IN THE COURT OF APPEALS OF IOWA

No. 2-636 / 92-801

IN RE THE MARRIAGE OF SHIRLEY ELAINE ESHELMAN AND ALBERT RAY ESHELMAN

Upon the Petition of
SHIRLEY ELAINE ESHELMAN,
Petitioner-Appellee/Cross-Appellant,

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And Concerning
ALBERT RAY ESHELMAN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Adair County, Dale B. Hagen, Judge.

The husband appeals and the wife cross-appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

James R. Van Dyke of Van Dyke & Werden, P.C., Carroll, for appellant.

Thomas J. Levis and Mark R. Schuling of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

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OXBERGER, C.J.

Shirley and Albert Eshelman were married in 1970. It was a second marriage for both parties. Shirley had four children from her first marriage, and Albert had two children from his first marriage. Shirley and Albert had a child during their marriage, Todd, who was born on October 9, 1977. All of the children are now adults, except Todd, who is a minor. During the marriage the parties lived on a farm in rural Adair County.

At the time of the dissolution trial Albert was sixty-eight years old. He retired in 1988. Prior to his retirement Albert was self-employed as a farmer, and he conducted a tiling business. Albert presently receives $703 per month in social security retirement benefits. He also receives about $1,241 per month from renting the parties' farm. Albert has total annual income of about $23,328 and net monthly income of about $1,756.

At the time of the dissolution trial Shirley was fifty-three years old. She did not work outside the home during most of the marriage, but took care of the seven children living in the household and helped with the farm work. She currently works part-time cleaning houses and cooking. Shirley has net income of about $168 per month from this employment. She receives rental income of $100 per month from a house she owns in Massena. Shirley was awarded certain assets in the decree which should give her investment income of about $93 per month.

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Shirley will receive $303 per month in social security benefits until October 1993, when Todd turns sixteen. Thus, Shirley's net monthly income will be about $664 until October 1993, and then $361 thereafter.

Todd receives a social security payment of $303 per month. He will receive this benefit until he reaches the age of eighteen.

The district court entered a dissolution decree in this case on May 11, 1992. The parties were awarded joint legal custody of Todd, with Shirley having primary physical care. The court ordered Albert to pay child support of $456 per month. No alimony was awarded. The court awarded Shirley her house in Massena, eighty acres of land, bank accounts, and a vehicle. Albert was awarded the remaining 320 acres of farmland owned by the parties, farm machinery, and cattle. Albert was ordered to pay a cash property settlement of $26,000 to Shirley. Shirley was awarded total assets worth $150,063, and Albert was awarded total assets worth $234,775.

Albert appealed and Shirley cross-appealed.

I. SCOPE OF REVIEW

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).

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II. *CHILD SUPPORT*

A. Albert contends the award of child support was excessive. He claims that his social security benefit should not be considered income because it is a form of public assistance payments. The child support guidelines specifically provide, "Gross monthly income does not include public assistance payments." Albert also points out that Shirley was awarded the income-producing bank accounts.

Our supreme court has ruled that social security retirement payments are not public assistance payments, and should be considered as income in determining the amount of child support. In re Marriage of Lee, 486 N.W.2d 302, 305 (Iowa 1992). The Iowa courts have consistently determined that public and private pensions, as well as social security benefits as a form of pensions, and military retired pay, could be considered by the courts in framing the financial clauses of dissolution decrees. In re Marriage of Yates, 365 N.W.2d 49, 51 (Iowa App. 1985).

Thus, the district court properly considered Albert's social security benefits in calculating his net monthly income. However, the court did not consider Albert's testimony that his benefit payment had increased to $703 per month or the fact that he would no longer receive investment income. We find Albert's net monthly income is $1,756.

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We note that social security benefits received by a child are not considered income to the mother. In re Marriage of Benson, 495 N.W.2d 777, 782 (Iowa App. 1992). However, the social security payment Shirley receives should be considered income to her under the rule discussed above. As noted above, Shirley's net monthly income will be $664 until October 1993, and then $361 thereafter.

In applying the child support guidelines for one child, we find Albert's child support obligation is $418 per month until October 1993, and then it will be $435 per month until Todd reaches the age of eighteen.

B. Albert also contends that the social security payment received by Todd should be offset against his child support obligation. He relies on the case of Newman v. Newman, 451 N.W.2d 843, 845 (Iowa 1990), which provides:

> The rule in Iowa is that a child support award may be offset by social security benefits during the period in which the benefits are received; any broader application would amount to a variance of the terms of the decree.

We determine this rule is not mandatory based on the supreme court's use of the word "may." In the present case, the social security payments designated for Todd have been placed in a special bank account. The parties intended this money to be used for Todd's education. Thus, the social security payments were not being used for Todd's day-to-day living expenses. We conclude Albert's child support obligation should not be offset by the social security payments received by Todd.

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We modify the dissolution decree to provide that Albert should pay child support of $418 per month until October 1993, and then $435 per month until Todd reaches the age of eighteen.

III. PROPERTY DIVISION

A. Albert claims the district court should have given him credit for the appreciation in the value of livestock he owned before the marriage. He points out that heifers were worth $175 per head in 1970, but were worth $750 per head in 1992. He asks that the cash property settlement be reduced from $26,000 to $2,065.

We note that the district court set aside to Albert the amount of $47,790, which represented assets he brought to the marriage, including livestock. We conclude Albert should not be credited for the appreciation in the value of livestock during the course of the marriage.

B. In her cross-appeal, Shirley contends the division of property was not equitable to her. As noted above, the district court awarded Shirley assets worth $150,063, and Albert assets worth $234,775. The court set aside to Albert the value of the assets he brought to the marriage, $47,790. The court also set aside to him 53% of the increase in the value of the farmland he brought to the marriage. The land had appreciated by $79,525, and Albert was awarded an additional $38,967.

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.

We conclude that the appreciation in the value of the farm land should not be set aside to Albert. The parties here were married for twenty-two years. Both contributed to the marriage--Albert by working on the farm, and Shirley by acting as a traditional farm wife. We note that Shirley took care of the seven children living in the parties' household, including Albert's two children by a previous marriage. We also note that no alimony was awarded in this case. Property division and alimony should be considered together in evaluating their individual sufficiency. Id.

The evidence shows the parties had total assets of $384,838. We find that $47,790 should be set aside to Albert to represent assets he brought to the marriage, and $2,000 should be set aside to Shirley to represent assets she brought to the marriage. Thus, the amount of $335,048 is available to be distributed. Half of this amount is $167,524. The district court awarded Shirley $150,063. In order to equalize the property distribution, Shirley should be awarded an additional $17,461.

We determine Shirley should be awarded the assets worth $124,063 which the district court assigned to her. We conclude the cash property settlement of $26,000 should be

increased by $19,461, which represents the $2,000 Shirley brought to the marriage and the additional $17,461 we have awarded to her from the marital assets. Therefore, Albert must pay Shirley a total cash property settlement of $45,461.

IV. APPELLATE ATTORNEY FEES

Shirley 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We order Albert to pay $500 towards Shirley's appellate attorney fees.

V. SUMMARY

We affirm the district court's dissolution decree, except that we have modified Albert's child support obligation and have increased the amount of the cash property settlement Albert must pay Shirley. Costs of this appeal are assessed to Albert.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Sackett, J., specially concurs without opinion.