



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF
LARRY HAROLD WEGNER AND JOAN ALICE WEGNER

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Upon the Petition of
LARRY HAROLD WEGNER,

)

Petitioner-Appellant,

)

Filed April 20, 1988

)

And Concerning
JOAN ALICE WEGNER,

)

7-412
86-1752

Respondent-Appellee.

)

Appeal from the Iowa District Court for Marshall County (No. 4065) - Dale
E. Ruigh, Judge.

Petitioner appeals a district court ruling dissolving the parties' marriage,
specifically, the award of \$350 per month permanent alimony to respondent.
AFFIRMED AS MODIFIED.

Pat W. Brooks, of Brooks, Ward and Trout, Marshalltown, for petitioner-
appellant.

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

HAYDEN, J.

The petitioner appeals a district court ruling dissolving the parties' marriage. Specifically, the petitioner appeals the award of \$350 per month permanent alimony to the respondent, contending the district court erred by considering the respondent's current income as opposed to her earning capacity in establishing the alimony award. Our scope of review is de novo. Iowa R. App. P. 4.

The petitioner, Larry Wegner, and the respondent, Joan Wegner, were married in 1960. Two children were born of the marriage. As the younger child is contemplating further education, child support of \$200 per month was awarded to the respondent and is not contested on appeal. During the marriage, both parties have held several different jobs. Currently, the petitioner is running his own gas station and his earning capacity is approximately \$20,000 per year. The respondent was employed at Swift meat packing plant for over ten years, but quit in May 1985 and now works at Party Pac Popcorn. Her present income from this job is approximately \$8,000 per year. Based on the length of the parties' marriage and the parties' present financial circumstances, the trial court ordered the petitioner to pay \$350 per month alimony until either party dies or the respondent remarries.

The petitioner contends on appeal the respondent should not be awarded alimony since she quit her \$8.95 per hour job at Swift, refused to return there for \$5.00 - \$6.00 per hour, and took a job at Party Pac Popcorn for \$3.65 per hour. The petitioner argues the trial court erred in basing the alimony determination on the respondent's current income, rather than her earning capacity at the highest payment level available to her.

A determination of alimony is based on the respective earning capacities and needs of the parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37

(Iowa 1981). Factors to consider are found in section 598.21(3) of the Iowa Code. Section 598.21(3)(c) specifically refers to the "earning capacity" of the party seeking maintenance. In re Marriage of Estlund, 344 N.W.2d 276 (Iowa App. 1983). Our supreme court has noted that a person's "ability to pay alimony is to be determined on the basis of his earning capacity rather than by the amount of his voluntarily reduced income." Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978). This statement is equally applicable to the proposed recipient of alimony.

The respondent worked at Swift for over ten years. She testified she had planned on retiring from that job after working for ten years, at which time she would have earned vested rights in the company pension plan. The evidence shows she left this employment while the parties were separated. She could have returned to this employment voluntarily and refused to do so. She worked at petitioner's gas station for a short period of time at his request. She quit working at the gas station and took a job at Party Pac Popcorn which is her current employment. Her earnings at Party Pac Popcorn are considerably less than she would have received had she returned to Swift.

Upon return to Swift respondent would have earned a minimum of \$5.00 per hour. For a forty-hour week this amounts to an income of \$200 per week or \$11,000 minimum annually. Respondent, of her own volition, refused to return to Swift's employment at a higher salary. We conclude her current earning capacity is, at least, the minimum she could have earned at Swift's instead of her earnings at Party Pac Popcorn. We determine this constitutes a voluntary reduction in income.

Having determined respondent's earning capacity is \$11,000 annually instead of \$8,000 as determined by the trial court, we next consider the amount of her alimony, if any. We determine respondent is entitled to alimony. In consid-

ering the length of the marriage and earning capacity of both parties, we reduce the amount to \$150 per month. The alimony shall terminate upon death of either party or respondent's remarriage.

AFFIRMED AS MODIFIED.

SCHLEGEL, J. (dissenting)

I respectfully dissent. The majority found that the respondent refused to return to her old job at the meat packing plant, which paid a higher salary, thereby constituting a voluntary reduction in income.

I do not believe that this case presents a "voluntarily reduced income" scenario. The respondent worked at the meat packing plant for over ten years. She had planned on retiring from that job after working for ten years, at which time she would have earned vested rights in the company pension plan. There is evidence that the petitioner requested the respondent to come and work for him at his gas station. The respondent did so, but after the parties' reconciliation proved unsuccessful, she moved on to her current job at Party Pac Popcorn. These facts do not present a situation where the respondent voluntarily left a higher paying job in order to obtain better alimony payments. Rather, her move was prompted by previously-formulated retirement plans and requests made by the petitioner.

I believe the trial court was correct in looking at the respondent's earning capacity in her current job, not in a different and former job that she could potentially have again. To view her earning capacity as that which she could earn from the meat packing job would, under the circumstances, be the equivalent of requiring the respondent to return to a job she left for valid and permissible reasons. I therefore agree with the trial court that the respondent's earning capacity was approximately \$8,000 and would affirm accordingly.