FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA A. FOGARTY AND GERALD J. FOGARTY

UPON THE PETITION OF LINDA A. FOGARTY,	)	
Petitioner-Appellant,	)	Filed January 26, 1983
AND CONCERNING GERALD J. FOGARTY,	)	2-382 2-67857
Respondent-Appellee.	)	

Appeal from Linn District Court, August F. Honsell, Jr., Judge.

Petitioner appeals from the decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

Byron G. Riley, Jr. and Gregory J. Seyfer of Bradley & Riley, CedarRapids, for petitioner-appellant.

James F. Pickens of Pickens, Barnes & Abernathy, Cedar Rapids, for respondent-appellee.

Heard en banc.

OXBERGER, C.J.

Petitioner, Linda Fogarty, appeals from the decree dissolving the parties' marriage, asserting (1) that the child support award was inadequate; (2) that the alimony award should not end after ten years but should continue until petitioner-wife's remarriage or death; (3) that respondent Gerald Fogarty's alimony and child support obligations should survive his death; (4) that the trial court should have provided for automatic yearly cost-of-living adjustments to the alimony and child support awards; (5) that the trial court should have awarded petitioner-wife the insurance she owned on respondent husband's life; and (6) petitioner also requests attorney fees and costs on appeal. Respondent concedes issue No. 5. We affirm as modified.

The parties were married in 1964. They have four children, born in 1965, 1966, 1968, and 1969, respectively. Gerald is a physician with an annual income of $91,000. Linda has not worked outside the home since 1966, but she is earning a degree in computer science.

The trial court gave Linda custody of the four children and directed Gerald to pay child support of $30 per week per child. Gerald was also directed to pay alimony of $1,640 per month for 121 months unless Linda remarried or either party died. The trial court did not specifically award the insurance policy Linda owned on Gerald's life to either party.

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 the 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. Child Support

Petitioner argues that the child support allowance of $30 per week per child is grossly inadequate considering the needs of the children and Gerald's financial ability and income.

Our review is governed by the criteria contained in Iowa Code § 598.21 (4)(1981), which need not be repeated here.

With respect to child support and alimony, the earning capacity of each of the parents is to be considered. Cole v. Cole, 259 Iowa 58, 143 N.W.2d 350 (1966); Weiland v. Weiland, 255 Iowa 477, 122 N.W.2d 837 (1963). Gerald, a general practitioner of medicine, has considerable earning capacity. On the facts before us, we are unable to determine what Linda's earning capacity might be at this time. So far as the record discloses, at the time of the dissolution, she was totally dependent upon Gerald's income. The parties' joint income tax return for 1980 reveals that Gerald's income during that year exceeded $91,000. From this amount roughly $10,000 was deducted for business expenses and a Keogh retirement plan and $24,000 in itemized deductions. The parties paid roughly $22,000 in federal and state income taxes. This would leave about $35,000 in disposable income. Gerald was contributing $7500 per year to his Keogh retirement plan. Since this is a voluntary contribution, it may be added to his disposable income for a total of $42,500 per year.

Linda was awarded $1640 per month or $19,680 per year in alimony. This, of course, is a tax deduction to Gerald. Assuming that he is in the fifty-percent tax bracket, the net cost to him of his alimony payments would be $9840 per year, leaving Gerald, before child support payments, with disposable income of $32,660, based upon his 1980 income.

On de novo review, we find that the award of $30 per week per child is insufficient, and that Gerald should be required to pay child support in the amount

of $60 per week per child in order to enable the children to maintain the standard of living that they would have enjoyed had there been no dissolution. The children are in their teens, and there is no doubt that their needs increase as they grow older. In light of Dr. Fogarty's earning capacity and the needs of his children, we feel that this is an equitable amount of child support for him to provide.

III. Duration of the Alimony Obligation

The trial court ordered that alimony be paid for a period of ten years and one month. Linda argues that this is inequitable, since at the end of that period, she will have consumed her alimony in attempting to raise her four children, and will be fifty years old, a difficult time to begin a new career. She argues, therefore, that payments should continue until her remarriage or death without any further limitation.

It appears that Linda will soon be in a position to support herself. Her children are reaching the age of maturity, and even now do not need her full-time care at home. We do not find that the court was in error in providing a limitation upon the duration of Gerald's obligation to support Linda. She has a reasonable amount of time in which to reenter the job market and find suitable employment to support herself.

IV. Termination of Support Obligations upon Respondent's Death.

The court has the power to extend alimony and support payments beyond the death of the party charged with payment so as to bind his estate. In re Estate of Roberts, 257 Iowa 1, 131 N.W.2d 458 (1964); In re Marriage of Kouba, 257 N.W.2d 35 (Iowa 1977); In re Marriage of Beeh, 214 N.W.2d 170, 175 (Iowa 1974).

In each of these cases, the supreme court either affirmed a trial court order providing that at the death of the payor, his heirs, fiduciaries, and assigns would be required to pay alimony or modified the decree to provide that alimony or support payments continue after the death of the payor. Ordinarily, the duty to

pay terminates upon the death of the payor. Kouba, 257 N.W.2d at 38. But under some circumstances, it is reasonable and equitable to extend the obligation to the estate of the payor should the payor die before the obligation is fully discharged. See Beeh, supra.

In this case, we find that the obligation to pay support and alimony should be charged against Gerald's estate in the event that he dies before those obligations are fully discharged. The duty to provide for the four children of this marriage should not fall upon Linda's shoulders alone. On July 9, 1981, Gerald's net worth was in the neighborhood of $274,000. It is reasonable to assume that the estate of a physician with his income will contain assets sufficient to cover these obligations.

On the other hand, we see no reason to require Gerald to purchase life insurance in order to provide for the continuation of these support payments in the event of his untimely death.

We therefore modify the decree to provide that in the event of Gerald's death, his obligation to pay alimony and child support will not terminate, but will be chargeable against his estate.

V. Cost-of-Living Adjustments.

Relying upon In re Marriage of Stamp, 300 N.W.2d 275 (Iowa 1980), the trial court concluded that since Gerald is self-employed rather than salaried, a cost-of-living adjustment to alimony and child support payments could not be implemented without resorting to his tax return, and therefore could not be implemented at all.

We disagree. The recent history of high inflation rates and a rapid deterioration in the purchasing power of the dollar makes it highly desirable for alimony and support payments to be adjusted according to some reasonable cost-of-living measure. The mere fact that one or the other of the parties is self-employed is not sufficient reason for exposing dependents to the vicissitudes of a volatile economy. If the payor's income is not sufficient to enable him or her to

make the payments required under a cost-of-living adjustment, an appropriate petition to modify the decree in light of the circumstances is always in order. There is certainly no need for the court to monitor the tax returns of the payor or the payee on a regular basis. It would be strange indeed if the children of salaried workers at manufacturing plants were to receive the benefits of cost-of-living adjustments, while the children of physicians, dentists, attorneys, and self-employed accountants were denied such benefits.

We therefore modify the decree to provide that alimony and support payments be adjusted each year on July 31 in accordance with the then most recent changes in the Consumer Price Index unless Gerald's income fails to increase during that period. These adjustments are to commence on July 31, 1983.

VI. Ownership of a Life Insurance Policy.

The trial court evidently overlooked a life insurance policy insuring the life of Gerald that was owned by Linda. The parties agree that ownership of this policy should be vested in Linda. The decree is therefore so modified.

VII. Attorney Fees and Costs on Appeal

Linda seeks $7,454.68 in attorney fees and expenses in connection with this appeal. In awarding attorney fees, this court does not determine what the fee should be for either party, but only that, because of the discrepancy between the present earning capacity of these parties, the respondent is entitled to assistance in paying her fee. See In re Marriage of Seidenfeld, 241 N.W.2d 881, 884 (Iowa 1976); In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978).

In view of the relative earning capacities and liquid assets of the parties, respondent is ordered to pay petitioner the sum of $2000 toward her attorney fees.

VIII. Summary

The decree of the trial court is modified as follows: (1) Gerald shall pay $60 child support per month for each of the four children; (2) Gerald's alimony and

child support obligations shall survive his death and be chargeable to his estate; (3) alimony and child support payments shall be adjusted annually on July 31 in accordance with changes in the Consumer Price Index; (4) the insurance policy owned by Linda on Gerald's life is awarded to Linda. Gerald is further ordered to contribute $2000 toward Linda's attorney fees. The trial court's decree is affirmed in all other respects.

AFFIRMED AS MODIFIED.