IN THE COURT OF APPEALS OF IOWA

No. 5-150 / 94-607

IN RE THE MARRIAGE OF JOHN M. BEIERSCHMITT AND DORIS A. BEIERSCHMITT

Upon the Petition of

JOHN M. BEIERSCHMITT,

Petitioner-Appellant/Cross-Appellee,

And Concerning

DORIS A. BEIERSCHMITT,

Respondent-Appellee/Cross-Appellant.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Robert L. Rausch of the Rausch Law Firm, Waterloo, for appellant.

David L. Takes and Samuel C. Anderson of Swisher & Cohrt, Waterloo, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

PER CURIAM

Petitioner-appellant John M. Beierschmitt appeals and respondent-appellee Doris A. Beierschmitt cross-appeals from the economic provisions of a decree dissolving their long-term marriage. John contends (1) the trial court should have set aside to him a 38.5 acre tract of land given to him by his parents; (2) it was not equitable to order him to pay Doris $500 a month in alimony; (3) the trial court should not have ordered him to pay interest at the rate of ten percent on a judgment awarded to Doris; and (4) it was not equitable to award Doris one-half of his John Deere pension.

Doris, on cross-appeal, contends John should have been ordered to pay more than $2000 toward her attorney fees and she should have attorney fees on appeal. We affirm as modified.

We review de novo. Iowa R. App. P. 4. 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 Hoffman*, 493 N.W.2d 84, 87 (Iowa App. 1992); *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. *Hoffman*, 493 N.W.2d at 87-88; *Russell*, 473 N.W.2d at 246. The determining factor is what is fair and equitable in each particular circumstance. *Hoffman*, 493 N.W.2d at 88; *Russell*, 473 N.W.2d at 246.

John, age forty-six at the time of the decree, and Doris, age forty-four, were married in 1968. They have two children. The older child has completed college and was not subject to the decree. The second child was a college student at the time of the decree and the decree made provision for the payment of her tuition and fees. She has now graduated and her college expenses are not an issue on appeal.

The trial court valued the parties' assets at $350,587 [1] and allocated the assets $278,347 to John and $72,240 to Doris. Then the trial court ordered John to pay Doris $34,500 to be paid by February 1, 1994, and $68,500 to be paid at the rate of $1000 a month with interest at ten percent per annum from June 1, 1993. With the cash payments, using the trial court's figures, the property going to Doris is $175,240 and the property going to John is $175,347. The trial court additionally found John responsible for a credit union debt at John Deere Credit Union of $6447 and a debt to his parents for $40,000. Doris was found responsible for a John Deere Credit Union debt of about $4000.

Additionally, Doris was awarded alimony of $500 a month, commencing June 1, 1993, to continue until she is sixty-five, begins to draw social security, remarries, dies, or cohabits with a member of the opposite sex, whichever occurs first.

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[1] This figure does not include the $100,000 Doris inherited from her father between the time of the hearing and the filing of the 179(b) motion. Also, the household goods and personal effects divided were not valued.

Both parties are in good health. John is employed by John Deere at an annual salary of approximately $47,000 and is also a self-employed farmer. Looking at the reportable farm income in the ten years prior to the dissolution, it appears John's farming has been a break-even venture. Doris is a travel agent at The Travel Store at an annual salary of about $14,000. John's salary is enhanced by substantial employee benefits; Doris's salary is not. John, who had finished two years of college at the time of the marriage, completed his undergraduate degree and master's degree. John Deere paid one-third of his tuition while he obtained his undergraduate degree and all of his tuition in graduate school. John worked full time for John Deere and farmed while attending college.

Doris accepted the role as the custodian of the home and children. She was to go to Hawkeye Institute of Technology in 1986, and in 1987 she graduated with a joint accounting certificate. Doris did part-time work outside the home, and in 1988 she took a three-month travel course also at Hawkeye Institute of Technology. Since that time, Doris has worked as a travel agent.

The parties accumulated assets both through their own efforts and from parental gifts. After the decree was filed, Doris's father died and she inherited approximately $100,000. John filed a 179(b) motion contending this property decreased Doris's need for alimony.

John's first complaint is an undivided interest in 38.5 acres of land given him by his parents should have been set aside to him. The trial court valued this land at $50,500 and did not set it aside to John.

John's second issue involves a twenty-five acre parcel of land purchased by John and Doris for $60,000 with the help of a $40,000 loan from John's parents. The loan has never been repaid. The trial court found the $40,000 was a gift because John's parents had not demanded payment over an eight-year period. The trial court valued the tract of land at $32,500, did not set it aside to John, and left him responsible for the $40,000 debt.

Doris received $44,400 in gifts from her father, and John received $6000 in gifts from Doris's father during the marriage. These gifts were used for various family purposes and were not traceable to specific assets acquired by the parties. John had an equity at the time of marriage that also was not traceable.

We agree with the trial court's decision it would not be equitable to set aside to John the value of the undivided 38.5 acres and not consider the money gifts from Doris's father that were not traceable to specifically acquired assets. *See In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Consequently, we disagree with John's claim the value of the undivided 38.5 acres should not have been considered in determining a property division.

We do not, however, agree with the trial court's reasoning concerning the $40,000 debt to John's parents. This money came to John and Doris only after they both signed a promissory note agreeing to pay it. The note is due and has not been forgiven. The fact John's parents have not sought payment of the note does not turn it into a gift. Consequently, we modify the property division to consider the obligation John has to his parents in determining an equitable division. We modify the property division to decrease the $68,500 John was to begin to pay Doris at the rate of $1000 a month with ten percent interest to $48,500, and we modify the interest to seven percent per annum. We agree with John ten percent interest is too high. *See In re Marriage of Friedman*, 466 N.W.2d 689, 693 (Iowa 1991). In all other respects, we affirm the property division made by the trial court.

John contends it was not equitable to award Doris a one-half interest in his pension benefits at John Deere. We strongly disagree. Pension benefits are considered in property divisions. *In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993); *In re Sturtz*, 415 N.W.2d 173, 173 (Iowa App. 1987); *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa App. 1984).

John contends the alimony award was not equitable. We look at the statutory and case law dictates in considering an alimony award. *See In re Marriage of Dahl*, 418 N.W.2d 358, 361 (Iowa App. 1987); *see also In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979); *In re Marriage of Voss*, 396 N.W.2d 801, 804 (Iowa

App. 1986); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa App. 1984). We reduce Doris's alimony to $200 a month.

Doris contends the trial court should have awarded her additional attorney fees. We disagree. 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 App. 1987). 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 Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

Costs on appeal are taxed one-half to each party. We made no award for attorney fees.

AFFIRMED AS MODIFIED.