FILED
NOV 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EILEEN ELIZABETH BREITBACH AND CLARENCE ANTHONY BREITBACH

UPON THE PETITION OF
EILEEN ELIZABETH BREITBACH,

Petitioner-Appellant,

AND CONCERNING
CLARENCE ANTHONY BREITBACH,

Respondent-Appellee.

18

Filed November 26, 1985

5-482
85-379

Appeal from the Iowa District Court for Dubuque County, T. H. Nelson, Judge.

Petitioner-wife appeals from the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Seymore M. Raben, Davenport, for petitioner-appellant.

Peter J. Klauer, Dubuque, for respondent-appellee.

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

OXBERGER, C.J.

The petitioner appeals from the decree dissolving the parties' marriage challenging the division of property, and asserting the award of alimony was too low. We affirm as modified.

The parties were married for forty-five years when the marriage was dissolved. The petitioner, Eileen Breitbach, is sixty-five and the respondent, Clarence, is sixty-seven. They had five children during the marriage who are all now adults. Clarence was employed by Flexsteel Industries until his retirement in 1982 and earned $16,000 to $18,000. Eileen was a homemaker and cared for the children. She also worked the last twelve years of the marriage as a motel maid and is now retired. Clarence's income is $895.67 per month from a pension and social security. Elizabeth receives social security of $287 per month.

The court did not set a value on certain property valued differently by the parties. Clarence says the 1976 Plymouth is worth $1000 and Elizabeth claims its value is $3000. He also says the household goods in his possession are worth $2500, while Elizabeth says the value is $4000. No evidence was presented at trial which would explain the reason behind the different figures. After a review of a list of the household goods provided by Clarence, and information provided in both financial statements, we accept Clarence's value for both the vehicle and the household goods. We also agree with Elizabeth the First Federal account does not have nominal value since Clarence can draw on the money at any time and then will be taxed. We accept her figure on its value. The court divided the parties' property as follows:

Elizabeth	
C.D. at Dubuque Bank & Trust	$1,084.24
Two U.S. Savings Bonds	2,251.96
	$3,336.23
Clarence	
Home	$30,000.00
First National	748.91
Holy Ghost Credit Union	30,957.30
East Dubuque Savings Bank	3,605.31
First Federal	8,565.00
Credit Union	3,048.16
Life Inv.	14,859.25
1976 Plymouth	1,000.00
Household Goods	2,500.00
	$95,283.93

Elizabeth says she should have been given more of the property, and that there is no support for the court's conclusion that it was in the best interests of the parties that control of the assets should remain with the husband. We agree there is little to support this conclusion in the record. Clarence says the probable reason for the court's conclusion is Elizabeth's hospitalization for an alleged alcohol problem in 1978. He says this shows she would squander the assets and leave nothing for the children to inherit. The purpose of a property division, however, is to divide equitably the marital assets, not to provide for adult children who are not in college and needing support. See Iowa Code § 598.21(1)(1985). Even if we were to consider this factor, there is nothing in the record to show that Elizabeth did not profit from this hospitalization. The record is absent of any indication she has had any problem in this regard since then.

The record shows, instead, that Elizabeth made considerable contributions to the forty-five-year marriage. Considering the length of the marriage, and other factors set out at section 598.21(1) of the Code, we find the assets should be divided nearly equally. Clarence has indicated he would like to live in the homestead for a while, but eventually move since heating costs are high.

Accordingly, we order the homestead sold and the net profits split equally between the parties. We also modify the award to give Elizabeth the Holy Ghost Credit Union account of $30,957.30. All of the other aspects of the property award are affirmed. This leaves Elizabeth with assets of $49,293.53 and Clarence has assets of $49,326.63.

In an award of alimony we consider the factors set out at section 598.21(3) of the Code. In addition to those factors mentioned, we note that neither party is in good health, Clarence has a ninth-grade education and Elizabeth has an eighth-grade education. The current award is over forty percent of Clarence's monthly income. We find this to be too high and decrease the alimony payments to $150 per month to be paid in the same manner as indicated by the court in making the award. We disagree with the petitioner that the award suggested joint marital assets be used to arrange for an annuity to pay for the alimony. The annuity was to be arranged for in the event of the death of Clarence prior to the death of Elizabeth. We affirm this portion of the decree.

Elizabeth asks that Clarence pay a portion of her appellate attorneys fees. We consider the results on appeal, and the financial situation of the parties. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). In this instance, Elizabeth has prevailed in her request the property division be modified, while the alimony award has been lowered. We also consider our property disposition in which Elizabeth has been given a large liquid asset. We hold each party shall pay their own attorneys fees.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (concurring and dissenting)

Petitioner Elizabeth appealed from the trial court's decision. Respondent Clarence did not cross-appeal.

The following issues were presented for review in Elizabeth's brief:

> I. The Trial Court improperly concluded (a) that wife-appellant should not receive any major assets; (b) that the First *Federal Savings* "*annuity*" had a nominal value to the parties; (c) that an annuity to pay $380 per month alimony to wife should be valued at sufficient sum to warrant granting almost *all assets to husband.*
>
> II. That the Trial Court did not properly allow a sufficient sum for true alimony.
>
> *III.* That the Trial Court did not properly divide the marital assets in an equitable fashion.
>
> IV. The wife-appellant is entitled to *attorney fees for* this *appeal.*

Clarence does not contend the *alimony* award is too high. Neither party has argued or briefed the issue of reduction of alimony. The majority has, however, elected to address the issue of alimony reduction and has determined the alimony should be reduced from $380 to $150 per month.

Since the parties not *having put* the issue of alimony reduction before us, I do not consider it appropriate or proper that this court address it.

Like the majority, I find the property award made to Elizabeth to be inequitable, and I would modify the award. In evaluating the property award, I consider the whole record including the alimony award to Elizabeth by the trial judge. I would modify the property award to order Clarence to pay Elizabeth the sum of $40,000.

Like the majority, I would order each party to pay their own attorney fees.