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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-043 / 92-867

000259

IN RE THE MARRIAGE OF BARBARA JANE KOEHLER AND LOUIE JOHN KOEHLER

Upon the Petition of
BARBARA JANE KOEHLER,

Appellee,

And Concerning
LOUIE JOHN KOEHLER,

Appellant.

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

The respondent husband appeals various economic provisions of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Gary J. Rolfes of Mayer, Mayer, Lonergan & Rolfes, Clinton, for appellant.

William M. Vilmont of Holleran, Shaw, Murphy & Stoutner, Clinton, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

000260

HAYDEN, J.

Barbara and Louie Koehler were married in 1956. They had four children, all of whom are now adults and are not affected by the terms of the present dissolution decree.

Barbara was fifty-seven years old at the time of the hearing. She is employed by Clinton Community School District as a cook at an elementary school. Her income is about $9,572, or about $798 per month. Barbara has been employed by the school district for about seventeen years and participates in the IPERS pension plan.

Louie was fifty-nine years old at the time of the hearing. He was employed as a railroad worker until he was injured in 1984. He received a workers' compensation settlement of $125,000 due to the injury. Louie lost part of the money in unwise investments, and the parties spent the rest. In 1990 Louie inherited the bulk of his mother's estate. He received a house in Clinton valued at $31,410 and stocks and bonds valued at about $120,000.

Louie is employed by Greater Rockford Auto Auction, where he earned a total of $1,702 in 1991. He currently receives $1,102 per month in combined railroad and social security disability benefits. He also received interest and dividend income of $6,277 in 1991 from his inherited stocks and bonds. Thus, Louie has total annual income of about $21,203, or about $1,767 per month.

The district court entered a dissolution decree for the parties on May 1, 1992. The court did not divide Louie's

000261

inheritance as a marital asset, but did consider it in making the property division. The court awarded Barbara assets worth $31,435, which included the marital residence and two investment accounts. Louie was awarded assets worth $15,228. He was ordered to pay all of the parties' debts in the amount of $14,297. He had incurred these debts.

The court realized Barbara was awarded net marital assets worth $31,435, while Louie received only $931. However, the court found Barbara needed a residence and sufficient money to repair the house and so she should be awarded a greater share of the marital assets. Louie had received a residence and sufficient funds for his needs through his inheritance.

The court also found Barbara had a limited earning capacity. Louie, on the other hand, has a greater income and a greater net worth due to the inheritance. The court ordered Louie to pay alimony of $100 per week to Barbara, terminable upon her death. Louie was ordered to pay $750 for Barbara's attorney fees. Louie appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

000262

II. Louie contends the property distribution was inequitable to him. By awarding Barbara net assets worth $31,435 and Louie net assets worth $931, the court awarded Barbara ninety-seven percent and Louie three percent of the marital assets. Louie agrees Barbara should be awarded a greater amount of the property but asks to be awarded the two investment accounts, valued at $10,486.

The partners in 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). 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.

The evidence presented in the case showed Louie was financially irresponsible. Of the $125,000 he received in a workers' compensation settlement, he lost $50,000 in an unwise investment and spent most of the rest. Also, nearly all of the parties' debt was due to Louie's credit card expenditures.

Furthermore, because he had inherited a house, Louie did not need the marital residence. Barbara, who was awarded the marital residence, needed additional funds to fix up the house, which was in poor repair. Under the particular facts in this case, we conclude the property division is equitable. We affirm the district court on this issue.

000263

III. Louie also contends the district court erred in awarding Barbara alimony of $100 per week. He claims she should be able to support herself on her income as a cook.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. In re Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an actual right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

We note Barbara has income of about $798 per month. Including his income from his inherited investments, Louie has income of about $1,767 per month. Alimony of $100 per week, which is $433 per month, will give Barbara total income of $1,231 per month and leave Louie with $1,334 per month to live on. We conclude the amount of the award of alimony is equitable. However, we modify the dissolution decree to provide the alimony should terminate on Barbara's death or remarriage, whichever occurs first.

IV. Barbara requests attorney fees for this appeal. An award of attorney fees rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We

determine Louie should pay $750 towards Barbara's attorney fees on appeal.

V. We affirm the district court on all issues, except we have modified the award of alimony to Barbara to make it terminable upon her death or remarriage, whichever occurs first. Costs of this appeal are assessed to Louie.

AFFIRMED AS MODIFIED.

Donielson, P.J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm the trial court in all respects.