IN THE COURT OF APPEALS OF IOWA

No. 1-454 / 91-182

FILED
FEB 25 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LARRY L. BROWN AND REBECCA A. BROWN

Upon the Petition of
LARRY L. BROWN,

Appellant,

And Concerning
REBECCA A. BROWN,

Appellee.

103

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

The husband appeals certain economic provisions of the dissolution decree entered in district court. **AFFIRMED AS MODIFIED.**

Merry C. Ford, Burlington, for appellant.

J. Bryan Schulte of Bauer, Schulte, Hahn, Swanson & Crowley, Burlington, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Larry and Rebecca Brown were married in 1972. They have three children: Christopher, born on April 1, 1973; Shawn, born on January 6, 1976; and Darren, born on March 31, 1983. The parties lived in Burlington, Iowa, during most of the marriage.

Larry was forty years old at the time of the dissolution. He is employed as a skilled machinist for General Electric in West Burlington. He has worked overtime in the past. His net income, excluding overtime, is about $1800 per month. Larry has worked for General Electric for the past three years and has not yet vested into the pension program. He has a high school diploma and some college credits.

Rebecca was thirty-eight years old at the time of the dissolution. She did not work outside the home during most of the marriage. Rebecca is currently employed at Antenna Craft in West Burlington as an unskilled laborer. She has a net income of about $674 per month. Rebecca has a high school degree.

The district court dissolved the marriage on December 31, 1990. The parties agreed to joint legal custody of the children with Rebecca having physical care. The custody provisions are not an issue on appeal.

The district court considered Larry's overtime income in assessing child support and alimony. The court ordered Larry to pay child support of $68.50 per week per child, or

$890.50 per month. Larry may claim the two younger children, Shawn and Darren, as dependents for income tax purposes. Larry was ordered to maintain medical insurance for the children and to pay ninety percent of the children's uninsured medical expenses. Larry was also ordered to pay $200 per month in permanent spousal support until Rebecca remarries, cohabits with an unrelated adult male, or either party dies, whichever occurs first.

Larry was awarded assets of $12,333 and debts of $14,513. Therefore, he received a negative net worth of $2,130. Rebecca received assets of $46,794 and debts of $40,464. She received a net worth of $6,330. Included in Rebecca's assets were the homestead and the accompanying debt.

Larry has appealed certain economic provisions of the decree of dissolution.

I. Scope of Review.

Our scope of review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Id.

II. Alimony.

Larry believes, under the facts of this case, Rebecca is not entitled to alimony. He points out Rebecca is working full time. She has expressed no interest in continuing her education or training.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). Id. A court should consider the one spouse's needs as well as the other spouse's ability to pay. In re Marriage of Bornstein, 359 N.W.2d 500, 502-503 (Iowa App. 1984).

After considering the applicable factors in this case, we determine no alimony should be awarded. Rebecca has a full-time job and is able to support herself. We modify the dissolution decree to eliminate the provision awarding Rebecca permanent spousal support.

III. Child Support.

Larry contends the district court ordered him to pay an excessive amount of child support. The court considered his overtime income in calculating his net income. The court also ordered Larry to pay an amount greater than required by the child support guidelines because it allowed him to name two of the children as dependents for income tax purposes.

There is a rebuttable presumption the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). The court must determine the parent's current monthly income from the most

reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). Overtime wages should generally not be included in income. In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa App. 1981). A child support obligation should not be so burdensome a party is required to work overtime to satisfy it. Id. at 153.

In this case we have found Larry's net monthly income without overtime is about $1800. Rebecca's net monthly income is $674. Under the current guidelines for three children Larry must pay $691 per month in child support. We modify the dissolution decree to make this change in the child support provisions.

IV. Health Expenses.

The district court ordered Larry to be responsible for ninety percent of the health expenses of the children not covered by insurance. Larry states his income is seventy-two percent of the parties' total net income. He believes he should only be responsible for seventy-two percent of the noncovered health expenses. We determine it is equitable for Larry to assume ninety percent of the children's health expenses not covered by insurance.

V. Property Distribution.

Larry contends the property distribution was not equitable because he received a negative net worth, while Rebecca received a positive net worth. He asks for one-half of the parties' equity in the homestead, which would be $3,341.56.

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). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id. We determine the property distribution as set forth by the district court is equitable in this case.

VI. Attorney Fees.

Rebecca has asked for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We hold the parties should be responsible for their own attorney fees. Costs of appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.

Donielson, P.J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I agree with the majority in all respects, except that I would consider Larry's overtime pay in applying the child support guidelines.