FILED
JAN 2 5 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-673 / 89-963

IN RE THE MARRIAGE OF ROBERT ALBERT PATTERS JR. AND MARY KAY PATTERS

231

Upon the Petition of
ROBERT ALBERT PATTERS JR.,

Appellant,

And Concerning
MARY KAY PATTERS,

Appellee.

Appeal from the Iowa District Court for Dubuque County, L. John Degnan, Judge.

Appeal from the economic provisions of a district court decree of dissolution. **AFFIRMED AS MODIFIED.**

Mary M. Schumacher of Roth & Schumacher, Dubuque, for appellant.

Charles A. Kintzinger and Darin S. Harmon of Kintzinger, Van Etten, Setter, Pearce & Scott, Dubuque, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM 232

Appellant Robert Albert Patters, Jr. appeals the decree of the district court dissolving the parties' marriage. He asserts the trial court erred in awarding appellee Mary Patters rehabilitative alimony for thirty-six months and in awarding Mary permanent alimony. We affirm as modified.

The parties were married in 1964. Robert, born in 1943, is presently employed in a supervisory position with John Deere Tractor Works. His gross annual income is between $52,000 and $53,000. He is in excellent health. Mary, born in 1943, is currently employed by the Dubuque Community School District on a contract basis with total income per year from $5000 to $6000. Mary informed the court that she intends to enroll in an intensive two-year nurse's training program. Upon completion of this nursing program, Mary should be capable of securing employment paying a gross salary of approximately $18,000 per year. Mary suffers from moderately severe asthma and rhinitis that requires continual medication. One child was born to the marriage, Dan, on July 30, 1972.

Following a hearing, the district court entered its decree of dissolution of marriage. The physical custody of the parties' son was placed with Mary. Robert was required to pay $600 per month child support. Robert was ordered to name his son as irrevocable beneficiary as to 50% of his current life insurance policies and to name Mary irrevocable beneficiary as to 25%.

Robert was ordered to pay Mary $300 per month in rehabilitative alimony for three years. Additionally, Robert was ordered to pay at least $100 a week permanent alimony plus any additional amount necessary to insure Mary receives a total gross income of $18,000 per year. The decree was silent as to when, if ever, spousal support terminates. Mary's request for attorney fees on appeal has been ordered submitted with this appeal.

I. **Scope of Review.** To resolve the issues presented by the parties we turn to well-established principles. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. **Alimony.** Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). In making an award of alimony the courts are to consider

those factors listed in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), as modified by In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) and now codified in Iowa Code section 598.21(3). See In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983); In re Marriage of Hayne, 334 N.W.2d 347, 350 (Iowa App. 1983).

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). Each partner in the marriage is "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987).

With these general legal principles in mind, we now move to the specific assignments of error in the dissolution decree premised on the evidence present at trial.

A. Rehabilitative Alimony. Robert agrees that Mary is entitled to rehabilitative alimony during the period she is enrolled in the nursing program. He argues, however, that Mary should only receive rehabilitative alimony for the twenty-four months of the program and not for thirty-six months as ordered by the trial court. We agree. Under the circumstances here, the length of the rehabilitative alimony awarded to Mary should be limited to the time

needed to complete the program. Her ability to secure immediate employment is very good. But even if such was not the case, she, simultaneously with the award of rehabilitative alimony, is receiving and will after the termination of the rehabilitative alimony continue to receive an award of alimony. We modify the decree so as to provide rehabilitative alimony of $300 per month for two years.

B. Permanent Alimony. Robert also argues that the trial court erred in granting Mary permanent alimony in addition to her rehabilitative alimony award. We note initially that both rehabilitative and permanent alimony may be awarded simultaneously. See Frye v. Frye, 385 So.2d 1383, 1389 (Fla. Dist. Ct. App. 1980). Rehabilitative alimony permits a former spouse to develop new skills by which the former spouse may earn a livelihood. Even with these newly-acquired skills, however, a former spouse may still be in need of additional support in the form of permanent alimony. In determining the appropriateness of an award of permanent 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 Boehje, 443 N.W.2d 81, 83 (Iowa App. 1989); In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

Upon completion of her nursing degree, Mary should be able to obtain a position paying approximately $18,000 per year. Additionally, Mary's age and health problems obviously will retard her capacity for advancement in nursing. While we conclude that the trial court was justified in awarding Mary permanent alimony, we, however, delete that portion of the dissolution decree which requires Robert to pay Mary the difference between her actual salary and $18,000. Such an award provides Robert with no permanency in regard to the amount of his support payments. It also provides no incentive for Mary to achieve her full earning capacity. The dissolution decree is modified so as to award Mary $100 a week in permanent alimony. The modified award is to continue until Mary's death or remarriage or until Robert's death, whichever occurs first.

III. **Attorneys Fees.** Mary requests appellate attorney fees. 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Guided by these general legal principles, we order Robert to pay $1,500 towards Mary's attorney fee obligation.

Costs are assessed equally between the parties.

AFFIRMED AS MODIFIED.

Donielson, P.J., and Habhab, J., concur; Sackett, J. dissents.

SACKETT, J. (dissenting)

I respectfully dissent. I would affirm the trial court.