

IN THE COURT OF APPEALS OF IOWA

No. 6-283 / 05-1602
Filed August 23, 2006

IN RE THE MARRIAGE OF CYNTHIA L. LAVELY AND JEFFREY A. LAVELY

**Upon the Petition of
CYNTHIA L. LAVELY,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
JEFFREY A. LAVELY,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Cynthia Lavely appeals and Jeffrey Lavely cross-appeals the alimony provisions of the district court decree dissolving their marriage. **AFFIRMED AS MODIFIED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

John W. Hayek of Hayek, Hayek, Brown, Moreland & Hayek, L.L.P., Iowa City, for appellant.

Thomas D. Hobart of Meardon, Sueppel & Downer, P.L.C., Iowa City, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Cynthia Lavelly appeals and Jeffrey Lavelly cross-appeals the alimony provisions of the district court decree dissolving their marriage. Cynthia contends the court erred in failing to award her permanent alimony and in ordering that alimony terminate if she remarries. On cross-appeal Jeffrey contends no alimony should have been awarded. We affirm as modified on the appeal and affirm on the cross-appeal.

I. BACKGROUND FACTS AND PROCEEDINGS.

Jeffrey and Cynthia were married February 25, 1978. They separated in 2004 after nearly twenty-seven years of marriage. Three children were born to the marriage, and all were of legal age at the time of trial. Only the youngest, almost twenty years of age, was eligible for a postsecondary education subsidy, which the district court ordered and which is not at issue.

Jeffrey was forty-seven years of age at the time of trial. He is a high school graduate and completed courses at a community college which allowed him to become a certified master electrician. He has been employed by Proctor & Gamble since 1979 and has worked as an electrician there for the past fifteen years. His current monthly net income is \$3,722.83.

Cynthia was forty-eight years of age at the time of trial. She has a high school diploma and has worked as a secretary in various Iowa City schools since returning to the workforce in 1987. She has worked at Regina Elementary School since 2001. Her net monthly income is \$1,593.60. The court found both parties are in good health and currently capable of working full-time until they reach retirement age.

Cynthia filed a petition for dissolution of marriage in February 2004. Following a June 2005 trial, the trial court issued its written findings of fact, conclusions of law, and a decree in August 2005. The great majority of the parties' property consisted of their home, in which they had equity of somewhat over \$200,000, and Jeffrey's Proctor & Gamble profit-sharing plan, worth approximately \$700,000 at the time of trial. Pursuant to agreement of the parties the court ordered the home listed and sold and the net profits of the sale divided equally between the parties. The court awarded each party one-half of the profit-sharing plan. While Jeffrey is unable to access these funds until his retirement, Cynthia may access her share without penalty. The court considered Cynthia's access to this money when determining alimony. The court then found:

Cynthia should receive spousal support from Jeffrey in the amount of \$1,000 per month for a period of four years to allow her to obtain additional education or training to increase her earning potential and her future income and to become more self-sufficient. This will allow the parties to live at relatively similar levels of income to that which they enjoyed during the marriage. If Cynthia takes the opportunity to obtain additional training and a higher-paying job, she will be in an even better financial position after the four-year period than she is at present. Whether she takes advantage of additional education and training or not, she will still have available to her the funds from the P&G settlement to spend or invest to her own benefit.

The court ordered that Jeffrey pay Cynthia \$1,000 per month in alimony for forty-eight months, or until Cynthia dies or remarries.

Cynthia appeals the alimony provisions of the dissolution decree contending the court erred in awarding her rehabilitative alimony rather than permanent alimony. She argues she should be awarded permanent alimony due to her age, limited education, and limited range of work experience. She argues her access to the Proctor & Gamble funds should not be considered as those

funds are for her retirement. Cynthia further argues the district court erred in decreeing that her alimony would terminate upon her remarriage. She requests this court modify her alimony to award her \$1,000 per month for the first forty-eight months and then \$750 per month permanent alimony thereafter.

Jeffrey cross-appeals contending the district court erred in awarding Cynthia alimony. He argues alimony is not necessary in light of the parties' property settlement. In the alternative, he requests we affirm the district court's decree.

II. SCOPE AND STANDARD OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

III. MERITS.

"Alimony is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1988). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21(3) (2003). *Id.* We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of*

Clinton, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). In marriages of long duration, both spousal support and nearly equal property division may be appropriate, especially where the disparity in earning capacity is great. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *Id.* Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989); see also *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses. *Francis*, 442 N.W.2d at 64.

Traditional or permanent alimony is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Hettinga*, 574 N.W.2d at 922.

[T]he 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, to the extent that that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well.

In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). The economic provisions of a dissolution decree are “not a computation of dollars and cents, but a balancing of equities.” *Clinton*, 579 N.W.2d at 839.

We agree with the trial court’s award of \$1,000 per month rehabilitative alimony for the next forty-eight months to Cynthia. This should allow Cynthia the time and income necessary to acquire retraining or further education in order to increase her earning potential, should she wish to do so. However, we conclude equity requires an award of permanent alimony and the decree should therefore be modified to also award Cynthia permanent alimony of \$500 per month beginning at the end of the rehabilitative alimony and continuing until Cynthia dies or reaches age sixty-six and six months and can receive full social security benefits. Based upon the length of the parties’ marriage, the parties’ ages, Cynthia’s level of education, Cynthia’s substantially lower income and earning capacity than Jeffrey’s, and the fact there is very little likelihood Cynthia will be self-supporting at a standard of living comparable to the one enjoyed during the marriage, we conclude this combination of rehabilitative and permanent alimony is equitable and appropriate.

We do note evidence presented at trial suggesting Cynthia could have additional income of \$20,000 per year by drawing on her share of the Proctor & Gamble pension fund. However, her ability to do so assumes the pension fund will continue to earn its current rate of return, which cannot be guaranteed. Further, Cynthia should not have to use the earnings on her share of the pension fund for current support while Jeffrey does not have to do so.

We further conclude the decree should also be modified to delete remarriage as a terminating contingency attached to the award of alimony. In the event Cynthia remarries, Jeffrey may petition the court for modification of the alimony provisions of the dissolution decree. See Iowa Code § 598.21(8)(g); *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 n.1 (2005).

Based on our determination of the issues raised in Cynthia's appeal, we conclude Jeffrey's cross-appeal should be denied.

IV. DISPOSITION.

We modify the trial court's decree to award Cynthia permanent alimony of \$500 per month to age sixty-six and six months following the forty-eight months of rehabilitative alimony, and to delete remarriage as an event terminating the award of alimony. We affirm on Jeffrey's cross-appeal. Costs on appeal are taxed to Jeffrey.

AFFIRMED AS MODIFIED ON APPEAL; AFFIRMED ON CROSS-APPEAL.