

IN THE COURT OF APPEALS OF IOWA

No. 6-627 / 05-1940
Filed October 11, 2006

**IN RE THE MARRIAGE OF BRENDA L. COLE
AND DAVID M. COLE**

**Upon the Petition of
BRENDA L. COLE,**
Petitioner-Appellee,

**And Concerning
DAVID M. COLE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

David M. Cole appeals the spousal support and attorney fee provisions of
the district court's decree dissolving his marriage to Brenda L. Cole. **AFFIRMED
AS MODIFIED.**

Maegan Lorentzen and Theodore Sporer of Sporer & Ilic, P.C., Des
Moines, for appellant.

Karen Taylor of Taylor Law Offices, Des Moines, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

David M. Cole appeals the spousal support and attorney fee provisions of the district court's decree dissolving his marriage to Brenda L. Cole. We affirm as modified.

I. Background Facts & Proceedings.

David and Brenda Cole were married in July 1989. They separated in June 2004. Shortly thereafter Brenda and David jointly filed bankruptcy. Brenda petitioned for dissolution of marriage on June 30, 2004. Pending final decree, David was ordered to pay Brenda's health insurance premiums and \$350 per month temporary spousal support.

At the time the matter was tried in August 2005, Brenda was thirty-nine years of age. She was employed part-time (thirty-one to thirty-five hours per week) as a waitress at the Philadelphia Bar and Grill, earning five dollars an hour plus tips (averaging twenty to thirty dollars per day). She received no health insurance or other benefits from her employment there. According to the parties' tax returns, Brenda earned \$14,751 in 2004.

Brenda's employment history includes ten years as an unemployment claims analyst at Gibbons Company. From 2001 to April 30, 2004, Brenda worked at Wellmark Insurance, where she earned approximately \$25,000 annually. Brenda's stated reasons for leaving Wellmark were health related, specifically diabetes and a diagnosis of throat cancer requiring surgery. Brenda's last full-time employment was as a convenience store clerk earning \$7.50 an hour.

Brenda has a history of significant medical problems, including diabetes, high blood pressure, and asthma. Aside from her reference to throat cancer as a reason for leaving Wellmark, the record is unclear as to any continuing treatment or disability from that illness. Brenda testified her monthly prescription drug costs are approximately \$200.

David was forty-three years of age at the time of trial. He, along with his brother, owns Tinker Tooling in Altoona. The parties' tax returns and David's testimony indicate that he has earned approximately \$40,000 a year for the five years preceding trial. David earned \$42,000 in 2004.

In an October 26, 2005 decree, the trial court dissolved the parties' marriage and divided their assets and liabilities. Each was awarded a vehicle, subject to liabilities secured thereby. Brenda was awarded the unspecified balance of her retirement accounts. David's IRAs were divided equally with each party receiving \$3250. David was awarded the unspecified value of his interest in Tinker Tooling. Brenda was ordered to pay David one-half of a bankruptcy filing fee (\$354.50), one-half of a ready reserve bank account (\$259.50), one-half of a mediation fee (\$140), and car payments totaling \$1132 David made on her behalf. David was ordered to pay any deficiency judgments or other costs related to the foreclosure of the mortgage on the parties' residence.

In addition, David was ordered to pay Brenda \$600 monthly spousal support beginning on November 1, 2005, and continuing through November 1, 2015. The decree provided for termination of David's spousal support obligation upon the death of either party or Brenda's remarriage. David was ordered to pay \$1929 of Brenda's trial attorney fees, as well as court costs.

On appeal, David argues the following:

- I. The trial court erred in awarding alimony and attorney fees where the recipient failed to demonstrate her need for and the respondent payor's ability to pay in any amount.
- II. The trial court erred in awarding Brenda attorney fees.

II. Standard of Review.

Our scope of review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). Although we are not bound by the district court's findings, we give them deference because the district court evaluated the parties with a firsthand view of their demeanor. Iowa R. App. P. 6.14(6)(g); *Daniels*, 568 N.W.2d at 54. "Prior cases have little precedential value; we must base our decision primarily on the particular circumstances in this case." *Daniels*, 568 N.W.2d at 54; see also *In re the Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Spousal Support.

An award of spousal support is a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Alimony is not an absolute right. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). Spousal support is a discretionary award that depends upon each party's earning capacity and present standard of living, as well as the ability to pay and the relative need for support. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998) (*overturned on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197 (Iowa Ct. App. 1998)). Iowa Code section 598.21(3) (2003) provides factors for the court to consider

when awarding spousal support. The factors include the length of the marriage, the parties' ages and health, the earning capacity of the spouse seeking support, and that spouse's ability to become self-sufficient. Iowa Code § 598.21(3). Rehabilitative alimony is awarded for a limited period of time to allow and provide incentive for an economically dependent spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989).

Based on our de novo review of the record, we conclude an award of rehabilitative alimony is appropriate in this case. David and Brenda were married for sixteen years. Although both have been employed throughout the marriage, their combined incomes have provided for little more than their subsistence. They have a modest net worth, and neither leaves the marriage with a significant amount of property. Their financial security is entirely dependent on their respective earning capacities. Moreover, Brenda's age and lesser earning capacity diminish her prospects to become self-supporting. Her prospects are further diminished by her medical condition and related insurance, medication, and treatment expenses. Brenda's best opportunity to improve her circumstances is by obtaining full-time employment with a salary and benefits sufficient to meet her needs. She will need support for a limited period of time to obtain the education or training necessary to obtain suitable employment. Brenda will also need financial assistance to defray the cost of her medical expenses pending completion of any education or training.

David has the earning capacity to pay a reasonable amount of rehabilitative alimony for the time required to allow Brenda the opportunity to become self-supporting. As noted earlier, David paid \$350 a month temporary

child support, as well as the cost of Brenda's medical insurance pending entry of the final decree. His financial affidavit indicates that he has been able to pay those amounts while continuing to maintain a reasonably comfortable standard of living. Under the terms of the decree, David will no longer be required to contribute towards Brenda's medical expenses and should have sufficient disposable income to pay rehabilitative alimony. We find the amount of monthly alimony set by the trial court is equitable.

We, however, disagree with the duration of the trial court's award. As noted earlier, the purpose of rehabilitative alimony is to support an economically dependent spouse for a limited period of education and training. We believe awarding Brenda rehabilitative alimony for five years is sufficient to accomplish those objectives. We accordingly modify the trial court's decree by reducing the duration of Brenda's alimony award from ten to five years.

IV. Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa 1994); *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Scheppele*, 524 N.W.2d at 680. Brenda's limited earning capacity compromises her ability to pay attorney fees. Because David enjoys a greater earning capacity, he is able to contribute to Brenda's attorney fees. The trial judge did not abuse his discretion by ordering him to do so.

Brenda requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *Kurtt*, 561

N.W.2d at 389. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny Brenda's request for appellate attorney fees. Costs are to be shared equally by the parties.

AFFIRMED AS MODIFIED.