

IN THE COURT OF APPEALS OF IOWA

No. 9-687 / 08-1767
Filed September 17, 2009

**IN RE THE MARRIAGE OF JANICE ROSEMARY SALEMINK AND DENNIS
ALLEN SALEMINK**

Upon the Petition of

JANICE ROSEMARY SALEMINK
Petitioner-Appellant,

And Concerning

DENNIS ALLEN SALEMINK,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Peter Keller, Judge.

Petitioner appeals from the decree dissolving her marriage to respondent, challenging several economic provisions. **AFFIRMED AS MODIFIED.**

Stephen D. Lombardi, West Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Janice R. Salemink in this appeal challenges certain economic provisions of the decree dissolving her forty-two year marriage to Dennis A. Salemink. We affirm as modified.

I. SCOPE OF REVIEW. We review de novo. *In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa Ct. App. 1990). While not bound by the trial court's factual findings, we give them weight, particularly in considering the credibility of witnesses. *In re Marriage of Farrell*, 481 N.W.2d 528, 529 (Iowa Ct. App. 1991).

II. BACKGROUND. At the time of trial on August 13, 2008, Janice was sixty and Dennis was sixty-one. Their three children were all adults. The parties had decided to retire in 2001. Dennis, who had been the major wage earner during the marriage, received an early retirement package from his employer that paid a monthly benefit of \$3098.01 payable until he reached sixty-two. The benefit was then reduced to a lifetime benefit of \$1933.11.¹ At the time Dennis took the retirement benefit, the parties both consented in writing to the proposed payout and acknowledged the fact that the benefits would terminate at Dennis's death. The retirement package also included health and dental insurance for Dennis and his family members for his lifetime. Dennis also had a substantial Individual Retirement Account.

¹ The reduction was made at age sixty-two on the anticipation that Dennis could begin drawing social security at that time. Statements from the Social Security Administration, filed as exhibits at trial, noted that Dennis, as of April 10, 2008, was eligible for monthly benefits of \$1575 at age sixty-two, and Janice, as of January 31, 2008, was eligible to receive monthly benefits of \$677 at age sixty-two.

Janice assumed substantial responsibility for the children's upbringing. In addition, she worked outside the home at various times and was employed at the time the parties decided to retire. She received no immediate retirement benefits. The parties together also had a home and other assets. Following retirement, neither spouse has reentered the work force.

The issues at trial were financial. The parties both sought an equitable division of assets and liabilities. Janice asked for an award of alimony and for payment of attorney fees.

The district court found an equal division of the parties' assets to be equitable. The court fashioned a division which left each party with over \$300,000 in equities and divided Dennis's pension equally. To facilitate an equal property division, Janice was required to make an equalization payment of \$11,831.35. The court provided that neither party was responsible for spousal support. The parties were each ordered to pay their own attorney fees and the costs of the action were divided equally between them.

III. PROPERTY DIVISION. Janice contends that the equalization provision of the decree is not clear and is in conflict with the district court's recitals, and that the district court failed to consider all property values, existing debt, and the earning capacity of the parties.

The district court, after dividing certain property and debts, ordered Janice to pay Dennis \$11,831.35. In addressing the property division, the district court first ordered distribution of certain assets including the parties' home, vehicles, bank accounts, and cash including \$51,080 held by Janice from the proceeds of

the parties' sale of a home in Florida. The district court found the Florida home proceeds were to be divided equally. The court at this juncture, added the items allocated to each party and determined that Janice had received \$26,835.79 more in equities than had Dennis and that to equalize the division to this point, Janice would need to pay Dennis \$13,417.50, which would give them each a total of \$303,636.29. The court went on to find that Janice, in addition, was entitled to receive one-half of \$75,000 Dennis had received in settlement as compensation for a severely burned leg.

In summing up this division, the district court considered the \$13,417.50 Janice was to pay Dennis, plus \$4243.41 she promised to pay him for money she withdrew from an account. The court found Dennis owed Janice \$5229.56 that he promised to pay her as his share of their daughter's wedding expenses, and \$600 as one-half of a tax stimulus payment. The end result was that the court found Janice owed Dennis \$11,831.35.

Contrary to Janice's argument, we do not find conflict in the district court decision. It is clear that Janice was required to both pay Dennis one-half of the proceeds she held from the sale of the Florida house,² as well as the \$11,831.35 equalization payment.

Janice further argues that in arriving at the equalization payment, the court failed to take into account the value of household furnishing, medical expenses, and future medical insurance costs. The district court found the household furnishing had already been divided. While arguing that the household furnishing

² As Dennis was to pay her one-half of the proceeds he held from his settlement.

value was not taken into consideration, Janice makes no effort to show where in the record household goods were inventoried and valued. Nor does she specify the amount of the claimed medical expenses, or refer to where in the record we can find that information. As to claimed future medical expenses, Janice cites no authority to support her position that undefined future expenses should be considered in making a property division. See Iowa R. App. P. 6.14(1)(c) (“Failure in the brief to . . . cite authority in support of an issue may be deemed waiver of that issue.”).

Our review of the record convinces us that the district court made an even, or nearly even, division of all of the parties’ assets and liabilities. As did the district court, we believe such a division is equitable considering among other things, the duration of the marriage, the contribution of each party to the marriage, the age and physical and emotional health of the parties, and pension benefits. See Iowa Code § 598.21(5) (Supp. 2007). We affirm the district court on this issue.

IV. SPOUSAL SUPPORT. Janice contends that she should have been awarded spousal support. She seeks \$1500 per month until she reaches age sixty-five and then requests \$750 per month.

Spousal support is provided for under Iowa Code section 598.21A (2007). Whether spousal support is justified is dependent on the facts of each case. See *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Entitlement to spousal support is not an absolute right. *Id.* In assessing Janice’s request for alimony, we look at the property division, all the factors of section 598.21A, and

applicable case law. See *In re Marriage of Francis*, 442 N.W.2d 59, 62-63 (Iowa 1989). An award of spousal support is discretionary and dependent on each party's earning capacity, as well as the ability to pay and the relative need for support. See *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997).

Janice received, (1) one-half of the parties' assets, (2) one-half of a \$75,000 settlement Dennis received to compensate him for a severe burn to this leg, (3) one-half of Dennis's pension, and (4) one-half of his Individual Retirement Account, which in 2008 was yielding income of some \$3375 per month.

Neither party is employed. Janice contends, in support of her alimony claim, that Dennis should be employed and he has a high earning capacity and can find a job at a high salary. Yet, she offers no evidence to support a finding that after his extensive absence from the job market, Dennis is able to secure well-paying employment. Janice contends that she wants to be employed but was not able to be so at the time of trial and that she does not have the education and experience to secure well-paying employment. The district court found both parties are able to be employed and we find no reason to disagree with this finding.

Janice agreed to Dennis's decision to take an early retirement package and she is receiving half of his retirement payouts. Dennis does not plan to seek further employment. The property division will allow both parties to enjoy the fruits of their labor accumulated during their married years. We do not consider that either party will be employed in the future in assessing Janice's claim for alimony.

Janice also argues that the district court did not consider her future health insurance costs in denying her alimony.³ She claims her medications cost \$932.16 per month and her health insurance will cost \$550⁴ per month while Dennis continues to have health and dental insurance. As a benefit in his retirement package, Dennis has health and dental insurance at little or minimal cost and will continue to have it. Dennis's financial affidavit indicates that he has been paying \$322 per month for dependent insurance. While Janice has received one-half of the parties' assets and will enjoy one-half of Dennis's retirement benefits, we believe that some alimony is justified to assist her with obtaining health insurance. We therefore modify to provide that Dennis shall pay \$300 per month alimony until such time as Janice reaches the age of sixty-five and qualifies for Medicare coverage. In all other respects we affirm the district court.

V. TRIAL ATTORNEY FEES. Janice contends that she should receive trial attorney fees. The district court ordered she pay her own fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Romanelli*,

³ Janice filed a motion for enlargement and amendment of findings and correction of errors pursuant to Iowa Rules of Civil Procedure 1.904(2) and 1.1004(8); yet, in the motion she did not call to the district court's attention that it had failed to look at the issue of her medical insurance in addressing the alimony issue. However, because the record does contain limited information on this issue we consider it on appeal.

⁴ Apparently this is COBRA coverage under Dennis's insurance. Janice claims this is the cost she will bear through this coverage and she may be able to continue this insurance for eighteen months or perhaps three years. Unfortunately, we find little in the record to indicate what the insurance may cost her, how long she can carry it, and what expenses it covers. Although, we assume some or all of her medication costs would be covered by insurance.

570 N.W.2d 761, 765 (Iowa 1997). Janice is receiving a property settlement equal to the one Dennis receives. She is also receiving alimony. She has the means to pay her own attorney fees. Furthermore, Janice's attorney failed to follow the rules of the district court, and the district court noted its concern for:

the fact that the Petitioner [Janice] through her counsel has failed to follow the orders of the Court in that they had failed to file their Witness and Exhibit List ten (10) days prior to trial. Furthermore, they failed to respond adequately and promptly to the discovery requests of the Respondent [Dennis] and as such, produced all of the documents on the day of trial. In addition, [Janice] took a deposition in Omaha, Nebraska, eleven (11) days prior to trial, which violated the Court Order on completion of discovery. As such, [Janice] has failed to abide by the rules of this Court. Furthermore, [Janice] filed a financial statement that does not comply with the mandate of the Iowa Supreme Court on the appropriate form and it was filed late.

Obviously these failures have resulted in Dennis paying additional attorney fees. See *In re Marriage of Winegarden*, 278 N.W.2d 507, 512 (Iowa 1979) (considering, when assessing attorney fees award, expenses incurred by wife's untimely filings and husband's litigious nature). Considering all the circumstances outlined above, we find the district court did not abuse its discretion in not ordering Dennis to pay her fees.

VI. APPELLATE ATTORNEY FEES. Janice has requested appellate attorney fees. An award of appellate attorney fees rests in our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We deny her request. She is leaving the marriage in essentially the same position as Dennis and has the ability to pay her own attorney fees. Furthermore, her appellate brief makes few references to the record and references facts outside the record. It is rambling and poorly organized. It has obviously required additional time for

Dennis's attorney to respond to it. For these reasons, we deny Janice's claim for appellate attorney fees.

AFFIRMED AS MODIFIED.