FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-027 / 90-0820

IN RE THE MARRIAGE OF WYNN WINSTON AND PAMELA WINSTON

Upon the Petition of

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WYNN WINSTON,

Appellee/Cross-Appellant,

And Concerning

PAMELA WINSTON,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Both parties appeal the district court's dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Raymond E. Pogge of Pogge, Root, Fleming & Tinley, Council Bluffs, for appellant.

Terrance G. Rutherford of Howard, Rutherford & Mailander, Atlantic, for appellee.

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

PER CURIAM

Wynn and Pamela Winston were married on November 15, 1974. With the exception of a 1973 Mustang automobile owned by Wynn, neither party brought substantial assets into the marriage. Two children were born of the marriage. The trial court dissolved the parties' marriage on March 28, 1990. It granted primary physical care of the children to Wynn. It ordered Pamela to pay $20 per month per child in support. The trial court divided the parties' assets and ordered Wynn to pay $500 towards Pamela's attorney fees. From this decree both parties have appealed to challenge the division of assets.

At trial time both parties held high school diplomas. Wynn had attended one year at a community college studying auto mechanics. Pamela had training as a nurses aid. After the parties' marriage Wynn started farming. He farms approximately 600 acres on either a crop share or cash basis with either his brother or father. He also raises cattle, sheep, and hogs. Pamela worked outside the home during the last three years of marriage. Both parties earned approximately $1,123 per month after taxes. Immediately prior to trial Pamela was laid off. She was allegedly receiving approximately $1,000 per month net income.

During their marriage the parties resided on one of the rented farms in a house owned by Wynn's grandparents.

After separation Pamela moved and was living in a mobile home she purchased using marital funds.

After hearing the evidence the district court awarded Wynn the farm equipment and debts, his personal property, and a portion of certificates of deposit valued at approximately $6,500. Additionally the court set aside the 1973 Mustang show car to Wynn as gifted property. The court awarded Pamela the mobile home, the furnishings therein, two old automobiles, and a portion of the CDs.

On appeal Pamela requests that she be awarded the microwave, stove, large television, the 1973 Mustang show car, lawn tractor, $10,000 in cash, full attorney fees, and costs. On cross-appeal Wynn asks that he receive all the CDs, child support in the amount of $180, and attorney fees. Wynn prays that he be relieved of the obligation to contribute $500 towards Pamela's fees. Wynn wants to keep the 1973 Mustang.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

I. Property Division.

Wynn received by far the lion's share of the parties' marital property. Pamela claims the property division is inequitable. Wynn cross-appealed the property division. He alleges the certificates of deposit the trial court divided were his by gift. He claims the trial court erred in dividing this allegedly gifted property. We deal with this issue first.

The evidence shows the CDs awarded to Pamela were purchased with money given to both the parties jointly from Wynn's grandparents. The CD awarded to Wynn was purchased with a gift to him alone.

Iowa Code section 598.21(2) provides:

> Property inherited by either party or gifts received by either party prior or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

We determine the trial court would have been justified in dividing the CDs on the basis of this section. There is a large disparity in the property division, with Wynn receiving all the farm equipment and assets, as well as the family home. Equity allows the division of gifted property in such a situation. We affirm the trial court on this issue.

We next consider Pamela's claim the trial court's property division was inequitable. After reviewing the

record, we agree with Pamela's assertion. While the fact Wynn has primary care of the children is entitled to consideration, it should not override Pamela's right to an equitable portion of the marital property.

We agree with the trial court the items purchased by Pamela for the family home, such as the carpet, large TV, and other large appliances should remain there. Additionally, we agree Wynn should retain title to the parties 1973 Mustang show car. The farming equipment and other farm goods likewise should remain with Wynn.

We modify the trial court's property award to Pamela. We determine Pamela should receive $10,000 more as her equitable share of the marital property. This $10,000 is to be paid over the next two years from the date of filing this opinion. It is to be paid in equal monthly installments of $416.67, due the first of each month, starting the first full month after this opinion is filed. There shall be no interest on the unpaid portion. We hereby modify the trial court's ruling in accordance with this additional award of property to Pamela. We affirm the trial court's property division in all other respects.

II. Child Support.

Wynn argues Pamela should pay child support in accordance with the child support guidelines. See In re Marriage of Bergfeld, 465 N.W.2d 865, 870-71 (Iowa 1991).

The trial court ordered Pamela to pay only $20 per child per month.

> There is a rebuttable presumption that the guidelines provide the correct amount of support. That presumption is overcome if the district court finds an adjustment is necessary to reach an equitable result.

Id. at 871.

The trial court made no such finding in this case. Nor does the record appear to justify departure from the guidelines. Additionally, it is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The child support guidelines are presumed to consider the pertinent factors, unless shown otherwise. Bergfeld, 465 N.W.2d at 871.

The record shows Pamela had an income of approximately $190 per week at the time of trial. This apparently was unemployment insurance payments. This income would only continue for a limited time. The trial court made no finding as to Pamela's net income. Based on the record before us, we cannot determine her net monthly income. Accordingly, we remand this case. The trial court shall determine the parties' net monthly income and apply the current child support guidelines accordingly.

III. Attorney Fees.

Wynn cross-appeals the trial court's award of attorney fees to Pamela. Both parties ask for attorney fees on appeal.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

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).

We determine the trial court was within its discretion in awarding Pamela attorney fees at the trial level. We affirm the trial court on this issue.

Each party is to pay his or her own attorney fees on appeal.

IV. Conclusion.

We affirm the trial court's equitable distribution of the parties' certificates of deposit. We modify the property division to award Pamela $10,000 more. This award is payable in monthly installments of $416.67, starting on the first day of the first full month after the filing of this opinion. Each installment is due on the first day of each subsequent month. There is no interest. We affirm the other aspects of the property division.

We modify the decree to provide Pamela shall pay child support in accordance with the child support guidelines currently in effect. She shall pay $225.72 per month child support. Either party may apply for a modification of this amount, if necessary to conform to the actual facts.

The trial court's award of attorney fees to Pamela is affirmed. Each party shall pay their own attorney fees on appeal.

We affirm the trial court on all other issues.

Costs of this appeal are taxed one-half to each party.

AFFIRM AS MODIFIED AND REMANDED.