IN THE COURT OF APPEALS OF IOWA

No. 1-214 / 90-1202

IN RE THE MARRIAGE OF ELLA MARIE VANDE KOP AND HERBERT VANDE KOP

Upon the Petition of

ELLA MARIE VANDE KOP,

Appellee,

457

And Concerning

HERBERT VANDE KOP,

Appellant.

FILED
SEP 24 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lyon County, Frank B. Nelson, Judge.

Husband appeals from a dissolution decree, challenging the award of alimony to the wife. **AFFIRMED.**

Michael L. Zenor of Zenor & Carr, Spencer, for appellant.

Randy L. Waagmeester of DeWaay & Waagmeester, Rock Rapids, for appellee.

Considered en banc.

OXBERGER, C.J.

Herbert and Ella Marie Vande Kop were married in 1975. It was a second marriage for each. At the time of the marriage both parties were around fifty years old; currently both are in the middle to late sixties. This marriage resulted in no children, although each party has adult children from the prior marriage.

Herbert has farmed throughout his life. He entered this marriage with substantial farm-related assets. During the marriage he has retired from farming due to his age and health. He still owns some farmland which generates rental income; other farmland has been sold on contract. Livestock and machinery were sold, and the proceeds were spent on a retirement home in town.

Ella Marie brought few assets into the marriage. She has employment experience as a waitress, a store clerk, a housecleaner, and a meat cutter. At trial time she was doing some part-time house cleaning; otherwise she has held little employment since marrying Herbert.

Both parties presently receive social security payments. Herbert receives $590 per month and Ella Marie receives $310 per month.

The district court dissolved the marriage in a decree dated July 6, 1990. The dissolution decree awarded Herbert all the farmland, some 246 acres valued at $319,000. The decree also awarded Herbert all the parties' interest in

the real estate contract concerning the land which was sold; this land amounted to about 150 acres, and the real estate contract generates income of $300 per month. The parties' house in town, valued at $77,000, was awarded to them as tenants in common; Ella Marie has the right to occupy the house all her life, or as long as she wishes to do so, but when the house is sold the proceeds will be split equally between the parties.

Herbert was directed to pay Ella Marie a property division of $50,000. He was directed to pay her alimony of $650 per month until she remarries or dies; he must also pay medical insurance premiums for Ella Marie as additional alimony. The decree specified that this alimony would remain an obligation of Herbert's estate if he dies before Ella Marie. Herbert was also directed to contribute $1,250 toward Ella Marie's trial attorney's fees.

Herbert has appealed from the dissolution decree, challenging only the size and duration of the alimony award. He asks that the alimony be reduced to $250 per month and that it cease upon his death.

Ella Marie requests attorney's fees on appeal. She requests appellate fees of $2,362.50, plus an additional $950 if oral argument is granted.

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).

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 Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). 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 (Iowa 1981). 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 first consider whether the trial court's award of alimony to Ella Marie is equitable. Herbert argues that an award of alimony to Ella Marie is not warranted after considering factors present in case law and codified in Iowa Code section 598.21. We disagree and affirm the trial court's award of alimony. Herbert admits Ella Marie's standard of living had significantly improved from the very

start of this marriage. He argues she gave up no opportunity to enter into this marriage and was on a "dead-end" street before she married him. The record however indicates that Ella was a full-time employee at Iowa Beef Processors, Inc. of Dakota City, Nebraska. She left her home in Nebraska to become a farm wife in this fifteen year marriage. Ella took the responsibility for all the housekeeping, cooking, cleaning and laundry duties, and on occasion helped with the farm work.

Ella is presently sixty-five years of age. She has had no exposure to employment outside the home for fifteen years. She has a tenth grade education and no prospect for employment. Ella Marie has been hospitalized in the past for emotional problems and Herbert admits it is obviously desirable to maintain good health insurance for her care.

In contrast, Herbert states the couple had a "solid middle-class standard of living." He further acknowledges that at the time of the marriage and during the marriage he had substantial abilities in the area of farming and by age 52 had accumulated a level of expertise which made him a success. He does not deny that his income is substantially greater than Ella Marie's nor dispute the court's award to him of all the farmland owned during the marriage.

Herbert seeks to rely upon an antenuptial agreement between the parties. Although he desired at the time for the agreement to be "divorce insurance", Herbert admits the

antenuptial agreement was less than comprehensive. The agreement only addressed the issue of distribution of property of either party in the event of death. We find the antenuptial agreement between Herbert and Ella Marie does not control the issue of alimony presented in this appeal.

Herbert, in asserting Ella Marie gave up nothing of significance for this marriage and therefore is not entitled to alimony, relies upon In re Marriage of Hethcote, 418 N.W.2d 83 (Iowa App. 1987). In Hethcote, this court denied an award of alimony where a wife left the marriage in the same or better condition than she entered. The couple in that marriage however were separated after only six months and their divorce was settled within fifteen months. Herbert and Ella Marie's marriage in contrast lasted fifteen years.

We find the suggestion that a spouse who enters a marriage with little should naturally leave with little is unacceptable and offensive. This court had thought the issue long settled that a spouse's station in life when entering a marriage is irrelevant in light of the life-style to which that person has grown accustomed during the marriage. See In re Marriage of Wallace, 315 N.W.2d 827 (Iowa App. 1981). We find Herbert's reliance upon Hethcote without merit.

Herbert next argues the trial court's order to continue alimony after Herbert's death is unfair in light of the antenuptial contract which expressly waives claims against his estate. We disagree. The antenuptial agreement in this case only addressed the issue of distribution of property in the event of death of either party. It did not address the right to alimony support.

We find it revealing when considering this state's public policy that the Iowa legislature in enacting the Iowa Uniform Premarital Agreement Act, expressly stated that the right of a spouse or child to support shall not be adversely affected by a premarital agreement. 1991 Iowa Legis. Serv. 89 (West). We find the trial court acted within its discretion in providing for Ella Marie's continued support in the event of Herbert's death. We affirm the trial court.

Herbert is directed to pay Ella Marie's attorney's fees on appeal in the amount of $2,362.50. Costs are taxed to the appellant.

AFFIRMED.

All judges concur except Hayden and Donielson, J.J., who dissent.

HAYDEN, J. (concurring in part and dissenting in part)

I respectfully dissent to the majority's affirmance of the duration of alimony awarded to Ella Marie. Also I determine the award of appellate attorney fees for appellee is excessive and unwarranted.

Ella Marie was awarded $50,000, one-half interest in the marital home, and the right to occupy the home during her lifetime. Herbert was held responsible for payment of real estate taxes on the property so long as Ella Marie occupied it. In addition the trial court awarded her $650 per month alimony to continue until she remarries or dies, and this becomes an obligation upon Herbert's estate should he predecease her. The trial court ordered Herbert to maintain medical insurance coverage upon Ella Marie as additional alimony. I determine the alimony should also terminate upon Herbert's death. It should not be made an obligation of his estate.

In view of Ella Marie being awarded $50,000 cash as property settlement, I determine she is financially capable of paying her own appellate attorney fees.

Donielson, J., joins this dissent.