IN THE COURT OF APPEALS OF IOWA

No. 8-030 / 97-526

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IN RE THE MARRIAGE OF HUGH C. BRIGGS AND JOSEPHINE A. BRIGGS

FILED
MAR 27 1998
CLERK SUPREME COURT

Upon the Petition of
HUGH C. BRIGGS,

Appellant,

And Concerning
JOSEPHINE A. BRIGGS,

Appellee.

Appeal from the Iowa District Court for Calhoun County, William C. Ostlund, Judge.

Hugh Briggs appeals from a ruling of the district court denying his request for modification of the parties' dissolution decree to reduce his alimony payments. **AFFIRMED.**

James L. Sayre of James L. Sayre, P.C., Des Moines, for appellant.

David E. Green and Julie Greteman of Green & Siemann, Carroll, for appellee.

Heard by Cady, C.J., and Huitink, and Mahan, JJ.

CADY, C. J.

Hugh Briggs appeals from a ruling by the district court denying his request to modify the alimony provision of a dissolution decree. He maintains the district court erred by failing to find a substantial change in circumstances warranting a modification in the alimony provision of the decree. He also appeals the trial court's award of attorney fees. We affirm the district court.

Hugh and Josephine Briggs married in June 1988. Josephine was sixty-five years old, and Hugh was sixty-three years of age.

Hugh and Josephine entered into an antenuptial agreement prior to the marriage. The agreement provided neither party could make a claim against the other for alimony or support. Josephine suffered a heart attack in 1992, as well as a series of strokes. She entered a nursing home in August 1993, as a result of her poor health.

Hugh and Josephine dissolved their marriage in May 1994. Josephine was paralyzed on her left side and bedridden at the time. Despite the antenuptial agreement, the district court awarded Josephine alimony in the amount of $500 per month beginning June 1, 1994. The alimony increased to $1,000 per month in November 1996.

A conservatorship and guardianship were established on behalf of Josephine in 1995. She remained bedridden and her only source of income, other than the monthly alimony, was monthly social security of $505.

Josephine qualified for Title XIX assistance in 1996, after a Miller trust was established for her. The trust was established because although Josephine's income exceeded the maximum level to enable her to qualify for Medicaid nursing home and medical benefits, it was insufficient to pay for the full cost of her care. *See* Iowa Admin. Code r. 441-75.24 (1997); *see generally Miller v. Ibarra,* 746 F. Supp. 19 (D. Colo. 1990) (discussion of judicial creation of trusts for incompetent persons as a method of excluding income for Medicaid eligibility purposes); *L.M. v. State Div. of Medical Assistance & Health Serv.,* 659 A.2d 450, 454 (N.J. 1995) (discussing background for Miller trusts). All Josephine's income was paid into the trust, which then allocated to her only enough income to qualify her for Medicaid nursing home benefits. Upon her death, the trust provided for the corpus to be used to reimburse the State for the balance of the Medicaid benefits paid on her behalf.

After Josephine began to receive the Medicaid benefits, Hugh commenced this action to modify his alimony obligation. He asserted his support was no longer necessary due to Josephine's receipt of Medicaid. He also produced evidence his income had decreased, although his net worth had increased from the time of the divorce from $610,675 to $646,000. The district court denied the petition to modify.

On appeal Hugh claims the district court erred by denying his request for modification of the alimony portion of the dissolution decree. He asserts changes in his income and Josephine's receipt of Title XIX benefits constitute a substantial change in circumstances not contemplated by the trial court at the time of dissolution.

He also contests the district court's award of attorney fees to Josephine and maintains she should not receive attorney fees on appeal.

I. Modification

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997). When determining the appropriateness of alimony, we consider: (1) the earning capacity of each party; and (2) present standards of living and ability to pay balanced against the relative needs of the other. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa App. 1997); *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *Gonzalez*, 561 N.W.2d at 99. Many factors are considered in determining the appropriate amount of alimony to be awarded to a spouse. *In re Marriage of Siglin*, 555 N.W.2d 846, 850 (Iowa App. 1996); Iowa Code § 598.21(3) (1995). Alimony may be 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). We also consider the division of property in determining alimony. *Siglin*, 555 N.W.2d at 850.

A. Antenuptial Agreement

Hugh initially challenges the district court's decision to award any alimony because of the parties' antenuptial agreement. It is our function to review arguments presented to the trial court, and not arguments raised for the first time on appeal. *See Podraza v. City of Carter Lake*, 524 N.W.2d 198, 203 (Iowa 1994). Hugh did not appeal from the decree of dissolution of marriage. Further, he did not raise the antenuptial argument in his petition for modification of the decree. We will not consider Hugh's challenge to the antenuptial issue when he did not raise this issue in the modification petition or on direct appeal from the district court's dissolution decree.

B. Changes in Health and Income

Hugh also claims changes in his health and spendable income constitute a substantial change in circumstances not contemplated by the trial court. Hugh maintains he ceased his farming activities because of his age and upon the recommendation of his physicians. He contends his income will drop from approximately $54,000 per year to approximately $33,000 per year.

Although Hugh's income may drop in 1997, his net worth increased from $610,675 to $646,000. The record indicates he sold one of his homes. The sale of

the home not only increased Hugh's liquid assets, but will also eliminate additional expenditures. Further, Hugh remodeled his home at a cost of $35,000 and purchased new equipment valued at $26,000. In light of Hugh's increase in assets, his sources of income, and his recent expenditures, we do not find the change in Hugh's income to be a substantial change in circumstances. Additionally, because of the parties' ages at the time of dissolution, and because health problems naturally occur with age, we find the changes in Hugh's health were contemplated by the district court at the time of the decree. They do not support a modification of the original decree.

C. Title XIX

The background and purpose of the Title XIX (Medicaid) program are well established.

> The Medicaid program, established in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396- 1396q, as amended, is a cooperative federal-state program designed to "provid[e] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." States participating in the program must develop Medicaid plans that contain "reasonable standards" for determining Medicaid eligibility. These plans must comply with the Medicaid statute, Medicaid regulations, and the Secretary's own administrative rules. The Medicaid program is the primary source of public assistance for elderly persons living in nursing homes.

Clark by Clark v. Iowa Dept. of Human Serv., 513 N.W.2d 710, 710-711 (Iowa 1994) (quoting *Washington v. Bowen*, 815 F.2d 549, 552 (9th Cir.1987) (citations omitted)). By statute, Iowa participates in the federal-state program established by Title XIX. *See* Iowa Code ch. 249A.

The Miller Trust is a part of the Medicaid system. It was established to protect those who found themselves caught in the "Medicaid gap," where their level of income was just above the Medicaid cutoff point but insufficient to cover the complete cost of nursing home care. *See L.M. v. State Div. of Medical Assistance & Health Serv.*, 659 A.2d at 454. The trust permits those in the "gap" to qualify for full Medicaid nursing home benefits by placing their income into the trust. *Id.* The State is then entitled to receive from the trust funds that amount which they paid out for medical assistance on behalf of the nursing home occupant.

On the other hand, public policy and legislation oppose arrangements where individuals structure their finances to allow Medicaid to pay for their medical expenses. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460, 469 (1981) (upheld the right of a state to deem one spouse's income as available to the other for purposes of determining Medicaid eligibility); *Clark by Clark*, 513 N.W.2d at 711 (income for Medicaid eligibility purposes determined as of its receipt, not after reduction by payments under spousal support order, thus disallowing attempt to reduce husband's income via spousal support order to qualify him for Medicaid eligibility); *Ford v. Iowa Dept. of Human Serv.*, 500 N.W.2d 26, 32 (Iowa 1993) (annuity calculation was reasonable interpretation of Medicaid rules); *Torner by Torner v. State*, 399 N.W.2d 381, 384 (Iowa 1987) (diversion rule governing the computation of Medicaid recipient's income which allowed diversion of institutionalized spouse's funds to noninstitutionalized spouse permitted only if

noninstitutionalized spouse did not have income to meet SSI standard upheld); *In re Marriage of Cerven*, 335 N.W.2d 143, 146 (Iowa 1983) (where wife was in nursing home, transfer of assets to son in order to shield husband from support obligations was a sham); *In re Benson*, 495 N.W.2d 777, 782 (Iowa App. 1992) (in the context of determining child support in dissolution proceedings, support is not structured so as to make families eligible for supplemental security income).

Further, federal law requires States to impose periods of ineligibility for individuals who transfer assets for less than fair market value in order to qualify for Title XIX benefits. *See* 42 U.S.C. § 1396p(c), (e)(1); *see also* Iowa Admin. Code r. 441-75.23 (rule governing transfer of assets for Medicaid eligibility in Iowa). Additionally, Iowa law provides receiving any transfer or assignment of a legal or equitable interest in property for less than fair consideration with the intent of enabling the other party to obtain Title XIX benefits, creates a debt owed to the State by the recipient of the benefits as a result of the transfer. *See* Iowa Code ch. 249F. Iowa Code section 249.A5 also provides the State must seek reimbursement of Medicaid benefits from the estate of the person who received the benefits.

Hugh claims the Title XIX benefits received by Josephine justified the termination of his alimony obligation. He points out his alimony payments no longer provide any benefit to Josephine, and the only beneficiary of the alimony is the State. He asserts the interest of the State, however, is an improper factor to support a continued award of alimony.

Hugh's argument initially appears compatible with the elimination of alimony. Need is a major component of alimony, and Josephine no longer requires the alimony to meet her financial demands. We have previously recognized that the elimination of need by a dependent former spouse is consistent with the elimination of an alimony obligation. *See In re Marriage of O'Brien*, 491 N.W.2d 202, 206 (Iowa App. 1992). On closer examination, however, we believe Hugh's argument fails to properly consider the underlying mechanisms which enabled Josephine to eliminate her financial dependence upon Hugh.

Josephine eliminated her financial dependence upon Hugh by qualifying to receive a new source of support from the government. This new source of support, however, was established not only to assist the financial needs of those, like Josephine, who find themselves caught in the "Medicaid gap," but to preserve the financial integrity of the Medicaid program. *See L.M. v. State Div. of Medical Assistance*, 659 A.2d at 454. Under the "Medicaid gap" program, the government generally assumes the financial burdens of recipients in exchange for their available income. *Id.* The exchange of this income is important because it helps preserve the desired financial integrity of the Medicaid program. *Id.* Thus, the interests of the State are intimately intertwined into the process, and must necessarily be considered in determining whether to eliminate a source of income to the trust.

Any relevant factor may be considered in establishing alimony, as well as determining whether it would be modified. *See* Iowa Code §§ 598.21(1), (8). Under

the facts of this case, we conclude it is proper to consider the interests of the State in determining whether to modify Hugh's alimony obligation. The integrity of the "Medicaid gap" program is dependent upon the receipt of the income of the eligible person. This program was not established to relieve an income source of its obligation to pay the income, but is dependent upon the continued payment of that income.

We are convinced Hugh has failed to show a change in circumstances to justify modification of alimony. At the time of the divorce between Hugh and Josephine, the district court established Hugh's future spousal obligation of support for Josephine. No circumstances have changed to justify a modification of that obligation since the State is now dependent on the income. Furthermore, a spouse should not be able to avoid an alimony obligation by actions which tend to circumvent the Title XIX provisions. *See In re Marriage of Cerven*, 335 N.W.2d 143, 145 (Iowa 1983).

II. Attorney Fees

We have considerable discretion in awarding attorney fees. *Gonzalez*, 561 N.W.2d at 99. To overturn an award of attorney fees, the complainant must show the trial court abused its discretion. *Id.* We find the trial court did not abuse its discretion in awarding attorney fees and we decline to disturb the trial court's findings.

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *Kurtt*, 561 N.W.2d at 389. In determining whether to award appellate

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attorney fees, we 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 decision of the trial court on appeal. *Id.*

Considering Josephine's need and both parties' ability to pay, we find Hugh should contribute $1500 for Josephine's appellate attorney fees.

We have considered all of the claims raised by Hugh and affirm the district court.

AFFIRMED.