FILED
MAY 26 1981
CLERK SUPREME COURT

IN THE IOWA COURT OF APPEALS

IN RE THE MARRIAGE OF BRADFIELD

Upon the Petition of)
DORINDA E. BRADFIELD,)
Petitioner-Appellee,)
And Concerning)
NORMAN R. BRADFIELD,)
Respondent-Appellant.)

Filed May 26, 1981

1-106
2-64634

Appeal from Dubuque District Court - Karl Kenline, Judge.

Respondent-husband appeals from economic provisions of trial court's decree dissolving his marriage to petitioner-wife, asserting: 1) that the evidence showed he is disabled to an extent preventing him from earning substantial income; 2) that the evidence was insufficient to show petitioner's disability rendered her less employable than she had been prior to the marriage; 3) that both the alimony award and property division were inequitable; and 4) that disposition of the net proceeds from the sale of the parties' home should have been delayed pending a later determination of the extent of his health problems. AFFIRMED WITH MODIFICATION.

Charles A. Kintzinger and Stephen W. Scott, Dubuque, Iowa, for respondent-appellant.

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent-husband, Norman Richard Bradfield, appeals from economic provisions of trial court's decree dissolving his marriage to petitioner-wife, Dorinda E. Bradfield. He asserts 1) that the evidence showed he is disabled to an extent preventing him from earning substantial income, 2) that the evidence was insufficient to show petitioner's disability rendered her less employable than she had been prior to the marriage, 3) that both the alimony award and property division were inequitable, and 4) that disposition of the net proceeds from the sale of the parties' home should have been delayed pending a later determination of the extent of his health problems. We affirm with modification.

The parties were married on April 28, 1973, each for the second time. Petitioner filed her petition for dissolution on February 2, 1979. Following an August 14, 1979 hearing, trial court entered its decree on November 21, 1979. At the time of hearing petitioner was fifty-three years old. She was not employed outside the home during the twenty-one years of her first marriage or during her marriage to respondent. She worked briefly in a domestic capacity between her two marriages. At trial, petitioner presented extensive medical evidence to the effect that she suffers from mental illness, personality disorders, and neurological disorders resulting in numbness of her hands. While these health problems existed to some extent prior to the parties' marriage, trial court found that her problems were aggravated during the course of the marriage. Petitioner brought approximately $7,600 into the marriage, most of which was used for various expenditures by the parties.

Respondent was fifty-eight years of age at the time of trial. He worked for approximately thirty-two years as a machine operator, earning $19,501.26 in 1978. He elected early retirement in January, 1979, and began receiving pension benefits of $700 per month. Respondent testified that his early retirement was primarily due to the pain from arthritis that he experienced while performing the lifting required by his job. Respondent also testified to health problems involving skin cancer and an hiatal hernia, although he also indicated these conditions were not disabling. Respondent owned his home free of incumbrance when the parties were married. He also had custody of his one minor son who was age fourteen at the time of trial.

In its decree, trial court awarded petitioner $10,000 interest in the net proceeds from the sale of the parties' home, a 1968 Rambler automobile, household goods and furnishings, a bank account of approximately $1,000, periodic alimony of $10 per month, the balance of the net proceeds from sale of the home ($7,433.92) as lump sum alimony,

fees of $1,500. Respondent was awarded all household goods and furnishings in his possession, all interest in his pension plan and several other items of property. Trial court concluded that petitioner's condition foreclosed her from pursuing many types of work, but found the record devoid of any competent medical evidence substantiating respondent's claim that his health condition prevented him from continuing remunerative employment. Trial court also found respondent had a demonstrated ability to earn income into the indefinite future at a level of approximately $20,000 per year or $11 per hour.

I. Scope of Review. Our review of dissolution proceedings is **de novo.** Iowa R. App. P. 4. We review the facts as well as the law and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Trial Court's Findings of Facts. Respondent claims that trial court erred in its findings of fact and essentially deprived him of a fair and reasonable basis for the equitable distribution of assets of the marriage. We will address his challenges individually.

A. Respondent's Disability. While we agree that respondent is competent to testify about the pain he experiences and the difficulty that it caused him in his job performance, trial court was not persuaded, as this court is not, that his decision to retire was medically required. Respondent offered no medical testimony at trial. In his deposition read into evidence at trial, respondent indicated that a Dr. Nemmers had told him 5 years earlier an arthritic condition is normal for people of his age, that Dr. Nemmers prescribed no treatment or medicine, that the only other contact respondent had with a healing practitioner regarding this condition was in 1978 when Dr. Deming, a chiropractor, prescribed vitamins (which respondent did not take). Dr. Deming also was available to administer treatments to respondent, but he declined saying "I won't until I hurt badly again." He continued to work for almost four years following the original diagnosis of arthritis. We cannot ignore the fact that respondent's retirement occurred just prior to petitioner's initiation of this action for dissolution. The evidence also suggests that respondent's retirement was related in part to his desire to relocate in Florida. While these factors make his decision understandable, they are not sufficient to warrant a conclusion that he is essentially unemployable.

B. Evidence of Petitioner's Disability. Respondent asserts trial court's finding that petitioner has less earning ability than she did at the time of the marriage is erroneous. He argues that because her problems predated the marriage, and because it appears that she can still perform housekeeping duties as she did prior to the marriage, she should not be eligible for more than a nominal amount of support. From our review of the record, we find that petitioner was in relatively good health, both mentally and physically, during the first years of the parties' marriage. The record also shows that her most debilitating physical ailments have manifest themselves during the marriage and that her mental condition has deteriorated.

III. Award of Alimony and Property Division. Respondent argues that petitioner should receive no more than $8,500 in alimony, property, and attorney's fees because the marriage was of relatively short duration, petitioner gave up no career opportunities to enter the marriage, her health was not particularly good at the outset of the marriage, and her financial contribution was comparatively modest. Trial court, in dissolution proceedings, may make such property divisions as are justified. § 598.21, The Code 1981. Justified property divisions are those considered equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). We are guided by the criteria of Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). The court can look at a party's earning capacity, not merely earnings. Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978). Although alimony on one hand and allocation of property rights on the other have different purposes, they are still closely related inthe matter of determining the amount to be allowed. Schantz, 163 N.W.2d at 405.

Trial court, in its ruling, relied heavily on Ellis to support its award of $7,434 in lump sum alimony and $10 per month periodic alimony. We agree with trial court's application of Ellis. However, awarding the entire proceeds from sale of the house leaves respondent with few assets. After reviewing the evidence, we believe respondent should be given the option either 1) to pay $250 per month permanent alimony until petitioner remarries or the death of either party and to receive the $7,434 balance from sale of the house, or 2) to accept trial court's decree awarding petitioner the $7,434 as lump sum alimony and requiring him to pay $10 per month periodic alimony.

IV. Further Proceedings. Respondent finally argues that the uncertain status of his health and future earning capacity required trial court to delay making a decision as to support and property division pending receipt of additional evidence to determine

his work capacity, earning capacity and employment opportunities. We do not agree. Respondent offered no medical evidence at trial, although he knew that the condition of his health would be an issue. His efforts to have the matter re-opened to present such evidence come too late.

V. Attorney Fees on Appeal. Petitioner requests an award for reasonable attorney fees and costs on appeal. Such an award is not allowed as a matter of right, but must depend upon the financial circumstances and earnings of both parties. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). After reviewing the entire financial situation of both parties, we conclude each party should be responsible for his or her own appellate attorney fees. Costs of this appeal are assessed against respondent.

Except for modifiction of the lump sum and periodic alimony awards, we affirm trial court's decree.

AFFIRMED WITH MODIFICATION