

IN THE COURT OF APPEALS OF IOWA

No. 9-121 / 08-1317
Filed March 26, 2009

IN RE THE MARRIAGE OF CONNIE J. HOLMES AND THOMAS L. HOLMES

**Upon the Petition of
CONNIE J. HOLMES,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
THOMAS L. HOLMES,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

Petitioner appeals the spousal support provision of the parties' dissolution decree, and respondent cross-appeals. **AFFIRMED.**

Susan M. Hess of Hammer, Simon & Jensen, Dubuque, for appellant.

Robert J. Sudmeier and Jenny L. Harris of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Sackett, C.J., and Mansfield, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Thomas and Connie Holmes were married in 1970. They have two children who are now adults. The marital residence is in Dubuque. Connie filed a petition for dissolution of marriage on March 8, 2007.

At the time of the dissolution hearing, Thomas was sixty-one years old. He has been employed for thirty-two years as a dispatcher for American Transition Company. Thomas's employment was in Madison, Wisconsin, and he stayed at an apartment there during the week, coming home to Dubuque on the weekends. Thomas had an annual salary of \$96,000, plus he received an annual bonus of about \$8000 each year. Thomas enjoyed good health.

Connie was fifty-eight years old at the time of the dissolution hearing. She had several different jobs throughout the marriage, with her highest income being \$59,000. She went back to school to get a teaching certificate, and then worked as a substitute teacher in Dubuque. In 2003 Connie moved to Chicago, Illinois, to take a full-time teaching job. She was assaulted by students in 2006, and she testified she could no longer return to the classroom. She then took an examination in Illinois to become licensed to sell insurance. She is currently employed by General Worth Insurance in Chicago, and is paid strictly on commissions. She testified her goal was to earn between \$46,000 to \$50,000 per year. Connie has been diagnosed with depression and arthritis.

During the marriage Thomas took \$100,000 from his retirement account and invested it in a business, Stained Glass Overlay of Eastern Iowa, run by the

parties' daughter, Emily. He stated that he spent some of his free time working for the business, and he planned on working there after he retired. Thomas testified that at the present time the business was only worth \$10,000. Additionally, Thomas gave the parties' son, Justin, \$20,000 to help him out. Connie was critical of Thomas's decision to give the parties' children money. She claimed Thomas had dissipated marital assets and asked for an adjustment in the distribution of property. Connie also sought alimony to help her with medical expenses.

The district court issued a dissolution decree for the parties on June 9, 2008. The court awarded Connie alimony of \$583 per month until she qualifies for Medicare. In the property division, the court awarded Connie \$40,000 more in assets in recognition of Thomas's investment in Emily's business. The court also ordered Thomas to pay \$1500 toward Connie's attorney fees. The court denied Connie's motion filed pursuant to Iowa Rule of Civil Procedure 1.904(2). Connie appealed, and Thomas cross-appealed.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. In our de novo review we examine the entire record and adjudicate rights anew on 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 district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Alimony

A. Connie contends the award of alimony is insufficient. She asks to be awarded \$1250 per month for seven years. She points out that this is the amount she was awarded as temporary support. Connie asserts that \$583 per month is not sufficient to cover her medical costs of \$640 per month in health insurance under COBRA, plus prescription costs of fifty-six dollars per month. Connie argues that she should receive more alimony due to Thomas's dissipation of assets during the marriage.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *Id.* In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1) (2007). *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). We give the district court considerable discretion in awarding alimony, and will disturb the court's ruling only when there has been a failure to do equity. *Smith*, 573 N.W.2d at 926.

Connie testified she intended to get health insurance coverage under COBRA after the dissolution, and this would cost her \$640 per month. At the dissolution hearing she stated, "I ask the Court for enough in support to get me health insurance until I'm 65." Thomas testified that after the parties separated in 2003 Connie primarily supported herself, although he continued to cover her on his health insurance, and she used marital assets to supplement her income.

The district court awarded Connie alimony of \$583 per month. The court found Thomas had been paying fifty-seven dollars per month to cover Connie on his health insurance. The court subtracted this amount from the \$640 per month Connie testified COBRA coverage would cost her. The alimony award continues until Connie qualifies for Medicare, presumably at age sixty-five, which would be in 2014.

Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). Here, the parties' property division has already been adjusted to take into account Thomas's use of marital funds to invest in their daughter's business. Connie was awarded \$40,000 more in marital assets than Thomas. We conclude no further adjustment to the award of alimony is needed to reflect Connie's claim of dissipation of assets.

Considering all of the circumstances in this case, we determine the award of alimony is adequate. The award of alimony, together with the property distribution, should be sufficient to permit Connie to pay for health insurance. We affirm the decision of the district court.

B. Thomas does not contest the amount of the alimony award. On cross-appeal, however, he asks to have the alimony award made non-modifiable. The parties may stipulate, or the court may determine that alimony is not modifiable. See *In re Marriage of Phares*, 500 N.W.2d 76, 79 (Iowa Ct. App. 1993); *In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa Ct. App. 1991). We decline to place such a provision in the present case.

IV. Attorney Fees

Connie asks for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.