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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF OLGA CHYLE JUNG a/k/a OLGA ZEPHIE JUNG AND EUGENE MICHAEL JUNG

Upon the Petition of)

OLGA CHYLE JUNG, a/k/a OLGA ZEPHIE JUNG,)

Petitioner-Appellant/ Cross-Appellee,)

And Concerning)

EUGENE MICHAEL JUNG,)

Respondent-Appellee/ Cross-Appellant.)

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7-07
85-1780

Appeal from the Iowa District Court for Black Hawk County (No. 32150), James C. Bauch, Judge.

Petitioner wife appeals from the judgment, amended dissolution decree, and the trial court's denial of her new trial motion, contending the trial court erred in its division of marital assets, in failing to award her alimony and a portion of respondent's pension benefits, and in denying her motion for new trial. Respondent cross-appeals, seeking the parties' homestead. Both parties request attorney fees and costs on appeal. **AFFIRMED AS MODIFIED.**

Jay A. Nardini of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for petitioner-appellant/cross-appellee.

Frederick G. White, Waterloo, for respondent-appellee/cross-appellant.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

The parties to this appeal, Olga and Eugene Jung, were granted a dissolution of their thirty-two-year marriage by the District Court for Black Hawk County on July 12, 1985. The district court, in those parts of the dissolution decree pertinent to the present appeal, divided the marital property and denied an award of alimony to both parties. Olga subsequently filed motions to enlarge, amend, and modify the findings and decree and for new trial. The district court responded by filing an amended decree and by denying her new trial motion. Olga has appealed in order to challenge the district court's property division and denial of alimony. She also contends the district court erred in denying her motion for new trial. Eugene has cross-appealed and takes issue with the district court's property division. Both parties seek attorneys' fees and costs in connection with this appeal. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I.

We deal first with those claims raised by appeal and cross-appeal which challenge portions of the decree's property division. Olga requests a larger share of the marital property to compensate for what she characterizes as district court errors of both fact and law; Eugene seeks an award of the parties' homestead. In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property

is based upon each marital partner's right to a just and equitable share of the property accumulated as a result of the efforts of both parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981).

Olga contends the district court committed an "accounting error" by "double counting" a portion of the marital property. This alleged error concerns the court's division of $12,000 in real estate contract payments made to the parties by their daughter, as well as certain assets accumulated as a result of the reinvestment of those funds. The district court's award to Olga of the entire $12,000 in essence recognizes her $6,000 share and awards her Eugene's $6,000 share. During the marriage, however, Olga used $9,100 of the contract payments to make a $2,500 car loan to the parties' daughter and invest $6,600 in a life insurance policy on her son-in-law, which life insurance policy she owns and is the beneficiary of. The district court, in addition to awarding her Eugene's $6,000 share, awarded Olga the $2,500 lien against her daughter's car and the life insurance policy. Olga contends in her brief this amounts to "double counting." We disagree.

As the statute declares, a court's mandate in cases of this type is to "divide all property, . . . equitably between the parties . . . ." Iowa Code § 598.21(1) (1985). The $12,000 in contract payments formed a res, a portion of which Eugene was entitled to. When Olga reinvested a portion of this res, including a portion of what now is recognized as Eugene's one-half share, she acquired additional assets. That these assets were acquired, in part, from Olga's share of the $12,000 payments neither turns them into non-marital property nor renders their consideration duplicative. Olga's contention that "[t]he only award the court could make to her of the $12,000 in contract payments was Mike's one-half

($6,000) as Olga was entitled to her one-half" misses the mark. To say she was "entitled" to her one-half share begs the issue of equitable distribution. That is, she was "entitled" to only so much of the $12,000 as would constitute, in consideration with the remainder of the district court's award, an equitable property division. See Iowa Code § 598.21(1) (1985). The district court was warranted in considering the insurance policy and the automobile lien along with Olga's $6,000 share as separate items in its property division and committed no mathematical error in doing so.

Olga also contends the district court erred in setting aside, because acquired after the parties' separation, certain property to Eugene. The final separation of these parties occurred in June 1982; the dissolution trial took place in July 1985. During the intervening three-year period, Eugene purchased an automobile and acquired certain bank accounts. Each of these items was awarded to Eugene. The district court's decree confirms Olga's contention that these items were awarded to Eugene because they were acquired by him after the parties' separation. Olga maintains such a disposition violates our precedent. See, e.g., In re Marriage of Moffat, 279 N.W.2d 15 (Iowa 1979); Locke v. Locke, 246 N.W.2d 246 (Iowa 1976). We disagree.

Our courts are of the opinion that the polestar of the task of property division is a recognition of each party's right to a just share of property accumulated as a result of their joint efforts. Hitchcock, 309 N.W.2d at 437. Because of the lengthy delay between the separation and dissolution trial, we do not think the district court erred in essentially determining that the property acquired by Eugene during this period of time was not a product of the parties' "joint efforts" and should therefore be awarded to him. Neither do we think such a determination violates our cases. For example, in Locke, although stating that the trial date and not the separation date should be used in determining

the parties' net worth, our supreme court was concerned only with the issue of whether property acquired after the parties' separation should be considered in reaching an equitable property division. Locke did not address the present question of whether, given the fact that property acquired after the parties' separation is to be considered, awarding such property to the acquiring spouse because of its "acquired-after" nature is inequitable per se. A more apposite case is In re Marriage of Hoak, 364 N.W.2d 185 (Iowa 1985). In Hoak, our supreme court sanctioned an award of stock to the husband in recognition of his greater efforts in its accumulation while characterizing the wife's interest in the property as "purely financial." Id. at 194. We find no error in the district court's methodology of property division or in its application of the law.

Olga also contends she should receive a share of Eugene's pension benefits. Such benefits are a form of property to be considered in framing the financial clauses of dissolution decrees. In re Marriage of Jensen, 396 N.W.2d 367, 369 (Iowa App. 1986). The district court denied both parties an interest in the other's pension plan. This award was based upon the district court's finding that "both parties will receive approximately the same amount of retirement time [sic] of over a $1,000.00 a month." There was no testimony at trial as to the present cash value of each of the respective retirement programs. The parties' testimony did establish, however, that Eugene's monthly benefit if he retires at age 65 without surviving spousal benefits would be $1,628. Olga's monthly benefits at age 65 would be $421. Both parties will receive social security benefits and the district court divided essentially equally approximately $98,000 in annuities accumulated during the marriage.

We disagree with the district court's finding of substantially equal retirement benefits. We think accommodation needs be made for Eugene's greater accumulation of pension benefits. When Eugene commences drawing his pension,

the parties shall file statements with the Clerk of Court of Black Hawk County showing the total respective amount of monthly pension and social security benefits each will receive. On or before the last day of each month in which he draws benefits, Eugene shall pay to Olga through the Clerk of Court that portion of his pension benefits necessary to provide Olga with one-half of the total social security and pension income available to the parties. Judgment shall be rendered against Eugene for any amounts not paid. These payments are considered a portion of the property division and the decree is modified to so provide. See Taylor v. Taylor, 329 N.W.2d 795, 798-99 (Minn. 1983); see also DuBois v. DuBois, 335 N.W.2d 503, 505 (Minn. 1983).

Eugene, on cross-appeal, contends the district court erred in not awarding him the parties' homestead. We disagree. The district court's property division, as modified, is within the bounds of equity. It is accordingly affirmed as modified.

II.

Olga maintains she should be awarded alimony, contrary to the district court's decree. We are informed by both the cases and Iowa Code section 598.21(3) that the payment of alimony is not an absolute right; it is awarded out of fairness, according to the particular facts of the case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976); Iowa Code 598.21(3) (1985). One factor to be given great weight in such a determination is the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972); Iowa Code § 598.21(a), (e) (1985). When determining the appropriateness of alimony, the trial court must consider the earning capacity of each party, present standards of living, and ability to pay balanced against the relative needs of the other. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

The district court, based upon the following finding, denied Olga's request for alimony:

> Olga has a high educational level with a professional degree as a registered nurse. She has a long employment record consisting of a varied work record that has established her expertise and professionalism. She has sufficient physical and emotional health to continue working and to continue to maintain her standard of living that she experienced during the course of the marriage.

Olga takes issue with this finding, arguing that her physical and mental condition results in a situation of diminished employability. Although the record does contain evidence of Olga's history of neck pain, the record does not support her claim of diminished employability due to physical condition. Olga maintained full-time employment until 1985 when her full-time status ended not because of physical disability or incapacity but, rather, because of managerial decisions on the part of her employer. While her emotional anxieties appear to have been more of a limitation on her employability than were her physical shortcomings, these anxieties were, according to the record, a result of her marital problems. The record does not suggest that, in light of the dissolution of the marriage, these emotional problems will continue to limit Olga's employment potential. In light of Olga's capacity to obtain gainful employment in the near future, Iowa Code § 598.21(3)(f) (1987), the equitable property settlement, Iowa Code § 598.21(3)(c) (1987), the considerable discretion granted the district courts in this matter, Yansky v. Yansky, 172 N.W.2d 114, 117 (Iowa 1969), we are not persuaded that the district court's denial of alimony should be disturbed. Cf. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980) (denial of rehabilitative alimony appropriate where wife's doctoral work could be financed through property division).

III.

Olga maintains the district court erred in denying her motion for new

trial. She grounds this claim in allegations of newly-discovered evidence, district court mistakes of fact, and that the property and alimony portions of the decree are not sustained by sufficient evidence and are contrary to law. The principles which guide the resolution of such contentions are well established and need not be reiterated here. See In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981); In re Marriage of Johnson, 311 N.W.2d 697, 699 (Iowa App. 1981).

Upon consideration of both the entire record and our modification of the property division, we do not believe the district court abused its discretion in denying Olga's new trial motion.

IV.

Finally, Eugene argues the district court erred in awarding Olga attorney's fees. The court, in the dissolution decree, ordered Eugene to pay $3,000 toward Olga's attorney's fees. Recognizing that the district court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution decrees, In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983), we think the allowance of attorney's fees here is reasonable and should not be disturbed. See In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984).

Both parties request attorney's fees for this appeal. In evaluating such a request, we 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). We conclude that both parties should be responsible for their respective attorney's fees incurred upon this appeal. See Pittman, 346 N.W.2d at 37. Costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.