IN THE COURT OF APPEALS OF IOWA

No. 1-379 / 00-1598
Filed July 31, 2001

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF KANDI JEAN BARTELS AND JERRY EDWARD BARTELS

Upon the Petition of
KANDI JEAN BARTELS,
Petitioner-Appellee,

And Concerning
JERRY EDWARD BARTELS,
Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

The respondent appeals various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Paul L. Macek of Dircks, Ridenour & Macek, Davenport, for appellant.

Robert L. Sudmeier and Norman J. Wangberg of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

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HUITINK, P.J.

Jerry Bartels appeals from the economic provisions of the district court's decree dissolving his marriage to Kandi Bartels. We affirm.

I. Background Facts and Proceedings.

The Bartels were married on September 17, 1965. They had two children, both of whom are now emancipated. In the fall of 1999 the parties separated. On January 10, 2000, Kandi filed a petition for dissolution of marriage.

The fighting issues at trial concerned property division. The district court concluded that two certificates of deposit (CDs) totaling $34,909 were Kandi's separate property by inheritance, dividing the remainder of the parties' assets, including Jerry's pension, approximately evenly. Jerry was awarded property valued at $241,102. Kandi was awarded property valued at $277,291.

On appeal Jerry contends the district court erred in dividing his pension and in failing to divide Kandi's CDs equally. Kandi requests an award of appellate attorney fees.

II. Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Hoffman,* 493 N.W.2d 84, 87 (Iowa Ct. App. 1992). We give the trial court's factual findings weight in considering the credibility of witnesses, although we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Clinton*, 579 N.W.2d 835, 838 (Iowa Ct. App. 1998).

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III. Property Division.

(A) Division of Alcoa Pension.

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.* An equitable distribution of the parties' property must be made according to the criteria set forth in Iowa Code section 598.21(1) (1999). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000).

Pension benefits are properly considered marital property and are subject to equitable distribution. *In re Marriage of Mott*, 444 N.W.2d 507, 510 (Iowa Ct. App. 1989).

Jerry contends that the equal division of his pension was inequitable under the circumstances and that the pension should have been awarded to him in its entirety. These circumstances include the couple's agreement that he should retire from the Alcoa Aluminum Plant so that they could live half the year in Iowa and half in Arizona, his reliance on expected income from Kandi in making his decision to retire, his limited success in starting his own construction business, and his overall loss of earning capacity due to health problems resulting from years of manual labor at Alcoa.

The district court, in its findings of fact, concluded:

> Jerry is fifty-three years of age and a high school graduate. . . . Jerry has a limited ability to read and write. He has some

> hearing loss and occasionally has back pain. In 1996 Jerry retired from Alcoa with a pension of $1,100.00 per month and health insurance. Upon retiring he intended to have his own small construction business, performing roofing and remodeling of residences. He lists income from carpentry of $500.00 per month. Jerry's income taxes do not show much income from his construction business. He is currently working as a subcontractor for a contractor on a day-to-day basis. It appears he works a lot but shows less income than one would expect. He testifies that he does not charge for all of his time and sometimes his charges are very low. He also testifies that he is seeking no other employment. **THE COURT FINDS** that Jerry is fully capable of earning an income at least equal to Kandi's. Unfortunately, the Court's impression is that he has a current block on finding better employment that pays more income, as he is both skilled and a hard worker. The Court's impression is that a trip to Job Services would likely provide him with several opportunities, and remedial education is readily available to improve his reading skills. None of Jerry's claimed deficiencies will preclude him from gainful employment, and he could easily correct his deficiencies.

Because the court's finding on this issue implicates its assessment of Jerry's credibility, we will not interfere. We find no inequity in the district court's division of Jerry's pension. We affirm on this issue.

(B) Division of Inherited Property.

First, we must determine whether the inherited property is divisible as marital property. Iowa Code section 598.21(1) states: "the court shall divide all property, except inherited property or gifts received by one party, equitably between the parties . . . ." In determining whether inherited property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the inheritance or gift. *In re Marriage of Wertz*, 492 N.W.2d 711, 714 (Iowa Ct. App. 1992).

Jerry argues that the CDs should be divided as marital property because they were titled as joint property, thus showing that Kandi intended to gift the

assets to him, and because the funds were commingled with marital assets when they were used as collateral to purchase joint assets. We disagree. Using nonmarital property as collateral for marital loans does not result in the nonmarital collateral becoming a marital asset. *See Farrior v. Farrior*, 712 So. 2d 1154, 1156-57 (Fla. Dist. Ct. App. 1998) (use of nonmarital property as collateral for joint marital debts does not require property then be divided as marital property). Moreover, the act of placing an inheritance into joint ownership and/or commingling the same with other marital assets is not controlling in deciding whether the property should be divided as a marital asset. *In re Marriage of Liebich*, 547 N.W.2d 844, 851 (Iowa Ct. App. 1996); *Hoffman*, 493 N.W.2d at 89.

Although we find Kandi's inheritance is not marital property for purposes of division, it is important to note inherited property may be divided as marital property where nondivision would be unjust. *Liebich*, 547 N.W.2d at 850. Factors considered in determining whether inherited property should be divided include:

> (1) contributions of the parties toward the property, its care, preservation or improvements;
> (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
> (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
> (4) any special needs of either party;
> (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee."

In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989) (quoting *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982)).

Jerry also contends it was inequitable for the district court to set aside the CDs to Kandi due to the length of the parties' marriage, his close relationship with her parents, and the significant contributions he made toward preserving the assets.

In addressing Jerry's challenge, we give weight to his close relationship with Kandi's parents. We note that while both parties helped to pay income tax on the accrued interest and to preserve the assets through their contributions to their joint economic welfare, Jerry likely contributed more funds by virtue of his higher income. On the other hand, as the trial court noted, Kandi was a frugal manager and was able to maximize the parties' wealth through her efforts in supervising their finances. We also note the money was immediately invested and did not enhance the couple's standard of living. Finally, as indicated above, Jerry has no special needs necessitating division. Considering all factors, we think that on balance there is no inequity in setting aside the CDs to Kandi.

The district court decision is affirmed in its entirety.

IV. Appellate Attorney Fees.

Kandi requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa Ct. App. 1994). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial

court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Kandi.

AFFIRMED.