little prospect of self-sufficiency, and the marriage was of long duration. *See In re Marriage of Eastman*, 538 N.W.2d 874, 876 (Iowa App. 1995).

We find the district court properly awarded traditional alimony in this case. Kimberly is forty-nine years old. During the twenty-year marriage, Kimberly worked almost exclusively in the martial home as a homemaker and primary caretaker for her children. She has not worked outside the home except briefly as a painter and wallpaper hanger. She possesses few marketable skills. She has several physical

impairments which will make learning new skills difficult. All of these factors justify an award of permanent alimony. We affirm on this issue.

IV. Property Distribution.

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Kimberly seeks an increased property award. She argues the district court undervalued Ronald's insurance agency. Kimberly also claims the court should have assigned substantial, rather than nominal, value to Ronald's interest in an investment company and certain items of personal property.

Ronald argues the value of his insurance agency, an apartment house, and the family home should be excluded from division because he acquired these properties before the marriage and Kimberly made no tangible contribution to their appreciated value. Ronald also disputes the valuation of a commercial property the parties refer to as Cedar Ridge.

Equity does not require division of premarital property if its appreciation does not result from the parties' joint tangible contributions. *In re Marriage of Hass*, 538

N.W.2d 889, 893 (Iowa App. 1995). These, however, are only two of many considerations made in arriving at a property division. *Id.* This is a twenty-year marriage. Kimberly is forty-eight years old and lacks sufficient earning capacity to achieve self-sufficiency. She was awarded modest alimony. Kimberly is also entitled to consideration of the economic value of her homemaking and child care services. Iowa Code § 598.21(1)(a)(e) and (f). Under these circumstances, we believe equity requires division of the property Ronald brought to the marriage.

The valuation of Ronald's insurance agency ranged from $137,500 to $225,000. These valued differed based on the multiple of net agency commissions earned in the preceding year. The record indicates 1996 net agency commissions were $110,000. Ronald testified the value of his agency was 125% of this amount. Ronald's brother and former partner testified 200% of net commissions was more realistic. The court found Ronald's valuation more credible. The $137,500 value set by the district court is within the permissible range of the evidence and we decline to disturb it on appeal. *See In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973). We similarly find the $134,500 value assigned to Cedar Ridge is within the permissible range of $84,000 Ronald claimed and the $134,500 appraisal by a local real estate agent.

Ronald was awarded his one-quarter interest in a limited liability company which sells and distributes franchises for Blimpie's, a fast-food deli sandwich chain. Kimberly relies upon a 1993 loan application in which Ronald stated his interest was

valued at $25,000. Ronald countered that the interest had a net value of zero. He explained the discrepancy by testifying that his interest was encumbered to the full amount of its stated value. The court valued the interest at zero. This determination implicates the district court's assessment of Ronald's credibility. We decline to second guess the district court on this issue.

The same problem befalls Kimberly's argument concerning the district court's valuation of the items of personal property. The testimony at trial was not clearly developed. We are left to judge the credibility of the witnesses and their testimonial claims, a task better reserved for the trial court. We affirm on this issue.

Finally, Kimberly asserts the district court erred by not imposing an obligation upon Ronald to pay interest on his five annual payments of $10,000 in satisfaction of the property distribution.

We have permitted awards which do not bear interest. *See In re Marriage of Richards*, 439 N.W.2d 876, 883 (Iowa App.1989); *see also In re Marriage of Pittman*, 346 N.W.2d 33, 37 (Iowa 1984). Interest may be awarded if to do so will equalize the property distribution. *See In re Marriage of Baculis*, 430 N.W.2d 399, 403-04 (Iowa 1988). We believe the district courts may decline to award interest on property distribution installment payments if equity so requires. *In re Marriage of Pertzsch*, 451 N.W.2d 22, 24 (Iowa App. 1989).

In this case, the amount of the equalization payments coupled with Ronald's ability to pay demonstrate an award of interest is not warranted. Upon our review of

the entire property division, we find the interest-free equalization payments are equitable.

V. Attorney Fees.

Kimberly requests both trial and appellate attorney fees. She requested attorney fees in the district court and was denied. We see no reason to disturb the district court's ruling. We will consider her request for appellate attorney fees.

In making such a determination, we are to 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 Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). We are also mindful that a party's unwillingness to cooperate in an effort to lengthen litigation is a factor for us to consider. *See In re Marriage of Aronow*, 480 N.W.2d 87, 90 (Iowa App. 1991).

We award Kimberly $2000 in appellate attorney fees.

AFFIRMED AS MODIFIED.