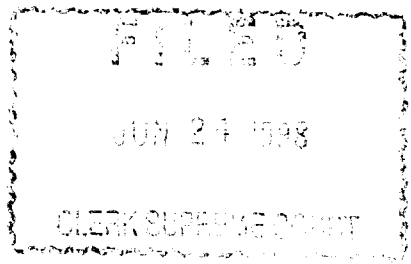
IN THE COURT OF APPEALS OF IOWA

No. 7-585 / 96-1936
Filed June 24, 1998

IN RE THE MARRIAGE OF H. BERNICE KELLER AND KENT B. KELLER



Upon the Petition of
H. BERNICE KELLER,
Appellee,

And Concerning
KENT B. KELLER,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Kent Keller appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Gregory A. Johnston, Muscatine, for appellant.

Linda L. Allison of Allbee, Allison & Denning, P.C., Muscatine, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

STREIT, J.

Kent Keller appeals the court's valuation of his premarital home and pension. He also appeals the court's refusal to award him alimony. The premarital value of the home is within the permissible range of the evidence. The lump sum due to Bernice Keller (Bea) from Kent to equalize the property award is modified to reflect the value of the premarital pension. The court's refusal to award alimony is affirmed due to Kent's ability to support himself.

I. Background Facts & Proceedings.

Kent and Bea Keller were married on August 2, 1980. It was Kent's second marriage and Bea's third marriage. They were no children born of this marriage. At the time of trial, Kent was fifty-three and Bea was fifty-five years of age.

Kent is employed at Nabisco. He earned approximately $43,800 in 1995. Bea works part-time as a beautician, and earned approximately $8400 in 1996. She earns approximately $16,000 a year from investments derived from her inheritance.

Both parties brought property to the marriage. Kent owned his home, a car, and a pension plan through his employer. The pension plan was worth approximately $20,000 at the time of the marriage. Bea owned her home and a $400,000 inheritance interest. Kent sold his home at the time of the parties' marriage and moved into Bea's home.

In 1990, Kent was diagnosed with multiple sclerosis. The disease has progressively affected Kent's performance at work, and his doctor has suggested Kent

terminate his employment. Because of his illness, Kent must take a number of medications. Following his diagnosis, Kent was placed on short-term disability for a period of six months on three separate occasions. Pursuant to the company disability plan, he will receive full pay for twenty-four weeks, followed by two weeks at two-thirds his regular compensation. After that, Kent will be covered under the company's long-term disability plan, which provides for sixty percent of his final base pay until age sixty-five or until he receives social security.

Bea filed a petition for dissolution of marriage on March 4, 1996. After hearing, the trial awarded Bea her American Life Insurance policy valued at $410, her home, a 1993 Buick, and her inherited investment accounts, for a total of $455,000. Kent was awarded his 401(k) plan, his Nabisco pension, his bank accounts, a mutual fund, and two life insurance policy valued at $3991, for a total of $221,621. Bea was ordered to pay marital debts totaling $22,787 and Kent was ordered to pay debts of $1350. Because Kent was awarded $186,254 of marital assets and Bea was awarded only $34,910, Kent was ordered to pay Bea $70,000, payable within ninety days of the decree. The court placed a lien on Kent's 401(k) plan and pension to secure payment. The court declined to award Kent alimony. Kent appeals.

II. Standard of Review.

Our review is de novo. Iowa R. App. P. 4. *In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to

view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

III. Refusal to Award Kent Alimony.

Kent argues he should have been awarded alimony of one dollar per year so if his disease progresses to the point he is incapable of self support he can seek to have the award increased. Alimony is an allowance to a former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

Alimony is not a right, rather, an award depends upon the circumstances of each case. *In re Marriage of Miller*, 532 N.W.2d at 162. It is sometimes used to remedy the inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3).[1] *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy the inequities in a marriage and to

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[1] Among those factors are the length of the marriage; the property brought to the marriage by each party; the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services; the age and physical and emotional health of the parties; the contribution by one party to the education or increased earning power of the other; and the earning capacity of each party. The court may also consider "other factors the court . . . determine[s] . . . relevant in an individual case." Iowa Code § 598.21(3)(1997).

compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997).

Alimony and property distribution are considered together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great. *In re Marriage of Geil*, 509 N.W.2d at 742; *In re Marriage of Hitchcock*, 309 N.W.2d 432, 438 (Iowa 1981).

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). Generally, it is payable for life or for so long as a dependent spouse is incapable of self-support. *In re Marriage of O'Rouke,* 547 N.W.2d 864, 866 (Iowa App. 1996). 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).

Kent has multiple sclerosis. For the three years prior to trial, Kent alternated between six-month short-term disability from his employment and six months on the job. He expected that within months of the trial he would have to permanently end his employment with Nabisco. His doctor has told him he should not be working.

Bea disputes the stage of Kent's disease. She points out that at the time of trial Kent was working full time, had moved into a third-floor apartment, and continued a normal lifestyle.

The physical health of the parties is one of the factors required to be considered under section 598.21(3)(b) in determining whether alimony should be awarded. However, the likelihood of future medical problems is not sufficient to justify an award of alimony when the other facts in the record do not justify alimony. *See In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991).

The record does not justify an award of alimony to Kent. Kent has been employed at Nabisco for over twenty-five years. His earning capacity is much greater than Bea's. His job is secure. Even if he were to end his employment immediately, his long-term disability income of $22,680.00 would be comparable to Bea's combined employment and investment income of $24,267.00. His benefit package from Nabisco gives him short-term disability for six months at full salary, two weeks of pay at sixty percent of his salary, and long-term disability at approximately one-half of his salary. His retirement contributions and health insurance continue when he is on disability as they would if he continued employment. Kent's social security benefits would be approximately $12,000 per year. He has a substantial 401K and pension plan. He leaves the marriage with assets of approximately $116,000. The prospect of Kent being unable to support himself is unlikely. The trial court correctly denied him alimony.

IV. Valuation of Home.

The parties stipulated their home was worth $110,000 at the time of trial. Kent argues the house was worth $80,000 when they got married and, thus, increased in value by $30,000 during the marriage. The trial court determined the home was worth $90,000 when the parties married and, thus, increased in value by $20,000 during the marriage.

There is scant evidence on the record to determine this issue. Bea testified the house was worth $100,000 when the parties married. Kent offered a tax assessment document which valued the home at $78,850 in 1981. Based upon this evidence, the district court placed the $90,000 value on the house. The value placed on real property by a trial court will not be disturbed on appeal if the value is within the permissible range of the evidence. *In re Marriage of Swartz*, 512 N.W.2d 825, 827 (Iowa App. 1993). The trial court's valuation is well within the permissible range of the limited evidence available to value the house. The premarital value of the house is affirmed.

V. Valuation and Division of Kent's Pension Plan.

Kent was awarded his pension from Nabisco. He argues, however, the district court erred in its valuation of his premarital pension. The court determined $68,667 was acquired during the marriage. After taking into consideration the property divisions between the parties, the court ordered Kent to pay $70,000 to achieve a more equitable division of the property between the parties. Kent argues he should

pay Bea less to equalize the property division because the court overvalued the marital portion of his pension.

Pension benefits are treated as marital property in Iowa and are properly subject to equitable distribution. *In re Marriage of Mott*, 444 N.W.2d 507, 510-11 (Iowa App. 1989). The appellate courts of this state have devised several schemes for the distribution of pension benefits in a dissolution. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997).

The parties dispute the premarital value of the pension plan that should be used in the division. The court's valuation of Kent's portion of the plan failed to take into consideration the growth of the premarital portion of the plan.

The parties were married in 1980. There is not sufficient evidence for this court to interpolate the figures to find a 1980 value for the plan. The documentation closest in time to the marriage is a 1988 value of the plan. At that time the plan had a value of $31,824.00. The parties agreed the pension plan was worth $88,667 at the time of trial. We modify the decree and order the parties to present to the district court a Qualified Domestic Relation Order[2] (QDRO) equal to $28,421.50 (fifty percent of $56,843.00 -- the growth of the pension plan during the marriage). The simplicity and fairness of a QDRO is far superior to the percentage approaches. *In*

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[2] The QDRO shall be in a form approved by the Plan Administrator pursuant to Internal Revenue Code section 401(a)(13) and ERISA section 206(d)(3).

re Marriage of Kurtt, 561 N.W.2d 385, 389 (Iowa App. 1997). Kent is entitled to one hundred percent of any increase in the pension benefits accruing after trial.

The lump-sum settlement to Bea ordered by the district court included the portion of the pension the court calculated Bea was entitled to. Because we have modified the manner in which the pension will be paid, we also modify the lump sum payment from Kent to Bea. Kent is ordered to pay Bea $34,500 to equalize the property settlement.

AFFIRMED AS MODIFIED.