

IN THE COURT OF APPEALS OF IOWA

No. 2-510 / 11-1794
Filed September 6, 2012

**IN RE THE MARRIAGE OF STEPHEN L. CARR
AND NISLA H. CARR**

Upon the Petition of

STEPHEN L. CARR,
Petitioner-Appellant,

And Concerning

NISLA H. CARR,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Stephen B. Jackson,
Judge.

Stephen Carr challenges the alimony provisions of the district court's
dissolution decree. **AFFIRMED.**

Mark D. Fisher of Nicey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar
Rapids, for appellant.

Cheryl L. Weber and Laura L. Folkerts of Dutton, Braun, Staack &
Hellman, P.L.C., Waterloo, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Stephen and Nisla Carr divorced after twenty-two years of marriage. During the marriage Stephen provided the primary financial support for the family, and Nisla cared for the couple's two children. In this appeal Stephen asks us to modify the spousal support provision of the dissolution decree. He contends the amount and duration of the support he is ordered to provide Nisla is inequitable.

Considering the length of their union and the difference in the parties' earning capacities, we find the district court's award of traditional alimony to be reasonable and affirm. We also award Nisla \$3000 in appellate attorney fees.

I. Background Facts and Procedures

Stephen enlisted in the Air Force in 1986 at the age of twenty-three. After being stationed in Panama for two years, he met Nisla—a twenty-one-year-old first semester student at the University of Pharmaceutics in Panama. Although she had never lived in another country, five months after meeting Stephen, Nisla discontinued her studies and accompanied him when he was transferred to a military base in North Dakota. They married in May 1989. The couple's son Stephen was born in October 1989 and their daughter Stephanie was born in October 1991.

Neither party brought substantial assets into the marriage. At the time of their first move, Nisla—a native Spanish speaker—had limited English language skills and did not know how to drive a car. She had completed twelve years of

school and intended to become a pharmacist. Except for one sister who lives in Florida, Nisla's family members remain in Panama.

Throughout his military career, the Air Force frequently transferred Stephen to different bases. After leaving Panama in 1989, the Carrs lived in North Dakota until December 1993, in Illinois until June 1996, in Hawaii until June 1999, in Italy until May 2001, in Louisiana until May 2003, in Alaska until March 2006, and in Mississippi until March 2007 when Stephen retired from the military. The family then moved to Iowa. During the marriage Nisla stayed home to care for the children and occasionally volunteered at their schools, in part to improve her English skills. While stationed in Italy, Nisla underwent back surgery. A week after the operation, the family relocated to Louisiana to be closer to Stephen's ailing grandmother who lived in Texas. Nisla acquired her driver's license at that time.

In 2004 Stephen injured his back while swimming. He receives periodic injections to treat the injury, and takes pain medication. At times the pain affects his ability to walk. He has experienced numbness and tingling below the waist and partial loss of feeling in his left foot.

When the family moved to Mississippi in 2007 and in anticipation of Stephen's upcoming military retirement, Nisla began working part-time selling shoes at Walmart. Stephen's top pay grade in the Air Force was \$36,000 per year, not including benefits and housing. After Stephen's retirement from the Air Force, the family bought a home in Cedar Rapids. Stephen began working for the Duane Arnold Nuclear Power Plant at a starting salary of \$70,000 per year.

Nisla transferred to a nearby Walmart. She continued to work in the shoe department until 2008 when she left to visit her dying mother in Panama and to care for her daughter, who was involved in a serious automobile accident.

The parties separated in December 2009 and Stephen filed for divorce on January 27, 2010. Nisla remained in the marital home while Stephen moved into an apartment. That same month Nisla began working as a skycap, handling luggage and wheelchairs at the Cedar Rapids airport. In February 2010, the district court ordered temporary support for Nisla in the amount of \$500 per month, plus \$1000 from Stephen's military pension. She also received \$5000 from their 2009 joint income tax return. Nisla began working at American Eagle in October 2010, preparing and de-icing planes. She held both airport jobs for the next three months until her car broke down. To coordinate transportation with her son, who also works at the airport, she quit her position as skycap and continues to prepare planes.

In December 2010, Stephen left his \$120,000 per year position at Duane Arnold and moved to Texas to work as a nuclear power cyber-security specialist. His annual salary is currently \$100,000.

The district court heard the case in September 2011 and entered its decree on October 25, 2011. The parties entered divorce proceedings with a significant amount of debt, mostly accrued since Stephen's retirement from the Air Force. Because the marital home is in foreclosure, the district court ordered neither party would be responsible for any debts or obligations associated with the real estate and each should cooperate and take all necessary actions to

avoid a deficiency judgment. The district court awarded the parties their personal bank accounts and the vehicles in their possession. Although Stephen offered to be responsible for all debts listed on the financial statement, the district court assigned each party the debts in their respective names, which totaled \$20,575 for Nisla and \$76,775 for Stephen.¹

The district court directed Stephen to pay spousal support of \$1500 per month to Nisla until July 1, 2028, or until her remarriage or death, whichever occurs first.² The court initially awarded Nisla one-half of Stephen's retirement pay that accrued during the parties' marriage. After parties submitted their appellate briefs, and during a limited remand, the district court modified the decree to award Nisla "45% of Stephen's disposable retired pay each month."

II. Scope and Standard of Review

Because dissolution is an equitable proceeding, our review is de novo. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Although we give weight to the district court's fact findings, especially when considering witness credibility, we are not bound by them. *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008). Precedent is of limited value due to the fact-driven nature of each case. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We afford the district court considerable latitude in its alimony determination under

¹ The district court also assigned Stephen the marital home's second mortgage, in the amount of \$97,000, because his vehicles were encumbered by that debt.

² At trial Nisla requested \$2500 per month in rehabilitative alimony the first three years to allow herself to go to school; \$1500 per month in traditional alimony for twenty years; and for the remainder of her life, \$500 monthly.

the statutorily enumerated factors, and will disturb its finding only when the award is inequitable. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996).

III. Analysis

Alimony is a payment to a spouse in lieu of the other spouse's legal obligation for support. *Anliker*, 694 N.W.2d at 540. Divorcing spouses cannot claim an absolute right to alimony; the award depends upon the facts and circumstances of each particular case. *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007).

We recognize traditional, rehabilitative, and reimbursement payments as the three forms of spousal support. *Becker*, 756 N.W.2d at 826. Reimbursement payments provide one spouse with a share in the other spouse's future income in exchange for the receiving spouse's previous contributions to that source of income. *Id.* Traditional spousal support is payable either for life or so long as the payee spouse is incapable of self-support. *Id.* Rehabilitative alimony supports an economically dependent spouse through a limited period of retraining following dissolution in an attempt to create opportunity and incentive for that spouse to become self-supporting. *In re Marriage of Shanks*, 805 N.W.2d 175, 181 (Iowa Ct. App. 2011). Because the goal of rehabilitative alimony is self-sufficiency, the award may be limited or extended depending on the needs of the dependent spouse. *Becker*, 756 N.W.2d at 826.

The form, duration, and amount of alimony awarded falls within the discretion of the court. *In re Marriage of Crotty*, 584 N.W.2d 714, 718 (Iowa Ct. App. 1998). Our legislature compiled the following factors to consider:

- a. The length of the marriage.
- b. The age and physical and emotional health of the parties.
- c. The distribution of property made pursuant to section 598.21.
- d. The educational level of each party at the time of marriage and at the time the action is commenced.
- e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
- g. The tax consequences to each party.
- h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
- i. The provisions of an antenuptial agreement.
- j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A (2009).

The district court applied these factors, concluding traditional alimony was warranted because of Stephen and Nisla's disparate earning abilities, the length of their marriage, and the fact their many moves supported Stephen's career. The court intended the alimony to provide long-term assistance to support Nisla. In making its determination, the court recognized both parties would receive a portion of Stephen's military pension in addition to their current incomes, and considered the relevant tax consequences. The court also determined Stephen had the ability to pay the award and Nisla demonstrated her need for the support.

On appeal, Stephen argues he left the marriage in "deteriorating health" with more than \$150,000 in debt, while Nisla is relatively healthier, four years younger, is employed full-time, and wishes to gain further education.

Accordingly, he believes the district court's alimony award was "excessive in both its duration and amount."³ He uses Nisla's last pay stub to calculate a gross yearly income of \$22,230, which is \$1852.50 monthly. He calculates those earnings, plus the \$600 monthly pension, results in a \$2452.50 monthly income before taxes.⁴ He reasons that because her self-reported expenses are only \$1445, more than \$1000 less than her income, "Nisla is clearly capable of self-support." Although he recognizes his calculation does not account for taxes, rent, and debt payments, he concludes even if those figures totaled \$1000 per month, her income would exceed her expenses by \$7.50. Stephen urges us to modify the spousal support payment from traditional to rehabilitative, and decrease the payments to \$700 per month for three years. He contends that award would be "more than sufficient to allow Nisla the ability to obtain retraining."

Nisla argues each of the relevant factors in section 598.21A weighs heavily in favor of traditional alimony, which Stephen has the financial ability to pay. She attacks Stephen's calculation of her monthly expenses, noting it fails to include rent or mortgage payments which she will incur after the foreclosure process on the marital house is completed. She also points to the costs of her health insurance, which the military covered before the divorce. She contends the reduction to \$700 per month in support payments, as urged by Stephen,

³ Stephen accuses the district court of failing to "specifically identify which form of alimony it was awarding to Nisla." In the decree, the court stated its belief "that traditional alimony is appropriate."

⁴ This amount is based on the initial pension division in the decree.

would not provide sufficient financial freedom to pay for classes to improve her employment prospects.

The parties' appellate arguments call for two inquiries: (1) did the district court properly conclude Stephen was able to pay \$1500 per month and Nisla demonstrated her need for that level of support, and (2) was the amount and form of support equitable, given the nature of the marriage. These questions serve as the framework of our analysis.

When determining the amount and form of spousal support, the district court must consider the earning capacity of each party and their present standards of living, as well as one spouse's ability to pay compared to the relative needs of the other. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Stephen makes several calculations to demonstrate the district court wrongly concluded "Stephen has been shown to have the ability to pay such support, and Nisla has demonstrated need for the same."

We first address each party's cash flow. Stephen argues Nisla's income will exceed her expenses by \$1000. But because Stephen did not account for her health insurance costs, monthly rent or mortgage payments, income tax, or personal debt, we find his prediction to be flawed. For his part, Stephen has a monthly income of about \$9000, including his military pension. Not including debt commitments,⁵ he lists his expenses on his financial affidavit at \$5331.

⁵ Stephen argues because his debt responsibility is greater than Nisla's, he is even less able to pay the alimony amount. Nisla responds that Stephen is doing what she feared at trial—taking on additional debt—which will ultimately be reduced—to pay less in spousal support. The district court ordered the parties to be responsible for debts in their own names, and noted Stephen's intent to work with a credit counselor to decrease

While he took on a greater portion of the debt than did Nisla, Stephen remains in a superior financial position.

Stephen concedes his income has increased over time, but argues his health issues may decrease his ability to work. Nisla dismisses Stephen's argument as "mere speculation." The district court considered Stephen's concern he may be unable to continue an eighty-hour work week pace, but held "to the extent that may change, such issues can be dealt with in an appropriate post decree filing."

Our supreme court faced a similar situation in *In re Marriage of Schriener*, 695 N.W.2d 493, 500–01 (Iowa 2005), where the payor spouse consistently worked overtime, but was concerned his age and previous back injuries would cause him to decrease his hours. Although *Schriener* addresses the question whether overtime pay should be included in the alimony determination, the reasoning applies to Stephen's concern for his deteriorating health. The court held:

While [payor's] income may in fact decrease or cease in the future, the fact is that at the time of trial, he was working overtime, and he presented no evidence that he was unable to continue. . . . As the court of appeals observed, if [payor] stops working overtime, he can apply for a modification.

Schriener, 695 N.W.2d at 501. The district court appropriately calculated spousal support as Stephen's income at the time of trial, leaving the door open to a

the amounts he owed. Although Stephen's vehicles are encumbered by the second mortgage, a portion of that debt will likely be discharged by the home foreclosure. Even if the amount of debt remained the same, the disparity in the parties' incomes shows he would be able to afford the alimony payments.

modification should Stephen's health decline affecting his future earning capacity.

Taking into account both parties' cash flow, property distribution, debt obligations, health conditions, and the remaining section 598.21A factors, we find the decree's \$1500 per month award would allow Nisla to maintain a standard of living comparable to that experienced during the marriage, but would not deprive Stephen of the same financial stability. See *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa Ct. App. 1995) (holding spouse is entitled to be supported "in a manner as closely resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living").

We now look to whether the form and amount of the award are equitable, considering each party's role in the marriage. Stephen argues rehabilitative alimony is more appropriate than traditional alimony in this case. He asserts \$700 per month would provide Nisla with "more than sufficient" income to pay for the education required to pursue a career in the medical field. Nisla responds that Stephen's proposed amount may allow her to decrease some hours worked, but does not consider the cost of attending college classes. At trial, Nisla requested a hybrid award of rehabilitative and traditional alimony.

Nisla left her vocational path to support the advancement of Stephen's military career during their twenty-two-year marriage. Nisla has marginally improved her employment skills, but her education level is unchanged. She receives financial support from her son, who also provides her with transportation

and helps around the house. Nisla tried to further her education and enter the nursing field, but twice failed the grammar test required to enroll in community college.

Following a longer marriage, traditional alimony is appropriate to compensate the spouse leaving the marriage at a financial disadvantage, especially when the payee spouse's contribution to the payor's increased earning capacity resulted in the payee spouse's lower earning potential. See *In re Marriage of Debler*, 459 N.W.2d 267, 268–70 (Iowa 1990) (affirming traditional alimony award after twenty-two-year marriage when payee spouse was unskilled, cared for children, earned only high school diploma, lacked retirement benefits, and earned significantly less than payor spouse); *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998) (holding that despite payee spouse's bachelors, masters, and doctoral degrees, where an alimony recipient spends substantial time out of the job market and structured her life to enhance payor spouse's career, she is entitled to traditional spousal support).

Nisla's contributions to the marriage are similar to those that typically justify traditional support. See *Clinton*, 579 N.W.2d at 839. Although she is able to remain in the work force for some time, her income is substantially less than she enjoyed during the marriage. See *Debler*, 459 N.W.2d at 268–70. Her struggle to fully master the English language inhibits her ability to gain higher education.

The district court observed: "It is clear from both parties' testimony that Nisla supported Stephen fully in this career and enabled Stephen to move

numerous times during their marriage in support of this career by maintaining the parties' home and care for their children." The couple's decision that Nisla would raise the children while Stephen advanced his career left her with a diminished earning capacity. Traditional alimony is proper in this situation. See *In re Marriage of Olson*, 705 N.W.2d 312, 316 (Iowa 2005). When considering the factors of section 598.21A, we believe the district court achieved equity by awarding Nisla \$1500 in traditional alimony until July 1, 2028.

B. Is Nisla Entitled to Appellate Attorney Fees?

An award of appellate attorney fees is not a matter of right, but rests within our sole discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the requesting party, the other party's ability to pay, and whether a party was required to defend the decision of the district court on appeal. *Id.*

Nisla requests \$6500 in appellate attorney fees. Given each party's relative financial positions and the fact Nisla was required to defend the district court's decision in Stephen's appeal, we believe it is equitable to award her \$3000 in appellate attorney fees.

AFFIRMED.