IN THE COURT OF APPEALS OF IOWA

No. 2-226 / 11-0876
Filed June 13, 2012

IN RE THE MARRIAGE OF DEBORAH STAEBLER ROBERT AND RICHARD MILES ROBERT

Upon the Petition of

DEBORAH STAEBLER ROBERT,
Petitioner-Appellee,

And Concerning

RICHARD MILES ROBERT,
Respondent-Appellant.

Appeal from the Iowa District Court for Floyd County, Christopher C. Foy, Judge.

Richard Robert appeals the alimony provision in his dissolution decree. **AFFIRMED AS MODIFIED.**

Roger L. Sutton of Sutton Law Office, Charles City, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, L.L.P., Charles City, for appellee.

Heard by Eisenhauer, C.J., and Vogel and Tabor, JJ.

TABOR, J.

Richard Robert challenges the spousal support awarded to his former wife, Deborah Robert, in the decree dissolving their twenty-seven-year marriage. He asserts the provision awarding her traditional alimony in the amount of $1800 per month (until she reaches the age of sixty-six or either party dies) is inequitable given her training and experience as a registered nurse. He also contends the decree should specify that the alimony obligation terminates if Deborah remarries. Both Richard and Deborah request appellate attorney fees.

While we appreciate that the district court enjoys considerable latitude in determining an alimony award, this decree failed to do equity between the parties because the court underestimated Deborah's earning capacity. Accordingly, we modify the award to reflect Deborah's professional training and experience and her failure to present evidence of a disability that would prevent her from achieving self-sufficiency following the divorce. Specifically, we hold that Richard shall pay $1800 monthly to Deborah in rehabilitative alimony for three years following the date of the dissolution decree. After that three-year period, given the remaining disparity in income and the length of marriage, Richard shall continue to pay $1000 a month in traditional alimony, under the terms previously ordered by the district court.

Because the district court had discretion to omit a provision automatically terminating alimony payments upon Deborah's remarriage, we leave that portion of the decree undisturbed. Lastly, we decline to award appellate attorney fees to either party.

I. Background Facts and Procedures

Richard and Deborah married in October 1983 in Arcadia, California. Neither party brought substantial assets into the marriage. Deborah, then twenty-six years old, held an associate of arts degree and earned her license as a registered nurse (RN) by the time the couple married. Richard was twenty-four years old, and completed his four-year bachelor of arts degree two years before marrying Deborah. For the first five years of marriage, Deborah worked as an RN in the orthopedics department of a California hospital. She was the primary income earner while Richard attended chiropractic college from 1985 through 1988. Deborah would work full-time during the week, and pick up extra weekend shifts as well. The couple's two children were born in 1984 and 1986, while the family still lived in California.

Richard received a doctor of chiropractic degree in 1988, and the family moved to Iowa shortly thereafter. Deborah did not work as an RN in Iowa, opting to take on the responsibilities of a stay-at-home mother. She tended to the children and the home, allowing Richard to pursue his career and provide financial support for the family. Even though she has not been employed as an RN since 1988, Deborah has satisfied the continuing education requirements and still maintains her California nursing license.

Richard began his chiropractic career in Mason City, practicing for one or two years before joining the Breitbach Chiropractic Office in Charles City, where

he remains today.[1] In Charles City, the Roberts moved into a historical residence owned by Deborah's father, to whom they paid very little rent. Her father financed a substantial amount of the utilities and improvements to the house.

Richard moved out of the family home in April 2010. That same month, Deborah filed a petition for divorce. The district court heard the case in January 2011, and entered its decree on April 25, 2011.

At the time of divorce, the Robert marital estate was modest. The main assets consisted of four vehicles and a trailer—a 1994 Chevrolet Astro van worth $500, a 1994 Jeep Cherokee valued at $1200, a 2004 Jeep Liberty worth $8185, a 2004 Chevrolet TrailBlazer valued at $15,075, and a 1973 Starcraft trailer worth $150. But they still owed $10,872 and $7529 for the Liberty and TrailBlazer. They also owed $12,972 in credit card debt, $3520 in unpaid hospital bills, and will likely be subject to state and federal tax liabilities. Richard owns a variable life insurance policy with a cash value of $3577. The Roberts share no equity in the family home. The district court adopted the parties' proposed property division of their assets and liabilities, finding it to be fair and equitable. The value of the property awarded to each party was roughly equal.

The parties disputed the amount of Richard's actual income, and the district court viewed Richard's representation of earnings with some skepticism.

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[1] Richard is considered a self-employed chiropractor, though he procures office space, equipment, supplies, and support staff from Breitbach. Breitbach also provides administrative and personnel services, including submitting and processing insurance claims, and collecting accounts. In return, Richard reimburses Breitbach for the cost of x-rays, supplies, and other expenses related to his patients, as well as a percentage of his gross revenue to cover rent, utilities, advertising, support staff compensation, and other overhead expenses.

Richard reported annual gross revenues between $193,990 and $216,977 for 2006 and 2010, exceeding $200,000 in four of the last six years. But after deducting reimbursements and payments made to Breitbach Chiropractic, his annual net revenue over the same period was $96,458 in 2006, $94,813 in 2007, $90,124 in 2008, $86,824 in 2009, and $90,827 in 2010. Richard incurs roughly $15,000 in annual expenses relating to payments to third parties for malpractice insurance premiums, advertising, license fees, professional dues, registration fees, and travel costs to educational seminars. With no other deductions accounted for, Richard claims his average net income to be $37,000 annually. The court found this amount to be highly suspect, delving into previous tax returns to find overstated deductions and understated income.[2] The court concluded Richard's average net annual income before taxes to be $76,808.

On the issue of alimony, the court considered the changes in the nursing field over the past two decades, specifically the increasing role of technology. It reasoned that because Deborah professes to be computer illiterate, it would take her more than two years to regain employment as an RN. Even if she could master the new technology, the court refused to speculate whether a fifty-six-year-old woman who had not worked in the profession for more than twenty-five years would be able to find employment that would pay $40,000 a year, the amount she was last paid in California. Figuring Deborah could earn $15,000 to $20,000 annually, the district court observed Richard's net income of $76,808

[2] In its decree, the district court held Richard overstated his insurance deduction by 270 percent, overstated his vehicle expenses 341 percent, and overstated his actual supply expense by 667 percent.

was more than three times Deborah's present earning capacity. The court concluded Deborah's situation presented a "classic case" for traditional alimony, ordering Richard to pay Deborah $1800 monthly until Deborah's sixty-sixth birthday or either party dies. During the entirety of his spousal support obligation, Richard also must name Deborah as the sole primary beneficiary of the life insurance policy.

Richard appeals the decree with respect to the alimony award, and requests that Deborah be required to pay his appellate attorney fees. Deborah defends the district court's award, and requests that Richard pay her appellate attorney fees.

II. Scope and Standard of Review

We review dissolution of marriage cases de novo. *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). But we give weight to the district court's findings, especially with regard to credibility determinations. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). Precedent is of limited value due to the fact-driven nature of each case. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We afford the district court considerable latitude in its alimony determination pursuant to the statutorily enumerated factors, and will disturb its finding only when the award is inequitable. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

III. Analysis

Iowa courts award alimony as a stipend in lieu of a spouse's legal obligation for support. *Hansen*, 733 N.W.2d at 702. This form of spousal support

is not an absolute right, and whether such an award is appropriate depends on the circumstances of a particular case. *In re Marriage of Shanks*, 805 N.W.2d 175, 178 (Iowa Ct. App. 2011). Iowa law recognizes at least three forms of alimony—traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008).

Reimbursement payments provide a former spouse with a share in the other spouse's future income in exchange for the receiving spouse's previous contributions to the source of that income. *Id.* Deborah suggests in her brief that she is entitled to reimbursement and traditional alimony, but the main thrust of the appeal is whether traditional or rehabilitative alimony is most appropriate.

Traditional alimony is payable either for life or so long as the payee spouse is incapable of self-support. *Id.* Rehabilitative payments are meant to support an economically dependent spouse over a limited period of retraining or re-education following divorce, thereby creating an opportunity and incentive for that spouse to become self-supporting. *Id.* Because the aim of rehabilitative support is self-sufficiency, this form of award may be limited or extended, depending on the circumstances of the economically dependent spouse. *Id.*

In determining the necessity, form, and amount of spousal support warranted in each case, we consider the guiding factors provided by our legislature, as listed in Iowa Code section 598.21A (2011). Relevant factors include (1) length of marriage, (2) age and emotional and physical health of the parties, (3) property distribution, (4) educational level of the parties at the time of marriage and when the dissolution action is commenced, (5) earning capacity of

the party seeking alimony, and (6) feasibility of the alimony-seeking party becoming self-supporting with a reasonably comparable standard of living to that enjoyed during the marriage. *Hansen*, 733 N.W.2d at 704.

The driving question in this appeal is whether Deborah would be able to rejoin her profession as an RN, at some point, if she received rehabilitative alimony, or whether she is incapable of self-support and would require the traditional spousal support payments ordered in the decree. Richard urges that two or more years of rehabilitative alimony would allow Deborah to regain her skills as a RN and find employment.[3] He argues in his post-trial briefing: "If Deborah were to acquire her education and to re-introduce herself to the market her income could well be in excess of the $40,000 she was earning in 1983." He disputes the district court's finding that traditional alimony is the more appropriate award. Richard questions Deborah's professed inability to work as an RN, suggesting that she simply has no desire to return to her previous profession and would prefer time to care for her seriously ill father and to pursue other nonprofessional jobs.

Deborah testified to needing additional training and computer skills before she could be employed as an RN. While remaining certified in California, she is not licensed in Iowa, and would need to obtain in-state licensure before resuming her career. In addition, Deborah doesn't believe her current fitness level would

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[3] The decree states that "Richard has offered to pay $1,000 each month for 48 months." In his opening brief, Richard's counsel asserted that "rehabilitative alimony at the $1,800.00 level for two (2) years" would allow Deborah to "live at a standard equivalent to that enjoyed during the marriage." At oral argument, Richard's counsel stated that it would be equitable for his client to pay Deborah rehabilitative alimony for three years at $1800 per month and then four additional years of alimony at $1000 per month.

allow her to handle the physical work required by her previous nursing position. On the orthopedic floor she was called to perform a great deal of lifting. Because of her time away, she feels she has lost the strength needed to satisfy some aspects of the position.

Deborah further testified that she did not plan to return to nursing at this stage of her life. She also offered second-hand views from friends currently working as nurses who told her "there's no way [she] would be hired at this point" because she lacked skills and technological knowledge. Deborah told the court that she eventually could find nonprofessional employment, but is currently consumed by caring for her father, who has been diagnosed with terminal bone cancer in California. She also is helping care for her grandchild in Arizona. Deborah could see herself returning to work at a nursery or garden center because she has completed a master gardener program and enjoys the work. She requested $2000 per month in spousal support to supplement her eventual work as an unskilled employee.

The district court ordered Richard to pay $1800 each month as traditional alimony because his net income of $76,808 was more than three times Deborah's earning capacity, which the court estimated to be between $15,000 and $20,000 per year.

Before we reach our analysis of whether the order for traditional spousal support is equitable given the facts in the record, we believe it is important to address Richard's burden-of-proof argument. Throughout his briefing, Richard

asserts that Deborah bore the burden to prove "whether she receives any alimony and which type"—a burden he contends she has failed to meet.

We find no definitive answer in our statutes or case law as to which party in an alimony dispute bears the burden of proof.[4] "Ordinarily, the burden of proof on an issue is upon the party who would suffer loss if the issue were not established." Iowa R. App. P. 6.904(3)(e); *see Beyer v. Todd*, 601 N.W.2d 35, 41 (Iowa 1999) (placing burden of proof on party who had "the most to lose" if the issue were not decided in his or her favor); *see also Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co*., 606 N.W.2d 370, 374 (Iowa 2000) (holding "burden of proof in an action ordinarily rests with the party who is seeking recovery" and finding that principle consistent with the notion that "the burden should normally rest with the party who has the greater access to the proof").

In precedent predating our current dissolution statutes, the supreme court assigned the burden of proof to the party seeking alimony. *Moore v. Moore*, 192 Iowa 394, 184 N.W. 732, 732 (1921) ("The burden was upon the plaintiff to make a showing that would justify the award of alimony claimed."). But recent Iowa cases addressing the factors in Iowa Code section 598.21A(1) do not speak in terms of the burden resting on one party or the other. *See, e.g., Anliker*, 694

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[4] Our cases on modification of support orders in dissolution decrees do address the burden of proof question and hold that the party seeking modification bears the burden to establish a substantial change in circumstances. *See In re Marriage of* Ales, 592 N.W.2d 698, 702 (Iowa Ct. App,. 1999) (interpreting Iowa Code § 598.21(8) (1997), which is now incorporated into Iowa Code § 598.21C(1)). When a recipient spouse remarries, the burden shifts to that party to show a continuing need for alimony payments. *Id*. at 702-03.

N.W.2d at 540 (recognizing no absolute right to alimony, that award depends on circumstances of particular case, and that court must consider statutory factors).

Courts in other states expressly provide that the party seeking spousal support bears the burden of proof. *See, e.g., Olsen v. Olsen*, 971 A.2d 170, 176 (Del. 2009); *Esaw v. Esaw*, 965 So.2d 1261, 1266 (Fla. Dist, Ct. App. 2007); *Ray v. Ray*, 136 P.3d 634, 637 (Okla. 2006). Some jurisdictions specify the spouse seeking support has the burden with respect to the form of alimony as well. *See, e.g., Horton v. Horton*, 62 So.3d 689, 692 (Fla. Dist. Ct. App. 2011) (requiring spouse seeking rehabilitative alimony to present "rehabilitative plan" to court); *Walter v. Walter*, 956 A.2d 255, 264 (Md. Ct. Spec. App. 2008) ("It is incumbent that the party seeking alimony, whether rehabilitative or indefinite, [to] move forward with evidence to allow the court to make the factual findings necessary to an alimony determination."); *McMullen v. McMullen*, 82 So.3d 418, 420 (La. Ct. App. 2011) (placing burden of proof on party seeking permanent alimony); *In re Marriage of Gunn*, 598 N.E.2d 1013, 1020 (Ill. App. Ct. 1992) (recognizing burden is on spouse seeking permanent or long-term maintenance to show the necessity for such alimony over rehabilitative payments); *see also Ondrejack v. Ondrejack*, 839 So.2d 867, 871 (Fla. Dist. Ct. App. 2003) (applying Fla. Stat. § 61.08 (2002), which creates a statutory rebuttable presumption that "long term" marriages entitle the seeking spouse to permanent alimony).

Because an award of spousal support is not an absolute right, the party seeking support would have the most to lose if the need were not established to the district court's satisfaction. The party seeking alimony also has greater

access to the proof necessary to determine his or her earning capacity and ability to become self-sufficient after the dissolution. Accordingly, requiring Deborah to show that Richard should be obligated to continue providing her with financial support at a particular level after the dissolution would be consistent with Iowa's general propositions concerning burdens of proof. Placing the burden on Deborah would also align with persuasive family law authority from other jurisdictions.

The district court faulted Richard for not offering evidence of Deborah's earning capacity:

> Richard disputes that Deborah is entitled to alimony at all, but asserts that if any alimony is awarded, it should be limited to rehabilitative alimony for a period of two years. Richard maintains that after one or two years of retraining, Deborah should be able to return to work as a registered nurse in a clinic or hospital. *Without presenting any evidence to support this claim,* Richard suggests that Deborah is capable of earning $40,000 or more per year if she would simply make the effort to brush up her nursing skills and complete some additional coursework. The Court disagrees.

(Emphasis added.)

The court then expressed its doubts that Deborah could be retrained in two years, and noted that if she did complete retraining in that time, she would be fifty-six years old. It concluded: "*In the absence of any competent evidence in the record*, the Court will not speculate on whether a 56 year old woman who last worked outside the home over 25 years ago might be able to obtain a nursing job that pays $40,000 a year." (Emphasis added.)

We believe the district court should have placed the burden on Deborah to show her earning capacity warranted traditional alimony payments in the amount

that she requested. Deborah did not present evidence, beyond her own testimony, to back her claim that she could not successfully return to the nursing profession, given rehabilitative alimony.

In making an equitable determination of the financial obligations of the parties to a dissolution action, we consider the earning capacity of both the payor and payee spouse. *In re Marriage of Wegner*, 434 N.W.2d 397, 398 (Iowa 1988). When deciding the amount of permanent alimony a spouse should receive, if any, we consider the earning capacity of the party seeking maintenance and the feasibility that the recipient spouse will become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve that goal. Iowa Code § 598.21A(1)(e), (f). These statutory factors reflect the legislature's recognition that "support after the marriage is dissolved is a two-way street." *Wegner*, 434 N.W.2d at 399. "[B]oth parties, if they are in reasonable health, need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for permanent support." *Id*.

In this case, both parties are middle-aged and in good physical health. While the parties' grown daughter testified that Deborah was "overwhelmed" by the looming divorce and the declining health of her own father, no evidence indicated that the stress on her mental health was permanent. At the time of their marriage, Deborah had obtained her nursing license after two years of post-high school training. She worked as a registered nurse for ten years in California, and earned approximately $40,000 a year when she left the

profession in 1988. Neither party presented evidence to show the average salary of a nurse in Iowa today.

Aside from one application for a position at the Floyd County health department, Deborah has not conducted any form of a job search—though she continued to be recruited for RN positions in California. She also admitted she did not want to return to the nursing field. She explained she would prefer to eventually work in a greenhouse or nursery—for at or near the minimum wage.

We do not believe that it was reasonable or equitable for the district court to accept that Deborah could earn no more than $20,000, even if she received retraining in her chosen field. The *Wegner* decision established that the recipient spouse has an obligation to earn up to her capacity, "even though she might have to take a job she did not prefer." *Wegner*, 434 N.W.2d at 399.

In awarding her traditional alimony, the district court treated Deborah as if she had no professional training or work experience. When contemplating Deborah's earning capacity, the statute directs us to consider her educational background, training, and employment skills. *See* Iowa Code 598.21A(1)(e). Because she has a nursing degree, a decade of experience, and a license to practice in California, her earning capacity is not as limited as someone lacking those advantages. Although Deborah was economically dependent on Richard during the marriage, rehabilitative alimony would create the incentive and opportunity for her to become self-supporting. *See Becker*, 756 N.W.2d at 826.

On the other hand, we appreciate that the Robert marriage lasted more than twenty-seven years. For the past twenty-two years, Deborah has not

worked outside the home. In such a long-term marriage, traditional alimony may appropriately compensate the spouse leaving the marriage at a financial disadvantage, particularly when the disparity in earning capacity is great. *See In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998) (holding that despite her bachelors, masters, and doctors degrees, where an alimony recipient spends significant time out of the job market and structured her life to enhance her husband's career, she is entitled to traditional spousal support).

The district court believed that the Roberts' circumstances presented a "classic case for granting traditional alimony." We disagree to a point. In many cases where our supreme court has upheld traditional alimony, the recipient spouse has been in declining health or suffered a permanent disability standing in the way of self-sufficiency. *See, e.g., In re Marriage of Olson*, 705 N.W.2d 312, 316 (Iowa 2005) (affirming traditional rather than rehabilitative alimony based on relatively long marriage, minimal property distribution, poor health, and disparity in earning potential); *Anliker*, 694 N.W.2d at 541 (electing not to disturb district court's award of traditional alimony, based on payee's permanent disability, and disparity in income capacity). By contrast, Deborah has not made a showing that her earning capacity is permanently diminished.

Given the facts at hand, we believe awarding a combination of rehabilitative and traditional spousal support payments to be the most appropriate course of action. In *Becker*, our supreme court pointed out that certain factual situations make it difficult to label an award as strictly rehabilitative or traditional spousal support. *Becker*, 756 N.W.2d at 827 (characterizing award

as combination of rehabilitative and traditional spousal support). The lesson of *Becker* is that regardless of whether the award may be categorized as traditional, rehabilitative or reimbursement, a court must consider the factors mandated by the legislature in section 598.21A. *Id*.

Under cross-examination, Deborah estimated it would take three years to "re-qualify as a registered nurse in today's modern world." Regardless of whether Deborah chooses to refresh her nursing skills or to seek retraining in another field, we order Richard to pay Deborah rehabilitative spousal support in the amount of $1800 per month for the three-year period starting at the entry of the decree (i.e., for three years from May 2011). We intend this rehabilitative award to give Deborah time "to develop her earning capacity past an entry-level position." *See id*.

But Richard admits that even if Deborah reenters the nursing profession, his income as a chiropractor will remain substantially greater than hers. Given this disparity, coupled with the length of their marriage, we find traditional alimony is also warranted. After completing the three years of rehabilitative payments, Richard shall pay Deborah $1000 per month in the form of traditional alimony until she reaches sixty-six years of age or either party dies.[5] From our de novo review of the record, we conclude that this structure of rehabilitative support followed by traditional alimony best reflects the factors found in section 598.21A(1).

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[5] In conformity with the decree, Richard must also "maintain and name Deborah as the sole primary beneficiary of the life insurance policy that he now has through American Family Life Insurance Company" for so long as he is obligated to pay any form of alimony.

B. Did the District Court Err by Not Including Deborah's Remarriage as a Condition Triggering the Termination of Richard's Spousal Support Obligation?

Richard contends the district court erred by not including remarriage as a condition that would automatically terminate Deborah's spousal support payments. He argues having to seek modification if Deborah remarries would impose an unnecessary burden on him. Richard notes the decree includes no findings of extraordinary circumstances that would require the continuation of alimony beyond remarriage. Deborah endorses the district court's omission, asserting that if such condition necessitated termination, it would not be listed in section 598.21C(1)(g) as a factor to consider in modifying support payments.

It is within the province of the district court to decide whether alimony will terminate upon remarriage. *In re Marriage of Von Glan*, 525 N.W.2d 427, 431 (Iowa Ct. App. 1994). Seeking modification would not impose an undue burden on Richard because if Deborah remarries she would shoulder the burden to show a continuing need for support. *See In re Marriage of Johnson*, 781 N.W.2d 553, 558 (Iowa 2010) (citing Iowa Code § 598.21C (2007), which authorizes modification for support awards upon a substantial change in circumstances for either party). We do not find that the district court acted outside of its discretion in omitting language from the decree addressing remarriage.

C. Is Either Party Entitled to Appellate Attorney Fees?

Richard requests $3000 in appellate attorney fees for what he deems to be an unjustified award of traditional alimony. Deborah requests the same

amount in appellate attorney fees, based on the disparity of income between the two parties.

An award of attorney fees incurred on appeal is not a matter of right, and rests within our sole discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the requesting party, the other party's ability to pay, and whether a party was required to defend the decision of the district court on appeal. *Id.* With these factors in mind, we decline to award attorney fees to either party. *See In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa Ct. App. 1995) (holding equity does not warrant awarding appellate attorney fees when the district court's alimony order is reduced).

We affirm the decree as modified in this opinion. The parties should evenly divide the costs of this appeal.

AFFIRMED AS MODIFIED.