

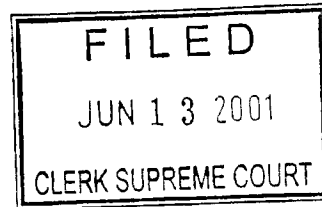
IN THE COURT OF APPEALS OF IOWA

No. 1-119 / 00-869
Filed June 13, 2001

IN RE THE MARRIAGE OF JAYNE P. MOOMAW
AND DALE WAYNE MOOMAW

Upon the Petition of
JAYNE P. MOOMAW,
Petitioner-Appellee,

And Concerning
DALE WAYNE MOOMAW,
Respondent-Appellant.



Appeal from the Iowa District Court for Jasper County, Jerrold W. Jordan,
Judge.

The respondent appeals the property distribution provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

James W. Cleverley, Jr. of Cleverley Law Office, Newton, for appellant.

Richard E.H. Phelps II, of the Phelps Law Office, Mingo, for appellee.

Considered en banc.

000223

PER CURIAM

A husband appeals the division of property in the dissolution decree entered for the parties. He claims the property division was not equitable to him. We affirm as modified.

Dale and Jayne Moomaw were married in 1964. They have three adult children who are not subject to this appeal.

At the time of the dissolution hearing, on April 11, 2000, Dale was sixty years old. He worked at Maytag during the marriage, and is now retired. Dale receives a retirement pension amount of \$2025 per month, which after withholding taxes gives him \$1816 per month. Dale testified his net monthly income would not change greatly after he begins to receive Social Security payments, as his pension will be reduced accordingly. Dale is in good health.

Jayne was fifty-nine years old at the time of the dissolution hearing. She worked as a teacher, substitute teacher, and youth counselor during the marriage. She has not worked since 1992 because of health problems. Jayne has been diagnosed with depression in the past, and more recently, post-traumatic stress syndrome. She takes prescribed medication for her condition. Jayne receives disability Social Security of \$675 per month, and IPERS retirement payments of \$325 per month.

The parties separated in July 1999, when Jayne filed a petition for dissolution of marriage. Dale moved to Texas, where he purchased a trailer valued at \$7000. Jayne remained in the marital residence, valued at \$74,000. Jayne incurred some debts after the parties' separation.

The district court entered a dissolution decree for the parties on May 16, 2000. The court noted Jayne will likely have significant medical expenses in the future. The court ordered Dale to execute a qualified domestic relations order to pay Jayne \$400 per month from his pension benefits, to continue for Jayne's lifetime.

In dividing the parties' property, the court stated:

The Court is mindful that the disposition of assets and liabilities as hereafter indicated is not in equal proportions between the parties, but believes there is no fair way to equally divide the assets and liabilities. Considering the health risks that Jayne has and her current condition compared to that of Dale, who is substantially in good health, able-bodied and certainly having the ability to produce income, if necessary, the Court does not believe that the following division of assets is unfair, but rather that it is fair and equitable.

The court awarded Dale assets worth \$40,716, which included his trailer, pickup, cash, bank account, furniture, and tools.¹ Dale was ordered to pay debts of \$14,361, giving him total net assets of \$26,355. The court awarded Jayne assets worth \$85,231, which included the marital residence, her car, cash, and furniture. She was ordered to pay debts of \$6550, giving her total net assets of \$78,681. Dale appeals the division of property.

Appellate review in this equitable proceeding is de novo. Iowa R. App. P.

4. The court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993). The appellate court gives weight to the fact

¹ The district court stated each party had his or her own vehicle. The court stated Dale was awarded assets valued at \$40,716, but only listed assets worth \$23,366. The court did not list Dale's pickup in the assets awarded to him. This leads us to find Dale's pickup was worth \$17,350.

findings of the district court, especially in determining the credibility of witnesses, but is not bound by them. Iowa R. App. P. 14(f)(7).

Dale asserts the property division was not equitable to him. He claims the debts which Jayne incurred after the parties separated should not have been considered as debts of the marriage. He states Jayne should be responsible for a loan of \$6500 on her vehicle. He also asks to receive one-half of the equity in the marital home. These changes would result in Dale receiving total net assets of \$69,855 and Jayne receiving total net assets of \$35,181.

The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa Ct. App. 1998). Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *Id.* The property distribution must be made according to the criteria set forth in section 598.21(1). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000).

Dale claims the debts which Jayne incurred after the parties' separation were frivolous, and were a waste of marital funds. Conduct of a spouse which results in loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable distribution of property. *In re Marriage of Bell*, 576 N.W.2d 618, 624 (Iowa Ct. App. 1998). Jayne testified she used the funds for attorney fees, repairs to the marital home, and living expenses.

We have previously stated:

The date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken. We value property for division purposes at its value at the time of the dissolution. It is the net worth of the parties at the time of trial which is relevant in adjusting property rights. Expenditures made during a separation should, in some cases, be considered in making an equitable distribution.

In re Marriage of Fall, 593 N.W.2d 164, 168 (Iowa Ct. App. 1999) (citations omitted). In the present case, as well, the parties' net worth at the time of trial should be used to determine an equitable distribution of property.

Jayne has health problems and requires many prescription medications, which will be a significant expense to her in the future. Jayne is unable to work, and thus cannot earn more money. Dale has the ability to work, although he is retired.

In balancing the equities in this case, we determine Jayne should be required to pay the debt of \$6500 which she took out against the value of her car. This will give Jayne total net assets of \$72,181 and Dale total net assets of \$32,855.

Jayne 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 and the parties' financial positions. *In re Marriage of Daniels*, 568 N.W.2d 51, 56 (Iowa Ct. App. 1997). Jayne should be required to pay her own attorney fees.

For all of the reasons discussed above, we affirm, as modified, the decision of the district court. The costs of this appeal should be assessed one-half to each party.

AFFIRMED AS MODIFIED.

All judges concur except Vogel and Zimmer, JJ., who dissent.

VOGEL, J. (dissenting)

I respectfully dissent. The goal of the courts is to reach an equitable, but not necessarily equal, distribution. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). Each dissolution is unique, and a fair allocation of assets and debts cannot be reached without consideration of the particular facts and circumstances of the parties. See *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998). The district court was fully aware of the disparity inured in its award of assets and assignment of debts, but found the division fair and equitable in light of Jayne's health concerns. These health concerns, when combined with Jayne's extensive medical expenses and need for independent health insurance, support the district court's distribution scheme. Equity does not require interference with the terms of the dissolution decree, and I would affirm the district court's ruling.

Zimmer, J. joins this dissent.