FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

59

IN RE THE MARRIAGE OF HELEN ELIZABETH BYWATERS
AND CHARLES ROBERT BYWATERS

Upon the Petition of)

HELEN ELIZABETH BYWATERS,)

Petitioner-Appellee/) Filed January 29, 1986
Cross-Appellant,)

And Concerning)

CHARLES ROBERT BYWATERS,) 5-549
) 85-317
Respondent-Appellant/)
Cross-Appellee.)

Appeal from the Iowa District Court for Guthrie County - A. M. Critelli, Judge

Respondent husband appeals from the decree dissolving the parties' marriage, asserting (1) that the trial court should not have awarded petitioner wife any alimony, and (2) that petitioner wife's attorney fee award is excessive. On cross-appeal, petitioner wife asserts that her alimony and attorney fee awards are inadequate. **AFFIRMED.**

C W. Carlberg of Don Carlos, Carlberg & Jungmann, Greenfield, for respondent-appellant/cross-appellee.

Martin E. Spellman of Spellman, Spellman, Spellman, Spellman & Kaelhofer, Perry, for petitioner-appellee/cross-appellant.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

Petitioner Helen Elizabeth Bywaters and respondent Charles Robert Bywaters began living together in July of 1973. They were married in 1976. It was the second marriage for both parties. No children were born of this marriage; the parties raised Charles's two children from his previous marriage.

Helen worked at Firestone Tire and Rubber until 1975. At that time Helen quit going to work to stay home and take care of the two children. Helen performed all of the housekeeping duties and cared for the children during the marriage. Several years ago, Helen started her own "home interiors" business. The business earned a net profit of $855 in 1983 and Helen expected the same profit in 1984. Helen is fifty-nine years of age and suffers from a heart condition diagnosed as tachycardia and back problems which prevent her from performing manual labor.

Charles is fifty-three years old. He receives a Navy pension and disability payment totaling over $8,500 annually. His gross salary from Firestone was $39,423 in 1983 and was $22,084 for the first half of 1984. Charles suffered a series of heart attacks and in 1980 underwent bypass surgery. His heart condition has not affected his ability to work at the present time.

The trial court awarded Helen part of the parties' household goods, a car, and a truck. She also received a $20,000 property settlement payable in installments of $400 per month at 10 percent. The court directed Helen to pay debts totaling $6,083 and any others arising from her business. The court awarded Charles the house and acreage, the vacation lot, part of the parties' household goods, a car, a motorcycle, some firearms and tools, his insurance policies, some stock, his bank and credit union accounts, his savings bonds, and his profit-sharing plans and pensions. The trial court directed Charles to pay the debts not allocated to Helen. The trial court also directed Charles to pay Helen alimony

of $700 per month for five years, and attorney fees, expenses, and court cost advances of $3,034.88. Charles has appealed and Helen has cross-appealed from the dissolution decree.

Our review is de novo. Iowa R. App. P. 4 (1983). We are not bound by the findings of the trial court, but we give them weight. Iowa R. App. P. 14(f)(7).

Alimony. Charles contends that the alimony award of $700 per month was excessive given the limited duration of the parties' marriage and his earning capacity. On cross-appeal, Helen asserts that the alimony award is insufficient and she requests $1,100 per month.

The criteria to be considered in awarding alimony have been codified in Iowa Code section 598.21(3) (1985). While payment of alimony is not an absolute right, it is awarded out of fairness, according to the peculiar circumstances of each case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible. In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). Two of the factors to be given great weight in such a determination are the duration of the marriage and the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

The disparity in the parties' earning capacities is great. Charles earns approximately $50,000 annually, his employment situation appears secure and his earnings have steadily increased over the years. In contrast, Helen's business profits only $855. Furthermore, Helen sacrificed her opportunity for seniority, pay increases, and pension rights when she left Firestone in 1975 to become a homemaker. Her employment opportunities at the age of fifty-nine cannot

be what she had at age seventeen or at age forty-five. Charles recognizes the valuable contributions Helen made to the home and the rearing of his two boys.

We find that Helen is entitled to alimony. However, given the duration of the marriage, Helen is not entitled to an indefinite award. We conclude the trial court's award of $700 per month for five years is reasonable and appropriate under these circumstances.

Attorney Fees. The trial court is vested with considerable discretion in allowing attorney fees to be awarded. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983). The allowance here appears fair and reasonable and should not be disturbed.

In evaluating a request for attorney fees on appeal, the court must consider the needs of the party making the request and the ability of the other to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We order Charles to pay $750 of Helen's attorney fees incurred on appeal. Costs are assessed to Charles.

AFFIRMED.