

IN THE COURT OF APPEALS OF IOWA
IN RE THE MARRIAGE OF SAMNIENG ROSE MARTIN
AND JOSEPH H. MARTIN

FILED

MAR 09 1988

CLERK SUPREME COURT

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Upon the Petition of)

SAMNIENG ROSE MARTIN,)

Petitioner-Appellant,)

Filed March 9, 1988

And Concerning)

JOSEPH H. MARTIN,)

Respondent-Appellee.)

7-338
86-1590

Appeal from the Iowa District Court for Black Hawk County (No. 34167),
John Bauercamper, Judge.

Petitioner appeals the decree dissolving her marriage. **AFFIRMED AS
MODIFIED.**

David D. Dunakey of Dunakey & Klatt, Waterloo, for petitioner-appellant.

Robert D. Fulton of Fulton, Frerichs, Martin & Andres, P.C., Waterloo,
for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

The petitioner Samnieng Martin appeals the economic provisions of the decree dissolving her marriage. She contends the trial court's awards of alimony and child support were inadequate. She also requests attorney fees for this appeal. We affirm as modified.

Samnieng and Joseph Martin were married in 1967. Two children, now ages thirteen and sixteen, were born of the marriage. Samnieng received a high school education in Thailand, but according to Job Service of Iowa has a limited earning capacity. She is currently a cleaning woman earning \$5,000 a year. Joseph works at John Deere and has a net income of approximately \$24,000. Joseph will be eligible to receive his pension in seven years, or he can wait twenty-one years when he will turn sixty-five.

The trial court awarded Samnieng the marital residence and furnishings, a car, two bank accounts, and an insurance policy. Joseph was given a truck, boat, insurance policy, and his credit union account. The trial court ordered Joseph to pay \$80 per child per week in child support. He was also ordered to pay one-third of his pension benefits to Samnieng as alimony when he began receiving it. There was no provision made for any temporary alimony.

Our review is de novo. Iowa R. App. P. 4. We review the facts and law and determine the parties' rights anew where the issues have been properly presented and preserved. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985).

Samnieng contends the child support and alimony awards were inadequate. She argues she does not earn enough money and that Joseph has the ability to pay more.

Initially, we conclude the child support award is adequate. Samnieng receives \$640 per month for the support of the two children. This amount is adequate to meet the needs of the children. We will therefore not disturb it.

The real fighting issue in this case is the trial court's denial of alimony to Samnieng before Joseph begins receiving his pension. The trial court stated the amount of alimony should be limited because Samnieng received a substantial portion of the marital assets.

We conclude the award of one-third of Joseph's pension benefits as periodic alimony is adequate under the circumstances of this case. See Petition of Sturtz, 415 N.W.2d 173, 174 (Iowa App. 1987). We make this determination because Joseph has worked at John Deere for twenty-three years, eighteen while married to Samnieng, and has not challenged the trial court's decision on this point. This alimony award appropriately balances Samnieng's needs against Joseph's ability to pay.

However, we also conclude alimony should have been awarded during the period prior to Joseph's receipt of his pension. The record shows Joseph is eligible to begin receiving his pension in seven years. He can also wait twenty-one years if he wishes. It is uncertain when he will decide to retire. One certainty, however, is that Samnieng has a limited ability to support herself. Joseph has a monthly net income of \$1,800, while Samnieng has a monthly net income of approximately \$400. Her basic living expenses exceed her income. We conclude, after considering the factors enumerated in Iowa Code section 598.21(3), that Joseph should pay Samnieng \$200 per month in spousal support. We feel this award is necessary because of the eighteen-year marriage, Samnieng's limited education and earning capacity, and her need. This support will end upon Samnieng's remarriage, death, or Joseph's death. When Joseph begins receiving his pension benefits, the amount will increase or decrease to one-third of his pension benefits in accordance with the trial court's decree.

Samnieng also requests appellate attorney fees. The award of attorney fees is not a matter of right but depends on the respective parties' ability to

pay. In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). Both parties' ability to pay is limited, but Joseph is financially capable of contributing to Samnieng's fees. We order him to pay \$900 of Samnieng's fees. One-half of the costs of this appeal will be paid by each party.

AFFIRMED AS MODIFIED.

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

DONIELSON, J. (specially concurring)

I concur specially in the majority's opinion. The majority states that alimony in this case shall end upon "Samnieng's remarriage, death, or Joseph's death." In addition, I find that alimony should end upon cohabitation of Samnieng with a person of the opposite sex. I believe that cohabitation is synonymous with remarriage for purposes of deciding termination of alimony.

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

I concur in all respects with the majority opinion except I would not terminate Samnieng's spousal support upon her remarriage.