FILED
AUG 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-152 / 93-925

IN RE THE MARRIAGE OF AMIRA F. SALAMA AND FOUAD A. SALAMA

Upon the Petition of
AMIRA F. SALAMA,

Appellant/Cross-Appellee,

And Concerning
FOUAD A. SALAMA,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

The petitioner appeals, and respondent cross-appeals, from various economic and child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Steven DeVolder and Joseph G. Van Winkle of Gamble & Davis, Des Moines, for appellant.

Thomas P. Hyland of Hyland, Laden & Pearson, P.C., Des Moines, and Teresa A. Beyer, Des Moines, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Amira appeals and Fouad cross-appeals the provisions of their dissolution decree. At the time of trial, Amira was forty-two years of age, and Fouad was fifty-four. The parties have a child, Sara, born in 1990. Fouad has two sons from a previous marriage, ages seventeen and fifteen.

Fouad is a physician who left his practice in 1986 after the death of his wife, Hoda. He suffered from severe depression and now receives a monthly income of $10,478 from his disability insurance. He is reestablishing his medical practice at this time. At the time of the marriage Fouad had substantial real estate holdings, investments, and savings.

Amira worked full-time as a legal secretary and real estate agent in California prior to the marriage. During the marriage Amira was not employed outside of the home. She is attending school part-time in an effort to obtain her certificate to be a legal assistant.

The district court awarded the parties joint custody of Sara, with Amira being awarded physical custody. Fouad was ordered to pay $1500 per month in child support, based on his income of over $10,000 per month. Amira was awarded rehabilitative alimony for two years in the amount of $1000 per month.

The district court awarded Amira a lump sum property settlement in the amount of $75,000. Amira received her premarital assets plus jewelry and a 1990 Dodge Caravan. She also received $20,000 for attorney fees.

Amira contests the economic, support, custody, and child support provisions of the decree. She also contests the award of attorney fees and asks for appellate attorney fees. On cross-appeal, Fouad argues Amira should not be awarded sole custody of Sara, as she requests, and should not have been awarded physical custody.

Our review in equity cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Amira first challenges the economic provisions of the decree. She argues the district court erred by setting off the majority of assets as premarital assets and failing to divide all property equally. We disagree.

The partners in the 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). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

This marriage was of short duration. Ordinarily, if a marriage lasts a very short time, the claim of either party

to the property owned by the other prior to the marriage during the brief duration of the marriage is minimal at best. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981) (citing the five-year marriage in In re Marriage of Steenhoek, 305 N.W.2d 448 (Iowa 1981)).

The record clearly indicates this marriage was troubled early on. Amira first filed for separate maintenance in August 1990. After she filed again in March 1992, Foaud responded by filing for dissolution. In this marriage the accumulated property was not the product of the parties' joint efforts, and there need not necessarily be a division when one party brought substantial property into the marriage. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa App. 1982); see also Wallace, 318 N.W.2d at 831. An equitable division of property should be a function of the tangible contributions of each party, and not the mere existence of the marital relationship. In re Marriage of Bulanda, 451 N.W.2d 15, 17 (Iowa App. 1982) (citation omitted).

We apply these principles as well as the factors enumerated in Iowa Code section 598.21 (1993) to the facts disclosed by the record. Fouad brought a substantial amount of premarital assets to the marriage. Amira contributed little to any increase in the value of these assets. There was insufficient time for Amira to develop the expectations discussed in Wallace, 318 N.W.2d at 831, which justify an increased property award. We conclude it

would be inequitable to award Amira any significant portion of these assets and affirm on this issue.

Amira contends she should be awarded additional alimony. We disagree. Amira was awarded rehabilitative alimony in the amount of $1000 per month for two years. Rehabilitative alimony is structured to support an economically dependent spouse through a limited period of reeducation or retraining following divorce. In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989). In addition, when considering an award of alimony, the property division must also be considered as both are neither made nor evaluated in isolation of one another. In re Marriage of Earsa, 480 N.W.2d 84, 85 (Iowa App. 1991) (citation omitted).

Amira had significant experience as a legal secretary and real estate agent before her marriage to Fouad. She is currently enrolled in a legal assistant program part-time. The trial court found, and we agree, that Amira has an earning capacity of $1000 to $2000 per month whether or not she completes the legal assistant program.

In addition, the record indicates Sara has been in full-time day care since August 1991. This will allow Amira to enroll as a full-time student and complete the program within two years. We affirm the district court's award of rehabilitative alimony.

Both Amira and Fouad contest the custody provisions of the dissolution decree. Fouad requests physical custody of Sara while Amira requests sole custody.

In making custody determinations, our object is to assure the child maximum physical and emotional contact with both parents. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). Joint custody is preferred whenever reasonable and in the best interests of the child. Id. An award of sole custody requires clear and convincing evidence that joint custody is not in the best interests of the child to the extent the legal relationship between the child and a parent should be severed. Id. (emphasis added).

The record indicates Amira is more supportive of Sara's relationship with Fouad. Amira has been the primary caregiver, and several social workers recommended Amira be awarded physical custody of Sara. However, the record lacks any basis for awarding Amira sole custody. In addition we find no merit in Amira's challenges to the visitation schedule. We therefore affirm the district court on these issues.

Amira also claims the trial court erred in its award of child support. We disagree. Under the child support guidelines, when the noncustodial parent's income is over $3001 per month the minimum amount of support that parent could pay is $675. In re Marriage of Gehl, 486 N.W.2d 284, 286-87 (Iowa 1992). An award which exceeds this minimum amount is within the discretion of the court. See id. We determine the district court's award of $1500 was well within its discretion, and we decline to disturb it on appeal.

Finally, Amira requests an increased award of attorney fees and expenses in the amount of $41,000. The trial court has considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). The court did not abuse its discretion in awarding Amira $20,000 for trial attorney fees.

Amira also requests appellate attorney fees. We are to 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 trial court's decision on appeal. In re Marriage of Manson, 503 N.W.2d 427, 431 (Iowa App. 1993). We decline to award Amira appellate attorney fees. Both parties are responsible for their own attorney fees on appeal.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Costs of this appeal are assessed one-half to each party.

AFFIRMED.

Sackett, P.J., concurs and concurs specially; Cady, J., dissents.

SACKETT, J. (concurring specially)

I concur with the majority in all respects.

The trial court carefully considered the equities and reached a decision that resulted in Amira benefiting from accumulations of Fouad and the deceased mother of two of his children not only during the marriage but also at the time of the dissolution. I agree with the trial court's findings there basically was no increase in Fouad's net worth during the marriage or, if there was, it was minimal. Yet, the trial court still ordered that Amira receive what I find to be a substantial property settlement.

During the marriage, Amira, as the trial court found, enjoyed a beautiful home, a luxurious lifestyle, and extensive travel.

Amira claimed to have entered the marriage with $11,000 in cash, a lot in New Mexico, a cemetery plot in California, and a vehicle. The New Mexico property and the California property were worth less than $3000. Amira also had an excellent job which she gave up. However, the trial court found and I find no reason to disagree, she has retained her skills and is readily employable now.

In the dissolution Amira received the New Mexico land, the California cemetery plot, and IRA valued at $7582, insurance of $9332, a Caravan valued at $10,500, a diamond

ring that cost $9,100, significant household goods, an after-tax cash settlement of $75,000, and alimony of $1000 a month for two years and $20,000 in attorney fees. I estimate the sum of property and fees awarded to Amira is approximately $180,000.

The trial court carefully considered the financial evidence and found there were little or no increases and, perhaps, some decreases in Fouad's net worth during the marriage.

I agree, in assessing the equity of a division of assets, we should give consideration to service as a mother and a homemaker. The substantial cash property award to Amira indicates to me the trial court properly considered this factor.

CADY, J. (dissenting)

I respectfully dissent and depart only from the property division portion of the opinion authored by the majority. Our legislature has statutorily defined a variety of factors to consider in making an equitable distribution of property in a dissolution of marriage. I believe the trial court, and the majority, failed to properly apply these factors. This has resulted in an inequitable distribution of the property to Amira. In a greater context, I fear the opinion by the majority gives tacit approval to a growing misconception that premarital assets are typically set aside in dividing property in a dissolution of marriage. The trial court, in fact, made such a specific finding in its decision. The majority comes perilously close.

In Iowa premarital assets are not set aside in dividing the property of the marriage. To the contrary, the identification of the property brought to the marriage by each party is only one of the many factors to consider in dividing all the property. Iowa Code, section 598.21 (1)(b) (1993). Only two types of property, gifted and inherited, are excluded from the property division, and even this exception is not followed if it would result in an inequity to the other party or the children. See Iowa

Code section 598.21 (2) (1993). In the context of a dissolution a spouse otherwise acquires an interest in the premarital assets of the other spouse by virtue of the marriage. Our laws do not recognize "his and hers" property at the time of divorce absent a written agreement entered into prior to the marriage.

The acquisition of property by a party prior to the marriage, as a consideration at the time of divorce, certainly weighs in favor of that party, but it does not prevent a court from awarding part or all of the property to the other party. See Gronneberg v. Gronneberg, 412 N.W.2d 84, 92 (N.D. 1987). Additional factors, such as the longevity of the marriage, often help diminish the importance of the acquisition date and source of the property. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa App. 1982). In each case all the relevant factors must be considered together to reach an equitable result.

In this case, Fouad was awarded net assets valued between 1.5 and 2 million dollars. The bulk of the assets were owned by Fouad prior to the marriage, and mainly consisted of a variety of investments. Most of the assets were subject to market forces during the marriage. Some increased in value, while others decreased. Amira brought approximately $25,000 of assets into the marriage. She was awarded slightly less than $100,000 in property. The application of all the factors reveal the award was inequitable.

The majority is content with finding that the marriage was of "short duration." The trial court refused to make a finding of when the marriage began. The length of the marriage is an important factor to consider, and can never be irrelevant. The parties in this case exchanged vows before a chaplain while on a cruise, and began living together in October 1987. Amira filed a petition for separate maintenance in March 1992, which eventually resulted with the dissolution of the marriage in April 1993. The marriage, through good and bad times, spanned five and one-half years. It was not long, yet cannot be fairly characterized as "short." It produced one child, born two years into the marriage. The parties purchased a $300,000 house during the marriage and acquired many possessions. Amira was the primary caretaker of their child, and also helped in the care of Fouad's two teenage sons from a prior marriage. She also actively assisted Fouad in his efforts to patent a medical device, and provided some limited assistance in his investments. She was otherwise a homemaker who enjoyed a luxurious lifestyle.

The majority concludes that "Amira's contributions to any increase in Fouad's premarital assets are of little significance." The important consideration, however, is Amira's contributions to the marriage, not her particular contribution to any increase in the value of Fouad's premarital assets. See Iowa Code section 598.21 (1)(c).

We are careful to fully recognize the contributions of a wife as a homemaker and mother. See In re Marriage of Lattig, 318 N.W.2d at 815. Each partner in a marriage assumes a variety of roles and the role of homemaker and caretaker is as important as that of a breadwinner. Moreover, just as Amira may have done little to increase the value of the assets owned by Fouad prior to the marriage, neither did Fouad. He was, for the most part, ignorant of his investments.

Considering the moderate length of the marriage, the property both parties brought to the marriage, the contributions of the parties to the marriage, the age and health of the parties', the disparity in the earning capacity of the partners, the opulent standard of living enjoyed during the marriage, and the modest child support and alimony awarded, I would award Amira $200,000 as a cash property settlement. See In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979).