IN THE COURT OF APPEALS OF IOWA

No. 7-785 / 07-0571
Filed January 30, 2008

IN RE THE MARRIAGE OF DAVID R. BRIES AND VANITA C. BRIES

Upon the Petition of
DAVID R. BRIES,
Petitioner-Appellee,

And Concerning
VANITA C. BRIES,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley, Judge.

Vanita C. Bries appeals the spousal support and property division provisions of the decree dissolving her marriage to David R. Bries. **AFFIRMED.**

Stephen W. Scott, Kintzinger Law Firm, P.L.C., Dubuque, for appellant.

Jennifer A. Clemens-Conlon, Clemens, Walters, Conlon & Meyer, L.L.P., Dubuque, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Vanita C. Bries appeals the spousal support and property division provisions of the decree dissolving her marriage to David R. Bries. We affirm.

I. BACKGROUND FACTS.

The parties were married on September 12, 1970, when David was twenty-two years of age and Vanita was eighteen. They have two children, born in 1971 and 1983 and whose welfare is not affected by these proceedings. David filed a petition for dissolution of marriage on May 4, 2006. A trial was held in January 2007 and the trial court filed its ruling on February 26, 2007. Vanita timely appealed in March 2007.

Vanita was fifty-five years old at the time of the dissolution trial. She had only a high school education until she began attending a community college in the fall of 2005. Vanita consistently maintained employment throughout the parties' marriage, while also being the main caretaker of their children. After graduating from high school she worked at Ertl's on the assembly line until she was about three months pregnant with the couple's first child and had to quit according to company policy. Vanita then opened an in-home day care business shortly before their first child was born in 1971 and continued to operate that for approximately five years. David and Vanita opened and operated a gas station for approximately eight months in 1975. During that time Vanita spent most days at the business waiting on customers and pumping gas, often from 8:00 a.m. to 9:00 p.m. because David was working out of town at that time.

In 1977 Vanita started working with Princess House, selling products at home shows in customers' homes. She was involved with this business, to varying degrees, for approximately twenty-two years. At the height of her career with Princess House, Vanita worked thirty to forty hours per week and earned approximately $16,000 annually. While she was working for Princess House Vanita also began working at a retail store at a mall in 1989. She initially worked there from September through December as seasonal help, and then was rehired the next year to work from spring through Christmas. During this time Vanita also became employed at Overhead Door and worked there until November 2003. She was earning $9.10 per hour plus benefits at the time of her termination from Overhead Door. Vanita was also a cheerleading coach for three years at a local high school during this time period.

Vanita took some classes to become a Master Gardener in 2000 and then worked part-time, seasonally, in the garden center at Steve's Ace Hardware from 2000 until the end of the gardening season in 2005. Her earnings there were $7.00 per hour.

Vanita obtained employment at the Dubuque YMCA/YWCA in the fall of 2005, conducting a before- and after-school care program for a local elementary school. She earned approximately $7.85 per hour at the Dubuque YMCA from 2005 until June 2006, when she got a job with the United States Post Office as rural carrier associate, delivering mail on Saturdays and when the regular carrier was unable to work. Her wages at the post office were $16.45 per hour. Vanita was not able to sort or deliver the mail fast enough and was given the option of

being fired or quitting so she quit the postal job. After that she returned to the Dubuque YMCA job and worked there periodically from the fall of 2006 through the time of trial.

Vanita began attending the business program at Northeast Iowa Community College (NICC) in the fall of 2005. At the time of trial she had just finished her fourth semester of schooling. However, three semesters into her four-semester degree program Vanita changed her major from business to pursing a degree to become an activities director for a retirement complex or college. As a result of this change she anticipates needing two more years of school before she can graduate from NICC, and will then need to attend a four-year college to complete her degree. Vanita estimates the four-year college will cost around $16,000 per year. After completion of her degree she hopes to obtain a position as an activities director earning approximately $22,000 annually.

Vanita has had several health problems over the years, and continued to see various physicians at the time of trial for the following conditions: hyperthyroidism, anxiety, depression, allergies, asthma, acid reflux, high cholesterol, carpal tunnel in her hands, back problems, and feet problems. Her most problematic malady in recent years apparently has been severe depression, which she claims caused her to quit or lose several of her previous jobs. Vanita sought counseling for the depression and was on medication for it at the time of trial. She asserts her feet problems prevent her from standing for long periods of time. When she was younger Vanita utilized the Del-Con shield

as a form of birth control and later found out that she suffered major health problems as a result of the shield. A class action lawsuit was filed concerning the shield. Vanita joined the lawsuit and eventually received about $88,000 as her share of the settlement proceeds.

Over the years Vanita has had a number of surgeries to treat difficulties with urination, bladder infections, a herniated disc in her neck, and carpal tunnel syndrome. She had gallbladder surgery, from which complications ensued. Vanita takes several prescription medications for her various maladies. Despite all of her health concerns, at the time of trial none of Vanita's doctors restricted her ability to work in any way, she had never applied for Social Security disability benefits, and she testified she did not believe she was disabled and that she was sure there were jobs she could acquire.

David was fifty-eight years old at the time of the trial, has a high school diploma, and is apparently in good health. David joined the Army in 1966, shortly after graduating from high school. He was on active duty from February to August 1967 and then served in the Army Reserves for an additional twenty-four years. From this, he has earned a military pension which he will be able to draw upon at the age of sixty in March of 2008. He estimates that twenty percent of the points he has accumulated toward the pension were derived before the marriage. He expected monthly payments of $617.87 beginning in March 2008. The pension has a provision for a surviving spouse. David asked that the trial court not divide the pension but instead provide Vanita with offsetting property equal to its present value, which he calculated at $74,412.39.

At the time of the parties' marriage David worked for Spiegel Construction but was laid off the first winter of their marriage. He then took a job at Tschiggfrie, for which he worked approximately eighteen years. David left Tschiggfrie to begin his own construction business, Bries Construction, around 1988. Bries Construction focuses mainly on concrete work for sidewalks and driveways and thus is seasonal work, generally running from April through December. During the off season David completes the year-end paperwork for the business and begins bidding jobs and doing maintenance on the trucks and equipment for the next season. The business is a subchapter S corporation, and both David and Vanita are stockholders and officers. David is also an employee of the corporation, which entitles him to unemployment compensation during the winter months. The income from the business has varied over the years. David's Social Security earnings statement reflects that his income averaged around $25,000 per year from 2000 to 2004. However, he testified that in 2006 the price of gas and materials both went up significantly and greatly affected his income, as jobs were costing him more than he had bid them for thus directly decreasing his profits. He plans to continue working in construction until age sixty-five and then retire.

The parties lived separately for a period of two years prior to the dissolution trial. David moved into an apartment while Vanita remained in the marital home. Pursuant to the parties' agreement, David assumed the costs of both residences and supporting Vanita, including paying for the mortgage on the marital home, his own rent on the apartment, car payments, insurance, utilities,

vehicle gas costs, health insurance, Vanita's cell phone, and giving Vanita $100.00 per week for expenses. In order to accommodate, in part, his increased expenses David increased the wages his company paid to him. On his corporate income tax return for 2006 David reported he had paid himself $28,800. The return indicates that the corporation experienced a loss of $7,439 in order to accommodate his increased wages.

II. DISTRICT COURT DECISION.

The trial court's property division resulted in David receiving $247,530.54, including Bries Construction and the entire $74,412.39 value of his Army pension. Out of this award David was ordered to pay the approximately $6,500 mortgage debt on the marital home remaining after the mortgage ($35,469) was reduced by the liquidation and application to the mortgage of the parties' protective life annuity ($26,852) and whatever their 2006 tax refund turned out to be.[1] The court ordered that any tax consequences associated with the liquidation be paid by David. Vanita received a $255,927.19 property award, including the marital home.

As part of its property division the court ordered David's Central Pension Fund divided between the parties by a qualified domestic relations order, awarding David $70,351.95 and Vanita $59,483.60; awarded Vanita the U.S. Allianz High Five contract worth $40,477.97 and the Dupaco CD in the amount of $2,750.62; awarded David the 1978 Chrysler Cordova and his business vehicles,

[1] Although the parties were not certain what their tax refund would be for 2006, it had been approximately $2,000 for the previous year and for purposes of generally determining what mortgage debt remained as David's responsibility on the marital home we assume it will be about the same for 2006.

and awarded Vanita the 1966 Mustang convertible and the 2005 Pontiac Vibe; and adopted the parties' agreement on the distribution of other assets and debts.

Vanita was not awarded alimony. The trial court found that traditional alimony was not warranted, despite the length of the parties' marriage, because Vanita had the demonstrated ability to maintain employment and be self-sufficient. The court found rehabilitative alimony was also not appropriate to assist her with her recent educational endeavors because those endeavors would not substantially increase her earning capacity. The court ordered David to pay $1,500 in Vanita's trial attorney fees and to pay all court costs.

Vanita appeals, contending the court erred in not awarding her traditional and rehabilitative alimony before she reaches retirement age, continued traditional alimony after she reaches retirement age, and a portion of David's Army pension.

III. SCOPE AND STANDARDS 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). 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. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

IV. MERITS.

Before addressing the issues presented, we note briefly some general principles concerning property division and spousal support. Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria codified in Iowa Code section 598.21(5) (2007). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). Property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

A. Spousal Support.

Vanita contends the trial court erred in denying her rehabilitative and traditional alimony until her retirement and continuing traditional alimony after she reaches retirement age. She argues the evidence shows that despite her motivation there is little likelihood she will become fully self-supporting before she retires and she will have only minimal retirement income while David will have significant retirement income.

"[Spousal support] is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa

1998). 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). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 589.21A(1). *Dieger*, 584 N.W.2d at 570. Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only where there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). 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 spousal support 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). We also consider the distribution of property, Iowa Code § 598.21A(1)(c).

The parties were married for thirty-six years. Vanita is fifty-five years of age and is a high school graduate. She had no post-high school education until she began attending a community college in the fall of 2005. Vanita was still taking courses there at the time of trial. She has had numerous health issues over the years. However, at the time of trial it appeared that most of those problems had either been resolved or were being managed with treatment and medication. None of her doctors had placed any restrictions on her ability to work. Vanita has an extensive and varied employment history, during which she

has earned anywhere from $7.00 per hour up to $16.45 per hour. Her employment has given her substantial experience in several areas.

David is fifty-eight, holds only a high school diploma, and is in apparent good health. He has worked in construction his entire life and has been the owner and employee of his own construction company for nearly twenty years. He has had an average annual income from 2000-2004 of approximately $25,000. He was also in the Army Reserves for twenty-four years, earning a military pension with a present value of approximately $74,412.39. As noted above, the trial court's property division awarded Vanita approximately $8,400 more than David, and David would be required to pay about $6,500 out of his award. This resulted in Vanita's property award being about $15,000 greater than David's.

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Hettinga,* 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). 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.

After considering all of the factors relevant to possible alimony awards, we agree with and find no abuse of discretion in the trial court's decision to not award rehabilitative or traditional alimony.

We agree with the trial court that Vanita's present and intended educational endeavors are not likely to substantially increase her earning capacity, and may in fact detrimentally affect her long-term economic circumstances when her age, the significant additional debt she would have to incur to finish the degrees she contemplates earning, and the probable income she would earn after acquiring the degrees, are all considered. Thus, the general goal of rehabilitative alimony, to support an economically dependent spouse through a period of retraining to allow that spouse to reach a level of

income to become self-sufficient, would not be met through such an award in this case.

In addition, despite the length of the parties' marriage, we also agree with the trial court that traditional alimony is not appropriate under the specific facts and circumstances of the case at hand. First, with her lengthy and varied employment history Vanita has shown she has the ability to maintain long-term employment and be self-sufficient and the record does not indicate any reason she is not able to do so at the present time should she so desire. It appears that all of her health issues, whether mental or physical, that might have interfered with some of her employment in the past are currently under control with treatment or medication. She has no current work restrictions, and testified she does not see herself as disabled or unable to work.

Second, over the two years since the parties' separation both David's and Bries Construction's financial circumstances have deteriorated. David has had to absorb the increased expenses of maintaining two households and supporting Vanita. The increased costs of gas and materials in 2006 not only directly impacted Bries Construction's profits but also led to David not getting as many jobs lined up for 2007 as he had been able to arrange for in prior years. In order to meet his increased expenses, David had to increase his wages from Bries Construction as well as borrow additional money from his AmerUs and State Farm life insurance policies. The increase in business expenses and the required increase in David's wages had caused the business to experience a loss of $7,439 for 2006. In addition, the trial court ordered that David pay the

approximately $6,500 balance on the mortgage of the marital home as well as any tax liability from the liquidation of the annuity used to pay part of the mortgage. Thus, despite the length of the parties' marriage, we do not believe it is possible for David to continue to support Vanita in a manner closely resembling the standards existing during the marriage without destroying his own right to enjoy at least a comparable standard of living. *See Hayne*, 334 N.W.2d at 351. His earning capacity is not substantially greater than hers.

Third, Vanita received about $15,000 more property than David received.

We conclude that a present award of traditional alimony to Vanita under the specific facts and circumstances of this case would not be equitable.

Vanita further claims the trial court erred by not awarding her traditional alimony after she reaches retirement age. We disagree. She has worked outside the home for nearly all of her adult life and has no doubt acquired significant Social Security retirement benefits. Furthermore, Vanita still has approximately ten years to work before she reaches retirement age and can acquire additional Social Security credits and perhaps other retirement assets. In addition, she did receive a substantial portion of the Central Pension fund. The record thus shows that Vanita received a property award of about $256,000, including pension benefits presently worth almost $60,000, and will no doubt have significant Social Security retirement benefits.

For these reasons as well as the reasons set forth above regarding the denial of a present award of traditional alimony, we agree with the trial court's

discretionary decision to not award traditional alimony to begin after Vanita reaches retirement age.

B. Army Pension.

Pensions are divisible marital property. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006); *see also In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993) ("Pensions in general are held to be marital assets, subject to division in dissolution cases, just as any other property."); Iowa Code § 598.21(5)(i) (stating vested and unvested pensions are circumstances to be considered in equitably dividing property). Pensions are considered in formulating an equitable distribution of property. *In re Marriage of Scheppele*, 524 N.W.2d 678, 679 (Iowa Ct. App. 1994). However, the fact that pensions are considered marital property does not necessarily mean they must be divided. *In re Marriage of O'Connor*, 584 N.W.2d 575, 576 (Iowa Ct. App. 1998). Rather, the courts do what is equitable. *Id*. at 576-77. There are two accepted methods of dividing pension benefits: the present-value method and the percentage method. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996).

At the time of the trial, David's Army pension benefits were vested and would soon be matured, and he was to begin drawing them in March of 2008. *See Benson*, 545 N.W.2d at 254 (stating benefits are "matured" when "all requirements have been met for immediate collection and enjoyment" and "vested" when an employee "has rights to *all* the benefits purchased with the employer's contributions to the plan. . . ."). We conclude the trial court did not err by including the pension as part of the property division at its present value.

Because we believe the court's overall property division, which included the Army pension, is equitable, there is no reason to deal with the Army pension separately.

V. DISPOSITION.

We affirm the trial court's decree in all respects.

AFFIRMED.