

IN THE COURT OF APPEALS OF IOWA

No. 0-129 / 09-1148
Filed March 24, 2010

IN RE THE MARRIAGE OF BRENDA L. BORDEN AND NELSON G. BORDEN

Upon the Petition of

BRENDA L. BORDEN,
Petitioner-Appellee,

And Concerning

NELSON G. BORDEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Jones County, Kristen L. Hibbs,
Judge.

Nelson G. Borden appeals from the decree dissolving his twenty-three
year marriage challenging the equity of the alimony he was ordered to pay
Brenda L. Borden. **AFFIRMED AS MODIFIED.**

Matthew J. Reilly of Eells & Tronvold Law Offices, P.L.C., Cedar Rapids,
for appellant.

Adrian T. Knuth of Knuth Law Office, Anamosa, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Nelson G. Borden appeals from the decree dissolving his twenty-three year marriage challenging the equity of the alimony he was ordered to pay Brenda L. Borden. We affirm as modified.

SCOPE OF REVIEW. We review de novo. *In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa Ct. App. 1990). While not bound by the trial court's factual findings, we give them weight in considering the credibility of witnesses. *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa Ct. App. 1991). We will disturb that determination of a district court only when there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

BACKGROUND AND PROCEEDINGS. Brenda, born in January of 1961, and Nelson, born in March of 1955, married in November of 1986. Two children were born to the marriage, a daughter in April of 1988, and a son born about a year later. Both children are employed and neither is subject to support.

At the time of the marriage Brenda was unemployed.¹ She remained unemployed outside the home for some period. About seven years ago Brenda, with financial assistance from her parents, went back to school and became a licensed practical nurse. She worked part-time for six years and at the time of the dissolution hearing had been working for about a year as a "charge nurse" at a care center. She was guaranteed thirty-two hours of work and was earning nineteen dollars an hour. She was about to become, through her employment,

¹ The parties' cohabitated for about eighteen months prior to marriage and during the first year of cohabitation Brenda was employed. She quit the job six or eight months prior to marriage because she and Nelson worked different schedules and she testified she was subject to sexual harassment in her employment.

eligible for retirement benefits and health insurance. She contends the insurance may cost her sixty dollars a pay period. There is no evidence that she brought any assets to the marriage.

At the time of the dissolution, Nelson was employed by Rockwell Collins where he had worked for some thirty-three years. He is paid twenty-five dollars an hour. He has retirement benefits and health insurance through his employer. At the time of marriage he had owned for some five years the home the parties lived in at the time of their separation. He also had some accrued retirement benefits with Rockwell Collins.

When the parties came to trial they basically had agreed to a division of their assets. Brenda was to receive one-half of approximately two-thirds of Nelson's retirement benefits as of the date of the dissolution. The parties had prepared a Qualified Domestic Relations Order that memorialized the agreed division and it had been approved by Rockwell Collins. Debts were allocated and Nelson was to receive the parties' home, which the parties agreed was valued at \$75,000 and subject to a mortgage of about \$28,000. The allocation made resulted in Nelson receiving about \$40,000 in assets and Brenda having about a \$1000 negative net worth. Consequently, Brenda requested that Nelson pay Brenda a \$20,204 settlement. The questions of whether Brenda should receive alimony and whether Nelson should pay a portion of her attorney fees were not settled.

The matter came on for hearing on July 13, 2009, and the district court filed its decree the same day. The court indicated it would enter the Qualified

Domestic Relations Order separately. The court accepted the parties' agreement that Nelson would get certain property including the parties' residence. It ordered that Brenda should receive an equalization payment of \$20,000 and further provided that if it was not paid in six months, then the home be sold and Brenda should have the first \$20,000 of the proceeds. The court ordered Nelson to pay Brenda alimony or spousal support of \$575 a month payable until the death of Nelson or Brenda or Brenda's remarriage. Each party was to pay their own attorney fees and one-half of the court costs.

The district court found the decision that Brenda stay home to raise the children was a joint decision. The court initially found Nelson's gross annual earnings to be \$53,600 a year and Brenda's to be \$32,000 a year. The court found the difference in net incomes, after deducting estimated taxes, to be \$13,850. Brenda contended she should have half of the difference, or about \$577.07 a month. The court then considered the difference in the parties' FICA payments, the fact this was a long-term marriage, the fact Brenda was a full-time mother, and that Brenda needed to supplement her earnings to become self-supporting at a standard of living reasonably comparable to what she enjoyed during the marriage. The court also considered Nelson's ability to continue to work at his current level and the other provisions of the decree, and set alimony at \$575 a month ending at Nelson's death, Brenda's death, or Brenda's remarriage.

ALIMONY. Nelson contends he should not have been required to pay alimony, but if he should pay alimony it should be decreased in both amount and duration.

“Alimony is a stipend to a spouse in lieu of the other spouse’s legal obligation for support.” *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). It is not an absolute right and whether it is awarded depends on the circumstances of the particular case. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996) (superseded by statute on other grounds as recognized in *In re Marriage of Shanks*, 758 N.W.2d 506, 510-11 (Iowa 2008)). When addressing a challenge to an award of alimony we consider the factors set forth in Iowa Code section 598.21A(1) (2007).

Traditional or permanent alimony, such as the district court provided for here, is awarded to allow a spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and is payable for life or for so long as a dependent spouse is incapable of self-support. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 854 (Iowa Ct. App. 1998); *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining, with the goal of establishing self-sufficiency. *Grady-Woods*, 577 N.W.2d at 854.

Nelson argues that both parties are physically and emotionally healthy and capable of self-support and that both have productive earning years ahead of them. He argues that the property division was not inequitable, for Brenda

received credit for half of the party's equity in their home, including equity that Nelson put in the house before the marriage. Nelson recognizes that Brenda's parents paid her educational costs, but he argues that he assisted her in receiving the education and she currently has more education than does he. He also notes that Brenda is educated to work in a field that offers employment opportunities, she has no child care responsibilities at this time, and that the opportunity to become a registered nurse is available to her which would increase her income. He disagrees with the district court's finding that Brenda needs the alimony to live at a standard of living comparable to that which she enjoyed during the marriage. He argues that the standard of living she now enjoys is comparable or exceeds the standard she enjoyed during the marriage. He points out that during the marriage his earnings were not substantially greater than what Brenda earns now and his wages supported Brenda, two children, and himself. He further argues that the alimony awarded by the district court will put her in a position better than he is in. He contends the district court's position that these parties should each receive half of their combined total earnings was rejected by this court in *In re Marriage of Hayne*, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). He argues he had the job he now has when he married Brenda and she has done nothing to enhance his earnings.

Brenda contends the alimony award is justified because the parties were married for twenty-three years, she remained home to raise the parties' children, and she has only been working full-time for a year. She points to the fact that she makes less than Nelson, is only guaranteed thirty-two hours of work a week,

and would not be able to participate in her employer's retirement plan until a few days following trial. She said while she would have health insurance from her employer following the dissolution of her marriage, such a policy has a high deductible.² She also contends that Nelson will receive more Social Security when he retires than will she and that if their current earning continued in the same amount during their working years, he would receive \$1707 a month and she \$853. She argues that she is at a disadvantage in comparison to younger persons in her field, and because her job is physically demanding she will not be able to work in it for a prolonged period of time. She also argues that because Nelson has worked for the same employer for thirty-three years his income is more secure and his retirement benefits will allow him to live comfortably when he retires, but she has not accumulated retirement savings during the parties' marriage, has no retirement safety net, and does not have sufficient time to accrue retirement benefits. She also contends that the property division only equalized the property and did not generate a windfall for her. She maintains the payment will be used to pay off debt and allow her to find a suitable place to live, and will not contribute to her retirement.

We agree with Nelson that the amount of alimony awarded should not necessarily be determined by subtracting the gross income of the lesser earning spouse from the gross income of the greater earning spouse and awarding the lesser earning spouse one-half the difference as traditional alimony. This is not

² The only evidence of the amount of the deductible is Brenda's testimony that some of her fellow employees complained about it being high. There is insufficient evidence here for us to make any comparison as to the value of the health insurance either party's employer provides and we do not do so.

contemplated by Iowa Code section 598.21A, nor is it in accord with case law. See *Hayne*, 334 N.W.2d at 351.

In assessing the equity of the alimony award we consider a number of things. This is a twenty-three year marriage and Brenda did not take a job outside the home for a period so that she could raise the parties' children. Both parties are in good physical and emotional health and have a number of years where they should be able to engage in gainful employment. However, Nelson is six years older than Brenda. He, in all probability, will have fewer future earning years. Brenda has more education than does Nelson, and while he did not pay for the education, he supported Brenda and the parties' children during the time she obtained it. Brenda's education will, in all probability, enhance her future earnings and her opportunity for advancement, which are proper factors to consider in assessing the equity of the economic provisions of a dissolution decree. See *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984).

We agree with Nelson that Brenda's standard of living while working only thirty-two hours a week without alimony is not substantially less than what she enjoyed during the marriage. Her financial affidavit indicates that her salary during the separation was more than sufficient to meet her monthly needs. However, she may have additional expenses following the dissolution because of her need to pay her share of employer-provided health insurance. While Brenda complains that Nelson has a greater retirement, we cannot say that she is without retirement benefits because she shares those benefits the parties

accrued during the marriage. Nor can we accept her argument that Nelson's future employment is more stable than is hers.

When we look to the amount of permanent alimony a payee spouse should receive, if any, we must consider not simply present income, but his or her earning capacity as directed by Iowa Code section 598.21A(1)(e). See *In re Marriage of Hitchcock*, 309 N.W.2d 432, 436-37 (Iowa 1981). If both parties are in reasonable health, they need to earn up to their capacities in order to pay their own present bills, and not lean unduly on the other party for permanent support. *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988). Brenda leaves the marriage with an education and skills enabling her to support herself and accumulate additional funds to support her in retirement.

Traditional or permanent alimony is usually only payable for life or for so long as the dependent spouse is incapable of self-support. *Hettinga*, 574 N.W.2d at 922. That is not the case here. The fact one party may generate more income than the other is not the controlling factor in the alimony award where both parties have the education and potential to supply for themselves a very adequate living, as they do here. See *In re Marriage of Mouw*, 561 N.W.2d 100, 102 (Iowa Ct. App. 1997). Traditional alimony is not called for here. We modify the decree to eliminate the provision that Nelson pay traditional alimony of \$575 a month.

While the award of traditional alimony was not appropriate, we do, however, believe that an award of rehabilitative alimony to compensate Brenda for the years away from the job market and to assist her with additional education

to enhance her earnings, is justified. We modify to provide that Nelson shall pay Brenda rehabilitative alimony of \$300 a month for forty-eight months.

We award no appellate attorney fees. Costs on appeal shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.