IN THE COURT OF APPEALS OF IOWA

No. 1-386 / 00-1796
Filed October 12, 2001

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF STEVEN FREDERICK SONGER AND JOY NORINE SONGER

Upon the Petition of
STEVEN FREDERICK SONGER,
Petitioner-Appellant,

And Concerning
JOY NORINE SONGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, James P. Rielly, Judge.

The petitioner appeals the alimony provisions of the parties' dissolution decree. **AFFIRMED.**

Allan C. Orsborn of Orsborn, Bauerle & Milani, Ottumwa, for appellant.

Sarah Wenke of Legal Services Corp. of Iowa, Ottumwa, for appellee.

Heard by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

Steven Frederick Songer appeals the alimony provisions of the decree dissolving his marriage to Joy Norine Songer. He contends the trial court erred in (1) the amount of permanent alimony it awarded, (2) not terminating or reducing his alimony obligation upon his retirement and (3) not ordering that his alimony obligation terminate upon Joy's remarriage or cohabitation. We affirm.

I. Background Facts.

The parties were married in March 1973. Their marriage was dissolved in August 2000, after they had been married twenty-seven and one-half years. Steven and Joy were both forty-six years of age at the time. Their daughter, Andrea, was born in March 1980 and was twenty and one-half years of age.

Steven is employed by Excel Company for whom he grades hog carcasses. His 1999 gross income from Excel was $25,369, more than $1000 less than his average income from Excel for the four immediately preceding years. He is in good health.

Joy was in nurse's training at the time the parties got married and received her R.N. degree in 1974. In August 1974 she began working in the operating room at a local Ottumwa hospital. She developed hospital-acquired, ongoing, resistant infections and was forced to quit her job in February 1976. From February 1976 through November 1979 she acquired and worked in other jobs. They included pediatrics at another local hospital, the Southeast Iowa Blood Center, and the mental health unit at a local hospital. Each time she was forced to quit because of one or more medical problems such as recurrent infections,

allergies and asthma from which she also suffered, and eventually problems with her pregnancy that led to Andrea's birth in 1980.

Andrea had allergies and developed asthma. Steven and Joy decided that because of Joy's and Andrea's health problems Joy would stay home with Andrea. Joy did not again work outside the home until 1995, when she went to work in a local nursing home. That job was short-lived because she developed a respiratory infection and asthma. In February 1996 she began training for a job with a doctor because a nurse who was working for the doctor was going to be quitting. However, the other nurse did not quit as contemplated. Joy developed a respiratory infection that triggered her asthma, and she was unable to continue working for the doctor. She has not worked outside the home since then.

Joy has additional medical problems. She has high blood pressure, scoliosis which causes back pain, pre-cancerous breast tumors, and may have a circulatory disease, Renaut's disease. She suffered from abdominal pain which resulted in July 1999 abdominal surgery in which part of her colon and small intestine were removed.

As of August 1999 Joy had talked to Vocational Rehabilitation about getting training for employment that would not be injurious to her health. She had taken some introduction to computer classes, but a subsequent class was cancelled for lack of enrollment. She injured her right hand and arm in a manner that causes her some limitations and problems. In early August 1999 because of Joy's numerous medical problems Vocational Rehabilitation placed her file in "medical status," meaning some resolution of her medical problems needed to occur before any further vocational planning or rehabilitation could occur. Then,

in October 1999, Joy severely injured her left hand, sustaining a dislocated thumb, structural damage to tendons and ligaments, nerve damage, and resulting reflex sympathetic dystrophy and pain. She also suffers from neuropathy in her ulnar nerve in her left elbow.

The parties stipulated and agreed to a resolution of all issues except alimony and the related issue of whether Steven would be required to pay premiums for health insurance for Joy under a "COBRA" plan. The parties agreed, and the court ordered, that Steven's 401(k) plan with Excel, worth about $15,000, would be divided pursuant to a Qualified Domestic Relations Order (QDRO) with Joy receiving sixty percent and Steven forty percent; that Steven's Excel pension plan benefits would be divided by QDRO pursuant to a formula under which Joy would receive one-half the pension benefits accumulated during the marriage; and that Steven would maintain health insurance coverage for Andrea while she remained a full-time student, but no later than the end of the semester during which she reached her twenty-third birthday. The premiums for Andrea's health insurance are $97.07 per month.

The parties also agreed to, and the court ordered, a division of the parties' other very limited assets and debts.

II. Scope and Standards of Review.

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because

the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Merits.

A. Amount of Spousal Support.

The trial court found that Joy was unable to work at the time of trial and her only income was temporary alimony which had been awarded. It awarded Joy $800 per month permanent alimony and ordered Steven to pay Joy's health insurance premium for a period of thirty-six months pursuant to a "COBRA" plan which was available through his employer. The premiums for Joy's insurance coverage are $174.20 per month. Implicit in the trial court's award is a finding that Joy will not be able to work and earn income within the indefinite future. We agree with the trial court's findings, which are fully supported by the record, and adopt them as our own.

Using his 1999 gross income of $25,369 as a starting point, Steven calculates his net monthly income to be $1548.20. He argues the trial court has thus left him with only $574 per month out of which to pay for Andrea's insurance and meet his expenses, while awarding Joy $974.20 per month. For the reasons that follow we find that Steven's calculation of the amount of net income he will have available to meet his expenses as a result of the trial court's ruling is inaccurate.

Steven asserts Andrea's health insurance premiums must be paid out of the $574 per month which he claims he is left with. To the contrary, the $1548.20 which he claims to be his net monthly income is derived after deducting $97.07 per month for medical insurance premiums for dependents.

Further, the figure of $1548.20 which Steven asserts to be his net monthly income is calculated without taking into consideration the income tax consequences of the alimony payments ordered by the trial court. The "tax consequences to each party" is a factor a court is required to consider in awarding alimony. Iowa Code § 598.21(3) (1999). Steven's alimony payments will be includable in Joy's gross income and deductible from his gross income. *See* I.R.C. §§ 61(a)(8), 71(a), 62(a)(10), and 215(a) (West 1988). Steven calculated his federal income tax to be $2725.35 per year, based on $18,169.00 federal net taxable income, and his Iowa income tax to be $959.75 per year, based on $21,173.65 Iowa net taxable income. However, after deducting $9600 of annual alimony payments from each of those taxable income figures, application of the relevant statutes shows that his federal income tax will be approximately $1285 per year and his Iowa income tax will be approximately $402 per year. *See* I.R.C. § 1(c) (West Supp. 2001); Iowa Code §§ 422.5(1), 422.12(1)(a) (2001). His combined income taxes will thus be about $2000 less per year, $165 less per month, than he asserts and he will therefore have net monthly income of about $739 available to meet his own personal expenses.

We also find Steven's comparison of the amounts of net income the parties will have available to meet their personal expenses to be inaccurate and misleading. He would compare his $574 per month (which in fact turns out to be $739 per month) to $974.20 per month for Joy. However, $174.20 of the $974.20 goes to health insurance premiums for Joy, and Steven apparently does not have any personal out-of-pocket expense for health insurance premiums. Further, the evidence shows without any substantial dispute that Joy has large

monthly expenses for medical and dental care, prescribed medicines, and over-the-counter medications that doctors have told her to take, expenses that Steven apparently does not have because of his good health. Joy's after-insurance expenses for such items is about $225 per month. Therefore, under the trial court's ruling Steven will have about $739 per month to meet his non-medical personal expenses and Joy will have about $575 to meet hers.

Finally, it should be noted that both Steven's obligation to pay Andrea's health insurance premiums and Joy's health insurance premiums will end in about three years. Steven will then have about $270 additional disposable income per month while Joy will either incur substantial expense for health insurance or face much higher expenses for medications and health care.

We conclude the amount of spousal support ordered by the trial court is equitable and affirm on this issue.

B. Termination or Reduction of Alimony

1. Steven's Retirement.

Steven claims the trial court erred by not ordering that his alimony obligation be terminated or reduced upon his retirement. We disagree.

The parties are each forth-six years of age and it will presumably be many years before Steven retires. He will have the opportunity to acquire unknown amounts of additional pension and social security retirement benefits. It appears unlikely Joy will be able to acquire and hold meaningful employment, and thus will need Steven's continued support even after he retires. Although it is at least possible that through resolution or control of some of her health problems, combined with vocational rehabilitation, Joy may be able to acquire employment,

any present estimate of what the parties' incomes or needs will be at and after the time of Steven's retirement would be based on speculation.

In summary, under the presently known circumstances an order for an amount of permanent alimony that continues even beyond Steven's retirement is appropriate. If significant changes in circumstances related to Joy's need for support, Steven's ability to pay, or both, should occur, whether before or at the time of Steven's retirement, he may seek modification. *See In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998) (declining to terminate alimony when payor, who was fifty-six years of age at the time of dissolution, retires and noting that payor could seek modification if circumstances changed upon retirement), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998); *In re Marriage of Hayne*, 334 N.W.2d 347, 353 (Iowa Ct. App. 1983) (declining to terminate alimony when payor retired, where recipient's only source of income was alimony and it would be difficult or impossible for her to find suitable employment and noting that payor could seek modification if his circumstances changed following retirement).

2. Joy's Remarriage of Cohabitation.

Steven argues the trial court erred by not ordering that his alimony obligation terminate upon Joy's remarriage or cohabitation. He argues such termination should occur to shift the burden to Joy to demonstrate extraordinary circumstances warranting continued alimony in the event of her remarriage or cohabitation.

We first note that, contrary to part of Steven's claim of error, the trial court's decree does in fact terminate Steven's alimony obligation upon

remarriage by Joy. Further, an order that automatically terminates alimony upon the recipient's cohabitation is not appropriate. *See In re Marriage of Wendell*, 581 N.W.2d 197, 200-01 (Iowa Ct. App. 1998). We therefore affirm on this issue.

IV. Disposition.

We affirm the trial court on all issues presented.

AFFIRMED.