IN THE COURT OF APPEALS OF IOWA

FILED
MAY 3 1 2000
CLERK SUPREME COURT

No. 0-28 / 99-384
Filed May 31, 2000

IN RE THE MARRIAGE OF JO A. HANSEN-BANKS and GORDON HAL BANKS,

Upon the Petition of
JO A. HANSEN-BANKS,
Petitioner-Appellee,

And Concerning
GORDON HAL BANKS,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Respondent appeals from the district court's ruling dissolving the parties' marriage. **AFFIRMED.**

J.E. Tobey III, Davenport, for appellant.

Kyle D. Williamson of Engelmann, Carroll & Williamson, Davenport, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

STREIT, J.

Gordon Banks appeals the district court's decree dissolving his marriage to Jo Hansen-Banks. He claims the marriage was void and, in the event it was not, that the trial court erred in equitably dividing the property and awarding Jo attorney fees. Upon reviewing the evidence de novo, we find the marriage valid and the court's decree to be both fair and equitable. The district court is affirmed.

I. Background Facts & Proceedings.

Jo Hanson-Banks and Gordon Banks married August 15, 1996, in New Mexico. When the couple returned to Iowa to a week later, they learned Jo's divorce decree had not been filed, leaving her previous marriage intact. A few days later, the divorce decree was signed and filed by Jo's previous husband. Jo and Gordon continued to live as man and wife until July of 1997, when the parties separated.

In May of 1998 Jo filed for dissolution. Gordon answered, claiming the marriage was void. In January of 1999 the court ruled a valid marriage existed, dissolved the marriage, and divided the parties' property. With regard to the property distribution, Gordon owed Jo $11,000 on a promissory note executed between the parties. The court ordered Gordon to pay the note, but permitted him to deduct from the balance $8000 needed to bring the marital home out of foreclosure and $2000 as a result of Jo living in the home rent-free after the separation. The court then awarded Jo the marital home, the furniture, and attorney fees in the amount of $2000.

Gordon appeals, claiming the marriage was void and, in the event the marriage was valid, that the court erred in dividing the marital property and awarding Jo attorney fees.

In April of 2000 Gordon died, and his estate has not sought appointment as a substitute party. Jo claims the appeal should be dismissed for want of a party. The case, however, was submitted to us prior to his death. We therefore deny Jo's motion to dismiss and render our ruling.

II. Standard of Review.

In an equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

III. The Validity of the Marriage.

Gordon first claims the marriage in New Mexico was void and their actions, subsequent to the dissolution of Jo's previous marriage, did not amount to common-law marriage.

Under Iowa Code section 595.19(2) (1997), "[m]arriages between persons either of whom has a husband and wife living are void, but, if the parties live and cohabit together after the death or divorce of the former husband and wife, such marriage shall be valid." Jo and Gordon went to New Mexico and were formally married in accordance with that state's laws. Jo's previous marriage had not been dissolved. Thus, the marriage is void unless the parties continued to

cohabit together after the dissolution of her previous marriage was finalized. Cohabitation is evidenced by: (1) an unrelated person of the opposite sex living or residing with another in the same dwelling, (2) living in a manner indicative of husband and wife, and (3) unrestricted access to the home. *In re Marriage of Ales*, 592 N.W.2d 698, 706 n.1 (Iowa App. 1999) (citations omitted). Gordon admits the first and the third elements are present but denies the second element was established by a preponderance of the evidence.

The interaction between Gordon and Jo was not of casual acquaintances but of husband and wife. The parties lived together in the same home, wore wedding rings signifying their commitment, and held joint accounts. Although the legal nature of their marriage was at times in question, their day-to-day treatment of the relationship and each other evidenced marriage. Gordon admitted he tried to make "a go" of the marriage, but it failed. The legal questions surrounding the validity of their marriage by third parties cannot vanquish the objective signs of marriage demonstrated by the parties' actions. As the parties lived in a manner indicative of husband and wife, Jo carried her burden of establishing cohabitation after the legal impediment of her previous marriage had been removed. Therefore the marriage was valid under Iowa Code section 595.19(2).

IV. Property Distribution.

Gordon next argues if the marriage was valid, the trial court erred in equitably dividing the property.

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 App. 1991). A fastidious adherence to equal property division does not bind the courts of this state. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The proper goal of the courts is to "achieve an equitable and just award under the circumstances." *Id.* In discerning a just and equitable distribution, a court should evaluate and consider the factors enumerated in Iowa Code section 598.21(1) (1997). *In re Marriage of Mott*, 444 N.W.2d 507, 511 (Iowa App. 1989).

The trial court's division of property was equitable under the circumstances. Gordon's only complaint regarding the property distribution was Jo's retention of the household furniture. However, given the contributions Jo made to the marriage, the court's failure to award any type of spousal support, and Jo's more limited earning capacity, the mere offset of household furniture was patently reasonable.

V. Attorney Fees.

Gordon finally claims the trial court erred in awarding Jo attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay, and the fees must be fair and reasonable. *Id.* Gordon must establish the trial court abused its discretion in awarding fees. *Id.* We find the decision of the trial court was equitable and not an abuse of discretion.

The trial court is affirmed.

AFFIRMED.