

IN THE COURT OF APPEALS OF IOWA

No. 3-806 / 03-0200
Filed August 11, 2004

**IN RE THE MARRIAGE OF DONALD EUGENE BURGETT and DEBORAH
LOUISE BURGETT**

**Upon the Petition of
DONALD EUGENE BURGETT,**
Petitioner-Appellant,

**And Concerning
DEBORAH LOUISE BURGETT,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen,
Judge.

Appeal by husband from alimony award claiming it should be reduced in
amount and duration. **AFFIRMED AS MODIFIED AND REMANDED.**

Andrew Howie and Steven Shindler of Hudson, Mallaney & Shindler, P.C.,
Des Moines, for appellant.

Kirke Quinn of Payer, Jordan, Mahoney, Jordan, Quinn, Hunziker &
Rhodes, L.L.P., Boone, for appellee.

Considered by Huitink, P.J., and Miller, J., and Snell, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(2003).

PER CURIAM.

This case comes to us on the appeal of Donald Burgett who questions the spousal support provisions in the decree of dissolution of his marriage. He believes the amount of support should be reduced and should terminate upon his retirement. We modify the trial court's judgment.

Our standard of review of this issue is de novo, the matter having been tried in equity. Iowa R. App. P. 6.4. We give weight to the trial court's findings, especially in determining the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa Ct. App. 1991).

At the time of the court's decree in March 2003, the parties were fifty-two years old. This was a marriage of long duration. The parties married in 1969 and had two children, now ages thirty-three and twenty-four. Don Burgett earned a bachelor's degree from Iowa State University in 1973 in animal science. Don worked hard to support his family and pay off student loans. Deborah also worked hard in raising her family. After graduating from high school in 1969, she returned to school, after a ten-year hiatus. In 1993, she earned a certified medical assistant degree through a two-year program at Des Moines Area Community College.

Don was in good health at the time of trial. For seventeen years after college graduation he worked for Oscar Mayer Company as a hog buyer. Starting at \$9,250 annually, he worked his way up to a \$45,000 salary. Typically for a growing family, there were financial pressures with little money saved for

retirement or luxurious spending. Don later worked for other companies at similar salaries.

In 1990, Don went to work for Wiechman Pig Company (WPC) as a plant manager at a salary of \$35,000 plus a bonus. This job brought a wage income of \$92,166. In 1993, Don purchased a five percent interest in the company. This investment proved to be enormously profitable. In 1993, the Burgetts' income amounted to \$140,000 and in 1994, \$194,000. In 1996, the income was approximately \$200,000. In 1998, Don earned \$236,000, in 1999, \$301,000, and in the year 2000, \$467,000. The income of Don in 2001 was \$518,000 before showing a farming operation loss of \$166,000. Net income of Don in 2001 thus was about \$352,000.

Don reported losses from his farming operation on his tax returns for several years. In 1998 he reported a loss of \$23,000, in 1999, \$29,000, in 2000, \$50,000, and in 2001, \$166,000. These losses were subtracted before the income amounts cited in this opinion for those years.

Don testified that in 1995 they spent about every cent they made. He said they did the same thing in 1996, 1997 and 1998. During these years, Don bought farmland so he could raise livestock. He purchased forty acres for \$45,000, then in 1999, eighty acres for \$36,000, and then 240 acres in the year of 2000 or 2001. He invested in cow herds, the last being for \$120,000.

Don testified that he and Deborah had a life style that consumed nearly all of their income. This is not surprising in their earlier years of lower income and, as he testified, they financed college educations for their sons. But later, in 1993 and 1994, when the income was \$140,000 and \$194,000, he said the same

thing. In 1997 and 1998 they consumed their income with the exception of \$36,000 to purchase eighty acres and \$30,000 for cows.

Don blames Deborah for much of this consumption. He points to her credit card debt of \$27,000 over three years from the year 2000 through the first month of 2002, which he had to pay off. Given the strictured financial bind of earlier years of her marriage and Don's huge income change, her greater spending is not surprising.

Don also argues that they had agreed in earlier years that he should retire between the ages of fifty-five and sixty. Deborah disputes this. Don says his job was simply too physically taxing for him to continue beyond his sixtieth birthday. They would live frugally but comfortably. Don believes that end should be promoted. He views their earlier expectations on retirement as a solemn obligation unchangeable by the fact of divorce. Don argues Deborah should not benefit from the divorce, yet admits she is entitled to maintain her lifestyle. Ignored in this argument is that divorce changes many expectations and the parties' lifestyles now are based on Don's sizably increased income.

As to the big incomes, Don says that WPC reaped great rewards from a government program. When the program was discontinued at the end of 2002, WPC suffered a dramatic turnaround. It lost fifty percent of its customer base and its net income for the first nine months of 2002 was considerably less than during the same period the previous year.

Don admits that the farming loss could be terminated at any time. Of course, that would eliminate the income tax loss deductions from an enormous income passed on to the government.

Deborah has never earned much money though she worked hard. She earned a 4.0 grade average in her higher education and worked full-time at the Iowa Heart Center providing patient care. She continually received good job performance reviews. She worked from October 1993 through May 1995. At the end of her employment she was earning \$9.11 per hour.

Deborah stopped working in May 1995 because of injuries suffered from a car accident in the course of her employment. She suffered a broken back requiring two surgeries. In September 1995, she returned to work two days per week. In June 1997, she stopped work because of chronic pain. Medical testimony indicated she could do part-time work although she has chronic pain syndrome. When working full-time before her accident, her highest rate of pay was \$9.11 per hour.

Deborah has filed for social security disability benefits. If awarded, she would receive \$244 per month. Workers' compensation benefits have provided her with \$243 weekly based on a forty percent disability. She believes that she is not now able to be employed.

The trial court divided the marital assets so that Deborah was awarded property valued at \$464,790 after a deduction of \$14,298 for debts. Don was awarded property valued at \$472,491 after a deduction of \$145,534 for debts. Don was required to pay \$200,000 cash to Deborah. As part of the property settlement to Deborah this amount was to be paid at the rate of \$50,000 by March 1, 2003, \$50,000 by December 31, 2003, \$50,000 by December 31, 2004, and \$50,000 by December 31, 2005. Interest was assessed at the rate of five percent per annum on amounts owing after March 1, 2003. This cash asset was

to provide an asset capable of supplying some living expense money since Deborah has little but workers' compensation and social security benefits for this purpose.

The court found that alimony was also required. An award of alimony is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The trial court determined that Don should pay alimony to Deborah in the amount of \$8,000 per month commencing March 1, 2003 to be reduced to \$3,000 per month when Don reaches age sixty-five. Alimony will terminate on death of either party or when Don reaches age sixty-nine.

In reviewing the division of property awards, we note that the \$200,000 cash payment by Don to Deborah was listed by the court as an asset of Deborah. As listed, Deborah's net assets would be \$464,790, while Don's would be \$472,491. Ignoring the \$200,000 cash payment, which is not a current asset, shows a division of property of \$264,790 to Deborah and \$472,491 to Don, a difference of \$207,701 in Don's favor. One-half of this property asset difference is Don's; one-half is Deborah's. Adjusted accordingly, Deborah is entitled to a property settlement amounting to \$372,491; Don's will be \$364,790.

The trial court ordered Don to pay \$200,000 in four installments as part of the property settlement. Although Deborah does not receive this immediately, we view this as getting an asset to her for producing income for her support. Don will have to supply this from his current assets or earned annual income.

The trial court also ordered alimony to be paid Deborah in the amount of \$8000 per month from March 1, 2003, to be reduced to \$3000 per month when Don reaches age sixty-five. Alimony and property division are intertwined and

one cannot be considered in isolation from the other. Iowa Code § 598.21(1)(h) (2003); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994).

Our review, considering all the circumstances, including lifestyle and ability to pay, convinces us that alimony is appropriate. Paul Jacobson, a certified public accountant, testified that the Burgetts had a three-year average adjusted gross income of \$339,000. Alimony is based on earning capacity and present standards of living. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996).

In assessing the appropriateness of amount of alimony here, we take into account the property division favoring Deborah, though delayed. Also, though somewhat speculative, Don's income will likely decline and, according to medical testimony, Deborah can supplement her income with part-time work.

Accordingly, we affirm the asset distribution, including the payment by Don of the \$200,000 cash to Deborah. However, we modify the alimony amount payable by Don to \$5000 per month commencing March 1, 2003, to be reduced to \$3000 per month when Don reaches age sixty-five. Alimony will terminate on the death of either party or when Don reaches age sixty-nine.

Each party shall pay his or her attorney fees incurred on this appeal. The trial court shall enter orders in accordance with this opinion. Court costs shall be paid by Don.

AFFIRMED AS MODIFIED AND REMANDED.