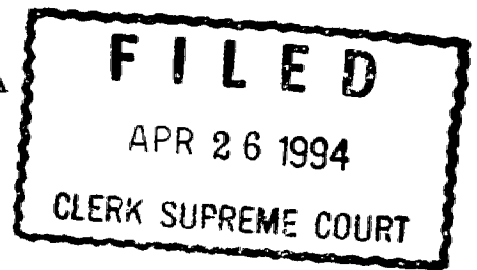


IN THE COURT OF APPEALS OF IOWA

No.4-082 / 93-1104



IN RE THE MARRIAGE OF KATHLEEN DEE HARTL AND
LEONARD JOHN HARTL

Upon the Petition of
KATHLEEN DEE HARTL,

Petitioner-Appellee/Cross-Appellant,

And Concerning
LEONARD JOHN HARTL,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Winneshiek
County, Robert J. Curnan, Judge.

Leonard appeals and Kathleen cross-appeals from the
alimony and attorney fee provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

Calvin R. Anderson and Stephen J. Belay of Anderson,
Wilmarth & Van Der Maaten, Decorah, for appellant.

Marion L. Beatty of Miller, Pearson, Gloe, Burns,
Beatty & Cowie, P.C., Decorah, for appellee.

Richard D. Zahasky, Decorah, for minor child.

Heard by Schlegel, P.J., and Habhab and Cady, JJ., but
decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady,
and Huitink, JJ.

CADY, J.

This is an action to dissolve the twenty-eight-year marriage of Kathleen and Leonard Hartl. They have one minor child, Daniel, affected by the dissolution. He was thirteen years old at the time of the decree. In accordance with the parties' stipulation, the district court ordered joint custody. Kathleen was designated as primary custodian. The parties' daughter, Julie, is twenty-one years old. She is in her final year of college. The parties' assets were divided consistent with their stipulation. A settlement pertaining to their farm assets was reached just prior to the trial, but details were not disclosed to the court. The only contested issues for trial were Leonard's request for monthly alimony of \$1200, Kathleen's request for child support, and the parties' requests for attorney fees.

The parties were married in 1965. Kathleen was a school teacher, and Leonard worked for an engineering firm. Leonard eventually went into teaching. In 1977, he began to manage the parties' business. The parties had purchased 360 acres of farmland since their marriage and started a business in 1977 building agricultural structures. In 1985, Leonard suffered a stroke which left his left arm and leg paralyzed. He recovered sufficiently to manage a farming operation he shared with his brother-in-law, but remains confined to a wheelchair. Leonard also has diabetes and high blood pressure. At the

CONFIDENTIAL

time of trial, Leonard was fifty-six years old. His income was limited to social security disability benefits in the amount of \$890 per month, supplemented by occasional farm income. Leonard continues to reside in the family home and receives regular in-home health care services.

Kathleen was fifty years old at the time of trial. She worked in the education field throughout the marriage and earned approximately \$45,000 in 1993 as director of marketing and developmental studies at a community college. She also receives the social security benefits for Daniel in the amount of \$462 per month. Kathleen testified that she had been contributing to their daughter's college education and expected to continue doing so. Kathleen is in good health but does take medication for high blood pressure and a hormonal imbalance. Her employment is stable. She is also a candidate for a doctorate degree. She may be considered for a higher level administration position after she receives her Ph.D.

The district court awarded Kathleen child support in the amount of \$1 per month until Daniel reached eighteen or graduated from high school. Leonard was awarded alimony in the amount of \$310 per month until Kathleen reached sixty-five or retired, which was to terminate at the death of either party or at Leonard's remarriage. The parties were ordered to pay their own attorney fees.

Leonard appeals, and Kathleen cross-appeals. Leonard argues among other things that he should have been awarded

GND:156

alimony in the amount of \$1200 per month until his death. He also argues Kathleen should have been ordered to name him beneficiary on her life insurance policy to insure payment of the alimony. Kathleen asserts that Leonard is not entitled to alimony.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the findings of the district court, but give them considerable weight. Iowa R. App. P. 14(f)(7).

I. ALIMONY

Alimony is an allowance to a spouse in lieu of the other spouse's legal obligation of support. In re Marriage of Brown, 487 N.W.2d 331, 334 (Iowa 1992). It is not an absolute right, but depends on the particular circumstances of each case. Id. Alimony can be awarded to either spouse. In re Marriage of Hass, 502 N.W.2d 286, 287 (Iowa App. 1993).

Many factors are considered in awarding alimony, including the length of the marriage, age and health of the parties, division of property, educational levels of the parties, earning capacity of the parties, standard of living of the parties, and ability to pay balanced against the relative needs of the parties. Iowa Code § 598.21(3) (1991); In re Marriage of McQueen, 493 N.W.2d 91, 93 (Iowa App. 1992). The goal is to structure an equitable and just result, given the particular circumstances of the case. Hass, 502 N.W.2d at 287.

The marriage of the parties spanned nearly thirty years. Leonard was fifty-six years of age at the time of trial. Kathleen was six years younger. Leonard leaves the marriage partially paralyzed and confined to a wheelchair. He requires in-home health care assistance. He has other health problems, including diabetes and high blood pressure. The property distribution was considered equal. Both parties held bachelor degrees at the time of their marriage and received master degrees during the marriage. Kathleen is a Ph.D. candidate.

The parties disagree over their earning capacities. Many factors are considered in determining earning capacity, including age, employment history, education, special training, present earnings, physical and mental health, and hours worked each week. See Iowa Dep't of Human Serv. ex. rel. Gonzales v. Gable, 474 N.W.2d 581, 583 (Iowa App. 1991). Earning capacity looks to the level a spouse can realistically earn, rather than the amount a spouse can theoretically earn. See Myers v. Myers, 592 A.2d 339, 343 (Pa. Super. Ct. 1991).

Kathleen's earning capacity has been enhanced during the marriage, and she leaves the marriage with an earning capacity that has not yet reached its peak. She currently earns in excess of \$45,000 and will likely qualify for a higher paying position after she receives her Ph.D. Leonard, on the other hand, leaves the marriage with a diminished earning capacity. His highest and most

realistic form of employment appears to be farm management. Since suffering a stroke, Leonard has demonstrated an ability to work as a farm manager and earn income. His earning capacity is limited, but the amount of his past earnings have been minimized for income tax purposes and to remain eligible for full disability payments. His earning capacity is greater than his current level of earnings. Notwithstanding, it is substantially less than what Kathleen is capable of earning. His age and physical disability hinder his ability to earn enough to support himself.

Kathleen is given the responsibility for raising Daniel under the decree, including the full financial burden. Although the trial court made no specific finding, it is clear Leonard's ability to contribute child support is severely limited by his disability. It supports a deviation from the guidelines. Daniel, however, is thirteen years old and, because of Leonard's disability, Kathleen receives social security benefits to assist in his financial needs. Kathleen's earning capacity is not affected by the child care responsibilities imposed upon her as the custodial parent.

The actual monthly expenses for Kathleen and her children are likely less than claimed. Furthermore, the oldest child is completing her final year of college. Our review of the record also convinces us that Leonard's actual monthly expenditures, including the cost of future

medical insurance and any nursing care, are likely much less than the \$2,300 he claimed. Yet, Leonard has a clear need for financial assistance beyond his disability payments and the amount he can reasonably earn to supplement his disability payments. The circumstances which impair Leonard's ability to care for himself are permanent. It has been nine years since the stroke, and Leonard still depends on full disability payments.

Considering all the circumstances, we find Leonard is in need of alimony. He leaves the marriage at a financial disadvantage and requires monetary assistance. From our review of the record, we conclude alimony should be established in the amount of \$450 each month. This is a fair and equitable amount and properly reflects the interests and circumstances of the parties. Furthermore, we believe the alimony should be permanent to recognize Leonard's lifelong disability and fixed needs. After Kathleen retires from her employment, the amount of alimony shall be reviewed to allow the court to reconsider Kathleen's ability to pay alimony once her earnings are reduced to retirement benefits. Alimony shall terminate upon the death of either party or remarriage by Leonard.

II.

Leonard claims Kathleen should name him as a beneficiary on one of her life insurance policies. We agree. See In re Marriage of Debler, 459 N.W.2d 267, 270 (Iowa 1990). Kathleen has life insurance available through

her employment at a small monthly cost. Leonard would lose a needed source of support if Kathleen died. Further, he would likely be responsible for the care of Daniel if Kathleen died before Daniel was able to support himself. We believe Kathleen should name Leonard as a beneficiary on a life insurance policy at all times she is employed and has life insurance available through her employment. The cost to Kathleen of providing the insurance is considered in determining the amount of monthly alimony. The minimum amount of insurance shall be \$10,000.

III. ATTORNEY FEES

Both Kathleen and Leonard asked for attorney fees at trial. The trial court ordered the parties to be responsible for their own attorney fees. Kathleen and Leonard now ask for appellate attorney fees.

An award of attorney fees depends largely on the needs of the party making the request and the ability of the other party to pay. Debler, 459 N.W.2d at 270-71. Neither party has an easy ability to pay for the attorney fees incurred by the other. Under the circumstances, the trial court correctly denied an award for attorney fees, and we decline to award attorney fees for this appeal.

In summary, we affirm the trial court's decision to award alimony to Leonard, but modify the alimony provision in the decree. Alimony shall be reviewed by the court upon an application of either party once Kathleen retires from her employment. The alimony shall terminate upon the death

000001

of either party or Leonard's remarriage. Kathleen shall maintain life insurance for the benefit of Leonard until such time as she is no longer employed and entitled to participate in life insurance benefits through her employment. We decline to award attorney fees.

Costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.

All judges concur except Hayden, J., and Sackett, J., who concur in part and dissent in part.

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

I concur with the majority's opinion in all respects except for the amount of alimony awarded to Leonard.

It is obvious Leonard is permanently disabled from a stroke in 1985. His left arm and left leg are paralyzed. He remains confined to a wheelchair. In addition, he is afflicted with diabetes and high blood pressure. There is no hope for Leonard to regain use of his left arm or left leg.

After thirty-six months from the date of their dissolution Leonard's health insurance premiums, through Kathleen's employer, will increase significantly from the present amount of \$182.13 per month. This will be an additional financial burden for him.

Leonard's sole income is derived from social security disability benefits and a minimal amount from a farm interest.

Kathleen is a candidate for a Ph.D. She currently earns about \$45,000 and has not yet attained her full potential in earnings from her vocation.

We should ignore gender when addressing the alimony issue. To do otherwise would be to ignore Iowa Code chapter 598. We address the alimony issue under a gender-neutral classification and are careful in our consideration to avoid sexual stereotypes. See In re Marriage of Bethke, 484 N.W.2d 604, 608 (Iowa App. 1992).

Under the circumstances of this case and these parties I determine Leonard is entitled to at least \$600 alimony

per month from Kathleen. Kathleen clearly has the ability to pay this amount. I would not reduce the alimony upon Kathleen's retirement at this time. It is better to wait until that time to know what the respective parties' health and financial circumstances are.

I agree the alimony shall terminate upon the death of either party or upon Leonard's remarriage.

Sackett, J., joins this concurrence in part and dissent in part.