IN THE COURT OF APPEALS OF IOWA

No. 1-451 / 91-135

IN RE THE MARRIAGE OF MARY JOSEPHINE FARRELL and TERRENCE OLIN FARRELL

FILED
FEB 25 1992
CLERK SUPREME COURT

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Upon the Petition of

MARY JOSEPHINE FARRELL,

Appellant,

And Concerning

TERRENCE OLIN FARRELL,

Appellee.

Appeal from the Iowa District Court for Polk County, Richard D. Morr, Judge.

Mary appeals and Terrence cross-appeals from the alimony provision in the parties' dissolution decree. **AFFIRMED.**

Timothy M. Duffy, Des Moines, for appellant.

William F. Fanter and Dorothy K. Goodman of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Mary and Terrence (Terry) Farrell were married on February 21, 1981. They have one child, Adam Thomas Farrell, who was born on August 27, 1986. During the marriage the parties lived in Des Moines, Iowa.

At the time the parties were married Terry was employed as an optician by Farrell Optical, which was owned by his father. In August 1981, after the parties had been married about six months, Terry was diagnosed as having a brain tumor. He had surgery for this tumor, but later a second tumor was discovered. Terry continued to work for Farrell Optical until June 1989, when his condition significantly deteriorated.

Terry is now considered to be totally disabled. He is not capable of employment and there is little expectation his condition will improve. He needs constant supervision. In April 1990 the parties separated and Terry moved in with his parents, Thomas and June Farrell. Thomas is now retired and June only works part-time. They have devoted themselves, financially and otherwise, to caring for Terry. Thomas and Judith Leibold, Terry's sister, are co-guardians and co-conservators for Terry. Terry receives $649 per month in social security benefits.

Mary has been employed with the Principal Financial Group throughout the marriage. She is presently a senior administrator in the pension department. Mary has an

annual gross income of about $32,000. She also receives $342 per month in social security benefits for Adam. Mary has a high school degree and has taken some college courses. She would like to continue her education in order to progress in her employment.

The district court granted the parties joint custody of Adam and awarded Mary physical care. No child support was ordered due to Terry's disabled condition. The court divided the marital property. Mary was ordered to pay alimony of $400 per month. The court noted that if eventually Terry's parents or sister could not care for him he would need to be placed in an institution. Therefore, the court stated that it should not be a ground for modification in the future if Terry accumulates a large amount of funds.

Mary appealed the award of alimony, and Terry cross-appealed.

I. Our scope of review is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Id.

II. Mary contends that only a nominal amount of alimony should have been awarded in this case at the present time. She states that Terry's needs are being met and that he has accumulated savings while living with his

parents. Mary points out that Terry's guardians could seek a modification in the future if his financial needs increase.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Williams, 449 N.W.2d 878, 883 (Iowa App. 1989). Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. Id.

We affirm the district court's award of alimony. The fact that Terry's parents are willing to support him should not relieve Mary of her financial obligation to Terry. We find that Terry's social security benefits do not meet the full extent of his expenses, and that he accumulated some savings during the separation due only to his parents' charity.

III. In the alternative, Mary contends that the award of alimony was excessive. She believes the district court should not have considered the social security benefits she receives on behalf of Adam in determining her earning capacity. She asks that her alimony obligation be reduced to $100 per month.

In his cross-appeal Terry claims the award of alimony should be increased to $500 per month. We will consider these two arguments together.

Our review of the district court's decision shows the court did not include the social security benefits in Mary's earning capacity, but did consider the benefits as income coming into her household. We agree with the district court's findings that Mary's earning capacity is $32,000, plus she receives $4,100 per year in social security benefits for Adam. Considering that Terry has a total income of $8,200 per year from his social security benefits, we find the award of $400 per month in alimony is sufficient. We affirm the amount of the district court's award of alimony.

IV. Finally, Terry claims Mary should be required to pay his attorney fees for this appeal.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We find the parties should be responsible for their own attorney fees. The costs of this case should be assessed one-half to each party.

AFFIRMED.