

IN THE COURT OF APPEALS OF IOWA

No. 9-469 / 07-1522
Filed August 19, 2009

**IN RE THE MARRIAGE OF MERLIN G. BIRETZ
AND SANDRA A. BIRETZ**

MERLIN G. BIRETZ,
Petitioner-Appellant,

And Concerning
AIMEE L. CORWIN and ADAM J. BIRETZ,
as Co-Executors for the Estate of Sandra A. Biretz,
Respondents-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Merlin Biretz appeals from the economic provisions of the decree
dissolving his marriage to Sandra Biretz. **AFFIRMED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellant.

Aimee L. Corwin and Adam J. Biretz, Waterloo, pro se appellees.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, J.

Merlin and Sandra Biretz divorced after thirty-nine years of marriage. At the time of the divorce, Merlin was partially paralyzed and Sandra was diagnosed with terminal cancer.

Following trial, the district court divided the parties' property equally. The court ordered Sandra's interest in her pension plan transferred to Merlin pursuant to a qualified domestic relations order and ordered Merlin to pay Sandra spousal support of \$750 per month "until the death or remarriage of either party."

On appeal, Merlin first contends the district court "erred in failing to appropriately consider the parties' respective health in dividing the parties' debts and assets." He specifically argues:

[T]he obvious reason for considering the parties' health and life expectancy is that if they are in poor health but likely to live for a number of years more, they will have more need for the assets of the marriage to support themselves.

The district court rejected this contention, stating:

Petitioner has supplied the court with no authority suggesting a person forfeits his or her interest in his or her marital estate on the dissolution of his or her marriage because he or she is terminally ill, because he or she may not have long to live according to standard mortality tables, or the like. The idea that a person should not be able to enjoy and dispose of their rightful interest in his or her marital estate as he or she sees fit simply because of how long they may be able to enjoy it is insulting and demeaning, it diminishes the person's contribution to the marriage and sense of accomplishment and could lead to a good number of very unpleasant lawsuits because the same principle could be used by a debtor to avoid paying a terminal creditor, by a businessman in the dissolution of a partnership with a terminal business partner, and the list goes on. In some cases, and this is likely one of them, it could aggravate a person's already depressed state of mind to the point where it seriously impacts his or her will to live.

We fully concur with this assessment. Additionally, on our de novo review, see Iowa R. App. P. 6.4(6)(g), we are convinced that the court acted equitably in equally dividing the property. This was a long marriage and Sandra made significant financial and non-financial contributions to the marriage. In particular, she was a regular and stable source of family income, she cared for two children from this marriage as well as two children from Merlin's prior marriage, and she cared for Merlin for almost five years after an accident that led to his paralysis. For these reasons, we decline to modify the district court's property allocation.

Merlin next argues:

[T]he trial court improperly divided the parties' property, requiring [him] to potentially pay half the share of Sandra's pension awarded to him, not only reducing the amount of the award to him, but also requiring him to assume all of the risk of not enjoying the full benefit of that property.

The record reflects that Sandra relinquished her interest in her pension to equalize the net worth of the parties. Merlin willingly agreed to pay Sandra spousal support equal to half the retirement benefit that she agreed to transfer to him. At the time of trial, this benefit was approximately \$1400. Because Merlin testified that he would pay Sandra spousal support, we conclude he waived error on his present challenge to the alimony award. See *In re Marriage of Horstmann*, 263 N.W.2d 885, 888 (Iowa 1978) ("It is our duty to examine the whole record and adjudicate rights anew on those propositions properly presented, provided issue has been raised and error, if any, is preserved in the course of the trial proceedings. . . .") (citation omitted).

As a final matter, Sandra seeks to have Merlin pay her appellate attorney

fees of \$3812. As she was obligated to defend this appeal, we grant her request.

AFFIRMED.