IN THE COURT OF APPEALS OF IOWA

No. 1-234 / 98-1494
Filed June 13, 2001

IN RE THE MARRIAGE OF MARLENE RAY AND BOBBY LEON RAY

Upon the Petition of MARLENE RAY,
Petitioner-Appellee,

And Concerning BOBBY LEON RAY,
Respondent-Appellant.

FILED
JUN 13 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Edward B. DeSilva, Jr., Judge.

The respondent appeals the property distribution provisions of the parties' dissolution decree. Respondent argues he received an inequitable share of the marital assets. Petitioner requests an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

James Bryson Clements, Davenport, for appellant.

Marlene Ray, Davenport, pro se.

Considered by Sackett, C.J., Huitink and Streit, JJ.

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SACKETT, C.J.

Bobby Leon Ray appeals challenging the economic provision of the decree dissolving his marriage of over forty years to Petitioner-Appellee Marlene Ray. We affirm as modified.

We review economic challenges to a dissolution decree de novo. Iowa R. App. P. 4; *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). We examine the entire record and adjudicate anew the issues properly presented. *In re Marriage of Bonnette*, 492 N.W.2d 717, 720 (Iowa Ct. App. 1992). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

At the time of trial Bobby was sixty-five and Marlene was sixty-two. They were married in December of 1953 and separated some time between 1988 and 1990. A petition for dissolution of the marriage was not filed until May of 1997. Three children were born to the marriage. They are now all adults.

Bobby is retired and receiving social security benefits and pension benefits from his thirty-two point eight years of employment at International Harvester and Farmall. His current pension is $688.59 a month. His pension benefits accrued during his marriage to Marlene. Bobby retired and began drawing a pension a year or more prior to his separation from Marlene. For the next seven years his pension was $1025.97 a month. It was decreased when he began drawing social security benefits. He currently receives social security of $1124 a month. Since his retirement he has also had several part time jobs; however, the record is not clear as to the nature of these jobs or the income they have generated.

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Marlene is employed part-time at the Bettendorf Public Library for twenty-seven hours per week and is paid $5.40 an hour. Prior to that time she had other short-term employment, and she did work at Vera French for thirteen years. Marlene has testified she cannot work full-time and that she has had difficulty keeping a job because of medical and physical health problems. The evidence reflects that in the month following the decree she expected to start receiving social security benefits of $571.

The parties had assets valued between $108,000 and $133,000. They had debts of $56,225 excluding their obligation for attorney fees. The district court allocated the assets so that Marlene received assets valued between $62,000 and $77,000 and debts of $9501, for a net value of between $53,500 and $68,500. Bobby received assets valued at $43,000 and debts of $46,724 leaving him with debts in excess of assets excluding attorney fees of $3,724. Marlene was awarded one-half of Bobby's monthly pension of $688.15. In addition Bobby was to pay $1000 towards Marlene's attorney fees. His own attorney fee bill totaled about $2500. Marlene's request for alimony of $200 a month was denied.

Bobby contends the allocation of assets made by the district court is not equitable. Marlene contends it is equitable because Bobby spent the pension he received during their separation, and she was entitled to her part of it. She further advances that Bobby took a second mortgage of $29,000 on the home which was their personal residence and which she occupies, and that he got the money but the mortgage has not been repaid. It is not clear when this mortgage was first taken out, but apparently it was at or near the time of Bobby and

Marlene's separation. Bobby denies Marlene's allegations that he received the $29,000. Rather he contends that it went to her. He also testified that $11,000 of the amount went to pay the first mortgage on the home she occupies and received under the district court's order. The district court originally had allocated $29,000 of this debt to Marlene but modified that allocation to charge $25,000 to Bobby and $4000 to Marlene.

Neither party testified with any clarity about his or her financial situation before or after the separation. Furthermore, neither provided any independent verification for his or her position that the other spouse had the benefit of all the money received from the second mortgage. The absence of a clear record makes our review difficult. We notice it also caused problems for the district court.

. . In reviewing Bobby's challenges we recognize that Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Havran*, 406 N.W.2d 450, 452 (Iowa Ct. App. 1987). Pension benefits are considered in making an equitable division of property. *See In re Marriage of Whelchel*, 476 N.W.2d 104, 107 (Iowa Ct. App. 1991). Pension benefits are subject to equitable distribution and are subject to division just as any other property. *See id.; In re Marriage of Mott*, 444 N.W.2d 507, 510 (Iowa Ct. App. 1989); *See In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989); *In re Marriage of Bevers,* 326 N.W.2d 896, 900 (Iowa 1982).

The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in

Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). Though in an equitable division state such as Iowa there is not a set percentage for dividing property we frequently consider a fifty-fifty allocation of assets and liabilities accumulated during a long-term marriage an equitable division. *See In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994); *In re Marriage of Russell*, 473 N.W.2d 244, 246-47 (Iowa Ct. App. 1991) (equal division made in twenty-one year marriage where neither party brought substantial assets or debts into marriage).

The allocation made by the district court is not in accord with the division made in most long-term marriages where as here there is no evidence that either party entered the marriage with appreciable assets or debts. Yet the question remains whether it is equitable. In her argument that after their separation Bobby spent pension money to which she was entitled, Marlene contends the distribution is equitable.

Assets and liabilities are valued as of the date of dissolution. *See McLaughlin*, 526 N.W.2d at 344 (court rejected husband's challenge that because the couple had been separated for eighteen months prior to the decree, the assets should be valued as of the date of their separation.) The date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). We value property for division purposes at its value at the time of the dissolution. *See Locke*, 246 N.W.2d at 252. It is the net worth of the parties at the time of trial, which is

relevant in adjusting property rights. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979).

However, equity, not the date of valuation, determines how property should be divided. Although in making an equitable distribution financial dealings by parties before the actual dissolution process begins may also be considered in some cases. *See In re Marriage of Fall*, 593 N.W.2d 164 (Iowa Ct. App. 1999) (expenditures made during a separation should in some cases be considered in making an equitable distribution); *See also In re Marriage of Williams,* 421 N.W.2d 160, 164 (Iowa Ct. App. 1988).

Bobby received wages and pension during the separation period. Marlene earned wages during that same period while she lived in the parties' home and consequently enjoyed the equity the parties had there. These factors when considered together do not justify the allocation of assets and liabilities made by the district court.

With his social security and pension Bobby should have approximately the same monthly income Marlene has with her portion of his pension, social security and her earnings at the library. Bobby appears to have the ability to increase his income with part-time work. The record does not support a finding that Marlene has the ability to work longer hours.

The district court's initial decree gave Marlene between $28,500 and $43,500 in net worth depending on the value placed on her income, and gave Bobby approximately $21,000. We modify to return to the initial decree thereby charging the entire debt secured by a mortgage on Marlene's home to her.

Bobby contends that he should not have been required to pay $1000 towards Marlene's attorney fees. 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 Kern*, 408 N.W.2d 387, 390 (Iowa Ct. App. 1987). The district court did not abuse its discretion in awarding attorney fees. We affirm on this issue. We award no appellate attorney fees. Courts on appeal are taxed one half to each party.

AFFIRMED AS MODIFIED.

Streit, J. dissents.

STREIT, J. (dissenting)

I respectfully dissent. I would not disturb the trial court's division of property and allocation of debt. These parties were separated for over twelve years, during which time Bobby accumulated considerable debt used for his own purposes. During this same time period he collected over $49,000 in pension benefits, which he did not share with his spouse. Although assets and liabilities are valued as of the date of the dissolution, it is not equitable in this case and under these circumstances to allocate this debt to Marlene. I would not disturb the district court's equitable distribution of assets and liabilities.