IN THE COURT OF APPEALS OF IOWA

No. 1999-217 (9-441) / 98-2226
Filed January 26, 2000

IN RE THE MARRIAGE OF MARILYN J. GELINAS AND DONALD H. GELINAS

FILED
JAN 2 6 2000
CLERK SUPREME COURT

Upon the Petition of
MARILYN J. GELINAS,
Petitioner-Appellant/Cross-Appellee,

And Concerning
DONALD H. GELINAS,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Jasper County, James W. Brown, Judge.

The petitioner appeals, and respondent cross-appeals, various economic provisions of the parties□ dissolution decree. **AFFIRMED.**

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellant.

Greg A. Life of Life Law Office, Oskaloosa, for appellee.

Considered by Huitink, P.J., and Mahan, J., and Honsell, S.J.*

*Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

Mr. and Ms. Gelinas were married September 18, 1980. This was his fourth marriage and her second. They have two children, Heidi, who was born on May 5, 1982, and Sarah, who was born on July 5, 1984.

Mr. Gelinas was sixty-three years of age at the time of trial, July 21, 1998, and was working part-time as a relief pharmacist. Ms. Gelinas was forty-nine at the time of trial. Prior to their marriage Mr. Gelinas had retired from the military after twenty years of service. He then worked as a pharmacist for the Veterans Administration for twenty-one years before retiring from that position. At the time of their marriage, Ms. Gelinas was a registered nurse with the VA. She quit her VA employment to raise their children, but later returned to work.

At trial, the main issues concerned the division of marital and premarital property. The district court awarded Ms. Gelinas $281,499.96 in marital property and Mr. Gelinas $190,631.12. The court did not give either party credit for property they claimed they brought into the marriage. The court refused to grant Ms. Gelinas a credit for an alleged $30,000 gift from her parents, concluding the $30,000 was a gift to both parties. The court awarded her a $5,000 credit for a gift from her mother made during the pendency of the dissolution action. The district court awarded Ms. Gelinas one-half of the portion of the VA pension accumulated during the marriage. The court awarded Mr. Gelinas one-half of the portion of Ms. Gelinas's retirement account accumulated during the marriage, and ordered repayment by him of $36,000 to the account to restore it to the condition it would have been in if the parties had not withdrawn $12,000 earlier. The court subtracted the $5,000 gift and the $36,000 pension repayment from Ms. Gelinas's property award, reducing the

difference between the awards to $49,869. The court then ordered Ms. Gelinas to pay Mr. Gelinas $24,934.50 to equalize the property division. Ms. Gelinas appealed, and Mr. Gelinas cross-appealed.

Claims on appeal. Ms. Gelinas claims the district court erred in not awarding her credit for $80,000 in equity she had in a home acquired during a previous marriage. She contends the equity can be traced from the sale of her home to the purchase of the current marital home, and thus the equity was kept separate from other marital funds. Ms. Gelinas also claims the district court erred in not crediting her for a $30,000 gift received from her parents during the marriage. She asserts the promissory note was written off in $5,000 installments as a gift solely for her benefit, even though the alleged gift was written as a promissory note to the couple. Ms. Gelinas requests an award of appellate attorney fees.

On cross-appeal, Mr. Gelinas claims the district court erred in ordering repayment of $36,000 into Ms. Gelinas's retirement account. He contends the withdrawal was a mutual decision when Ms. Gelinas quit to raise their children. He argues she will benefit more from the repayment because, at age 49, she will have time to contribute more to the pension. He claims it was inequitable to use part of his property settlement to fund her retirement account and seeks an additional $18,000 in marital property as his share of the $36,000 repayment.

Scope of review. We review dissolutions of marriage de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). 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). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997).

I. Both parties claim substantial premarital assets. They are a factor we may consider, but they are not set aside to one party as is a gift or inheritance. *See In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996); Iowa Code 598.21(1)(b). While it is true the equity in Ms. Gelinas's premarital home can more easily be traced throughout the marriage than some of Mr. Gelinas's premarital assets, that does not make it more equitable to set her premarital assets aside and not Mr. Gelinas's. The district court's determination was equitable and we affirm.

II. The $30,000 "gift" evidenced by a promissory note was forgiven in $5,000 increments at the couple's annual wedding anniversaries. The evidence suggests it was a gift to them both and it was properly divided by the district court.

III. The court divided both parties' pensions using the same formula, giving each party one-half of the portion of the pension accumulated during the marriage. In order to make this allocation, the court determined Ms. Gelinas's pension needed to be restored to the condition it would have been in had there been no withdrawal from the account. We find the repayment as ordered by the district court was equitable and the benefits of the repayment were divided equally in the pension distribution.

IV. Ms. Gelinas seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112

(Iowa App. 1994). 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). We award no attorney fees in this appeal.

AFFIRMED.