IN THE COURT OF APPEALS OF IOWA

No. 4-157 / 93-1008

FILED
SEP 16 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LINDA VIOLET BROWN AND JAMES LEWIS BROWN

Upon the Petition of
LINDA VIOLET BROWN,

Petitioner-Appellee,

And Concerning
JAMES LEWIS BROWN,

Respondent-Appellant.

Appeal from the Iowa District Court for Howard County, Margaret Lingreen, Judge.

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

Richard D. Stochl of O'Donohoe, O'Connor, O'Donohoe & Stochl, New Hampton, for appellant.

Jerry H. Folkers of Dunkelberg, McKinley & Folkers, Osage, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HABHAB, J.

James and Linda Brown were married in November 1964. They have five children, two of whom, David, born in 1979, and Christine, born in 1980, were minors at the time of trial. Both James and Linda were approximately forty-nine years of age at the time of trial. Both are high school graduates.

At the time of the marriage, James was employed at John Deere in Waterloo. James and Linda resided in Waterloo for five years following their marriage, and then moved to a farm outside of Riceville owned by James's uncle, Bill Heller. After moving several times, James and Linda moved a large house onto the property owned by Heller.

James continued to work for John Deere for approximately ten and one-half years following the marriage. In addition, James farmed on a part-time basis, raising hogs, milking cows, and growing crops. In 1978, James quit his job with John Deere and began farming full-time on a forty-acre tract he had purchased from his mother's estate in 1972. James also rented eighty acres from Heller. James and Linda continued to farm full-time until the farm economy made their operation unprofitable. James obtained employment at White Farms in Charles City and earned between $15,000 and $16,000 per year. James also earned $9782 in farm land rental income.

Linda reentered the work force in 1985 when she opened up an archery shop. Linda was primarily responsible for

the operations of the business, and ultimately obtained a client base of over 300 people. Linda maintained an inventory of between $6000 and $7000. Linda also worked part-time as a waitress at the Hang Out Lounge and part-time at the Riceville Locker. Linda had a net monthly income of $1025 from all three jobs. Linda eventually quit the job at the Riceville Locker and now has a net monthly income of about $400.[1]

James and Linda inherited considerable property during the marriage. In addition to the forty acres James purchased from his mother's estate, James inherited a 210-acre farm from Heller. James also inherited a one-half interest in a 146-acre tract known as the Wermuth property. Linda inherited the sum of $11,726.18 from her mother's estate. This money was used to purchase some livestock, pay living expenses and pay for their daughter's wedding. In total, James and Linda accumulated assets worth $215,640. They also accumulated debts in the amount of $210,160.72. After the parties separated in 1992, they sold the forty-acre tract and used this money to pay off debts. The capital gain on that sale resulted in a Federal income tax liability in the amount of $15,370 and state tax liability in the amount of $5630.

Following trial, the district court awarded Linda

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1. Linda quit the Riceville Locker job because the two jobs were not on alternating days which sometimes led to work days of 18-19 hours.

property in the amount of $5310. James was awarded property in the amount of $209,015, but was also awarded all of the parties debts, amounting to $210,161. In distributing the property, the district court included both the Wermuth property and the Heller property inherited by James. The district court stated it included such property since Linda's inheritance had been used for the benefit of the family. The division of the inherited property and marital assets and accumulated debts is not at issue on appeal.

The district court awarded Linda physical custody of the children, and ordered James to pay $428 per month in child support, based on James's income of $1650 per month. The district court also ordered James to pay Linda $350 per month alimony. James has appealed.

I. Scope of review. In this equity action, our review is 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 Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

II. Alimony. James argues the district erred in awarding Linda $350 per month in alimony. James makes three assertions to support his argument. He contends the district court improperly interpreted the property

distribution, the court failed to recognize Linda's earning capacity, and the court failed to consider James' inability to pay alimony.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

We find Linda's earning capacity provides a basis for modifying the alimony award set by the district court. James does not specifically provide what Linda's true earning capacity should be. However, we agree with James that Linda's earning capacity should be higher than a part-time job cooking and tending bar.

We recognize the likelihood of a limited job market in Riceville, yet we also recognize James was employed in Charles City at the time of the trial. We find Linda's earning capacity to be higher than the $92 per week she is making at a part-time job. In modifying the monthly alimony payment, we consider Linda's earning capacity to be equivalent to a full-time job (roughly forty hours per week) at minimum wage. As a result, we modify the monthly alimony payment to $100.

Although James also raises the issue of whether permanent alimony was appropriate in this case, he fails to state, argue, or cite any authority to support his argument

on this issue. We deem this issue waived pursuant to Iowa Rule of Appellate Procedure 14(a)(3). Genetzky v. Iowa State Univ., 480 N.W.2d 858, 861 (Iowa 1992).

III. Child support. James argues the child support should be recalculated if the alimony is modified. We agree. As a result, child support is modified to $531.65 per month according to the Child Support Guidelines.

IV. Attorney fees. Linda requests 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 (Iowa App. 1991). We determine each party should pay his or her own attorney fees for this appeal.

We affirm the district court except as we have modified in this opinion. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.