IN THE COURT OF APPEALS OF IOWA

No. 8-667 / 98-637

IN RE THE MARRIAGE OF DIANE ISOBEL HERBST AND RONALD THOMAS HERBST

FILED
APR 30 1999

Upon the Petition of
DIANE ISOBEL HERBST,

Petitioner-Appellee,

And Concerning
RONALD THOMAS HERBST,

Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The respondent appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Darin S. Harmon of Kintzinger Law Firm, P.L.C., Dubuque, for appellant.

Robert L. Day, Jr., Dubuque, for appellee.

Considered by Huitink, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Ronald Herbst appeals the permanent alimony and property division provisions of the dissolution decree for his marriage. We modify the duration of alimony and affirm the property division.

Ronald and Diane Herbst were married in 1979. This union produced three children, Dustin, born in May 1981; Catherine, born in March 1983; and Anthony, born in April 1987. Diane was employed throughout the marriage as a seamstress, with an annual income of about $19,500 and net monthly income of $1,432. She has been diagnosed with a bulging disc and may need surgery to repair the condition. Ronald is a truck driver, with an annual income of about $50,000 and net monthly income of $3,193. At the time of the trial, Ronald was forty-one years old and Diane was thirty-seven years of age.

In January 1998, the district court issued a dissolution decree for the parties. The court placed primary care of the children with Ronald, and according to child support guidelines ordered Diane to pay child support of $499 per month for the three children. The amount will be reduced to $417 per month when only two children qualify for support and $285 per month when only one child qualifies. Ronald was ordered to pay alimony of $200 per month until Diane remarries or dies.

The court divided the parties' property to award Diane assets worth $6,000. Ronald was awarded assets worth $69,550. Ronald was ordered to pay Diane a cash property settlement of $31,775 in order to equalize the property division. In addition, each party was awarded a share of the other party's pension benefits.

Ronald filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). The court amended the dissolution decree to provide alimony would continue until Diane dies or remarries, or Ronald dies, whichever occurs first. The motion was denied on all other grounds. Ronald appeals.

We review this equitable proceeding de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa App. 1993). We will give weight to the fact findings of the district court, especially in determining the credibility of witness, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Alimony

Ronald contends Diane is not entitled to alimony. He asserts the court gave too much consideration to her speculative health problems, and alimony would reduce the money he has to available to support the children. Alternatively, if alimony is not abated completely, Ronald claims it should also terminate on Diane's cohabitation or his retirement.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa App. 1997). In determining the necessity and length of alimony, we consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of educations and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa App. 1998).

Diane has been working throughout the entire marriage and there is no indication she will not be able to continue to work in the future, while maintaining or increasing her current income level. The medical problems suffered by Diane have not caused her to miss work, and no work restrictions have been placed on her by her doctor. If Dianes's medical problems worsen it is likely she would still be able to obtain further education or change careers if she so chooses.

Most cases involving permanent alimony have dealt with marriages of long duration and a spouse with little or no potential for future employment. *See In re Marriage of Bell*, 576 N.W.2d 618 (Iowa App. 1998) (Permanent alimony was awarded to a wife who was severely disabled by a stroke which precluded her from future employment. The marriage had lasted thirty-six years. Even with these facts the court reduced the alimony by 50% upon the husband's retirement.); *In re Marriage of Hayne*, 334 N.W.2d 347 (Iowa App. 1983) (Permanent alimony was awarded to a fifty-seven year old wife with no other source of income after a thirty-four year marriage.) In contrast, Diane is employed with a stable position, and she will be able to generate a source of income. Given the circumstances of this case, we believe an award of permanent alimony is not appropriate.

We agree with Ronald that alimony should terminate at his retirement. In its decree, the trial court divided the retirement benefits accumulated during the marriage equally between the parties. Ronald is four years older than Diane and will likely retire before her. If this is the case, Diane would be receiving her salary, in addition a portion of Ronald's retirement benefits and alimony. This would create an

inequitable situation. We modify the trial court's award of alimony to provide that alimony shall terminate when Ronald reaches the age of sixty-five.

Ronald contends his alimony obligation should terminate if Diane cohabitates with another. Generally, it is inappropriate to use cohabitation as an event to automatically terminate alimony in an original dissolution decree. *In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa App. 1998). The question is better reserved for resolution in an action to modify the decree for dissolution of marriage. *Id.* We believe an adjustment to alimony would be better considered at the time of Diane's cohabitation.

II. Property Division

Ronald contends the property division is inequitable to him. He asserts he should have received a set-off for property he brought to the marriage. The parties agreed Ronald had approximately $8,000 in a bank account at the time of the marriage along with some equity in a truck, and Diane brought household goods worth $1,000 to $3,000 to the marriage. The district court did not give credit to either party for premarital assets.

Partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa 1997). Property which a party brings into the marriage is a factor to consider in making an equitable division. *In re Marriage of Wendell*, 581

N.W.2d at 199. We consider the possibility of giving full credit for the premarital property, but are not required to set aside the asset when determining property division.

In determining the property division we have looked at the premarital assets of both parties, but in accordance with 598.21(1) we will consider other factors as well. The marriage lasted for eighteen years. Diane does have some health concerns. Because both parties worked throughout the marriage, both made many contributions to the marriage. In light of all the circumstances, we believe the property division set out by the district court is equitable to both parties.

III. Attorney Fees

Diane requests attorney fees for this appeal. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d at 389. We have taken into consideration the relative financial conditions of the parties at this time and order Ronald to pay $1,000 for Diane's attorney fees.

We modify the trial court's dissolution decree by providing alimony shall terminate when Diane dies or remarries, when Ronald dies, or when he reaches age sixty-five, whichever occurs first. We affirm the property division and order Ronald to pay Diane's appellate attorney fees. Court costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.

No. 98-637. [8-667] IN RE MARRIAGE OF HERBST

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge. **AFFIRMED AS MODIFIED.** Considered by Huitink, P.J., and Vogel, and Zimmer, J. Opinion by Zimmer, J. (6 pages $2.40)

Ronald Herbst appeals the permanent alimony and property division provisions of the dissolution decree for his marriage. Ronald and Diane Herbst were married in 1979, and had three children born in 1981, 1983 and 1987. Throughout the marriage Diane was employed as a seamstress, with an annual income of about $19,500 and she has recently been diagnosed with a bulging disc which may require surgery. Ronald is a truck driver, with an annual income of about $50,000. At the time of trial, Ronald was forty-one years old and Diane was thirty-seven years old. A dissolution decree was issued in January 1998, in which Ronald received primary care of his children. Diane was ordered to pay child support and Ronald was ordered to pay alimony. The court also divided the parties's property. Richard filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). The court amended the dissolution decree to provide alimony would continue until Diane dies or remarries, or Ronald dies, whichever occurs first. The motion was denied on all other grounds. **OPINION HOLDS: I.** Ronald contends Diane is not entitled to alimony and in the alternative requests termination of alimony on Diane's cohabitation or his retirement. Alimony is not an absolute right; an award depends on the circumstances of each case. In viewing the circumstances of this case, we determined permanent alimony was not appropriate. Diane worked throughout the marriage and there was no indication she would not be able to continue to work. Permanent alimony is generally reserved for cases involving marriages of a longer duration and a spouse with little or no potential for future employment. We agreed with Ronald, alimony payments would terminate when he reached age sixty-five. Given the facts that Ronald is four years older than Diane and the retirement benefits accumulated during the marriage had been divided equally between the parties, we felt to force Ronald to pay alimony beyond age sixty-five would be inequitable. On the issue of Diane's possible cohabitation with another, we believe this adjustment would be better considered at the time of the event. **II.** Ronald contends the property division is inequitable to him, claiming the trial court should have given him an set-off of property he brought into the marriage. Iowa Code section 598.21(1) gives us the criteria for property distribution and property which a party brings into a marriage is only one factor to consider in making an equitable division. There is no requirement to set aside the property brought into a marriage. We looked at all of the factors in this situation and determined the property division established by the district court was equitable to both parties. **III.** Diane requested appellate attorney fees. An award of appellate attorney fees is a matter of discretion. In looking at the financial situation of both parties, we ordered Ronald to pay $1,000 of Diane's attorney fees. We modify the trial court's decree by providing alimony shall terminate when Diane dies or remarries, when Ronald dies, or when he reaches age sixty-five, whichever occurs first. We affirm the property division and order Ronald to pay $1,000 of Diane's appellate attorney fees.