FILED
JUN 26 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-188 / 89-320

IN RE THE MARRIAGE OF FRANK J. KOLBE, III and KAREN K. KOLBE

Upon the Petition of
FRANK J. KOLBE, III,

Appellant,

And Concerning
KAREN K. KOLBE,

Appellee.

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

The husband appeals from a dissolution decree, challenging the division of property. The wife requests attorney's fees on appeal. **AFFIRMED AS MODIFIED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for the appellant.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for the appellee.

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

DONIELSON, P.J.

The parties were married in 1969. Both were forty-two years old at the time of trial. They have two children, a girl born in August 1972 and a boy born in October 1976. The children were placed in joint legal custody and in Karen's physical care; these custody provisions are not challenged on appeal.

Both parties have been employed for many years at Fisher Controls in Marshalltown, Frank as a welder and Karen as a secretary. Each party grosses approximately $30,000 in income each year.

The dissolution decree directed Frank to pay Karen child support of $400 per month while both children were eligible for support and $250 per month when only one child remains eligible. In addition, Frank is to pay support of $200 per month for any child who is over 18 and qualifies for support as a full-time student under Iowa Code section 598.1(2). Neither party was awarded alimony.

The parties' primary asset was a house valued by the court at $48,750, but subject to a debt of $13,000. The decree provided that Karen may occupy the house, and shall make the mortgage payments, until the younger child turns 18 or graduates from high school, whichever is later. At that time the house is to be sold; Karen is to receive a credit for mortgage payments made after the dissolution decree, and the remaining net proceeds are to be divided evenly between the parties.

The parties' other significant asset was Karen's "Savings and Investment Plan" (SIP) account with her employer. This account contained about $35,000, $18,653 of which may be withdrawn now without penalty. The decree awarded Karen all her interest in this account. The decree also awarded Frank all his interest in his own, much smaller SIP account; Frank's account was valued at approximately $1400. Each party also received a vehicle and various personal effects.

Frank has appealed from the dissolution decree and challenges the division of property. He acknowledges that Karen and the children should occupy the family home, but he argues Karen should be required to pay him his share of the home equity now. In the alternative, he argues that if he does not receive his share of the home equity now, he should be awarded a share of Karen's SIP account.

Karen requests attorney's fees on appeal. She also filed a notice of cross-appeal, but she later dismissed it after a limited remand was granted to clarify Frank's level of earnings.

In this equity action, our review is de novo. Iowa R. App. P. 4. In reviewing a property disposition, we keep in mind 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 Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). 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 App. 1983).

When dividing marital property, a court may consider the desirability of awarding the family home, or the right to live in the family home, to the party having custody of the children. Iowa Code § 598.21(1)(g) (1989). Frank does not challenge the propriety of allowing Karen and the children to reside in the family home. However, he wants Karen to reimburse him now for his half of the home's equity.

We have recognized in the past that it is not necessarily inequitable to "freeze" a noncustodial parent's equity in the family home. See In re Marriage of Woodward, 426 N.W.2d 668, 670 (Iowa App. 1988). In this case, Frank pays only $400 per month in child support and Karen now has the primary obligation for providing for the children's care. The trial court and this court deem it to be in the children's best interests to allow Karen and the children to remain in the family home. The economic realities of this situation make it equitable to defer Frank's recovery of his equity interest in the family home.

Frank contends he is entitled to part of Karen's SIP account. We agree. The trial court record reveals Frank agreed to waive any interest in this account only if he were to immediately receive his equity interest in the home. In lieu of receiving his equity interest now, Frank claims he is entitled to one-half of Karen's SIP account.

The evidence reveals Karen opened her SIP account in 1984; Frank began his in 1988. Frank's testimony indicates SIP accounts were not available for union employees until September 1988. Karen's substantial SIP account was acquired during the course of the parties' marriage. In light of the parties' essentially-equal level of income, this court finds it reasonable to assume Karen was able to contribute so much to her SIP account because more of Frank's income was used for the family's household expenses and other debts. Karen's SIP account is a substantial marital asset made available because of the contributions of both parties to the marriage.

Aside from Karen's SIP account, the remainder of the trial court's property distribution was essentially equal. While an equal division or percentage division of the property is not required, In re Marriage of McNerny, 417 N.W.2d 205, 209 (Iowa 1987), we find an award to Karen of her entire SIP account is inequitable. We disagree, however, with Frank's claim to one-half of the account.

As noted earlier in this opinion, Karen is now primarily responsible for the parties' children. This financial responsibility renders it equitable to award Karen the majority of the SIP account. We modify the decree to award Frank 30% of Karen's SIP account. At the time of trial, this account was worth $35,000; therefore, Frank is entitled to $10,500. Karen's testimony suggests part of her SIP account may be transferred to Frank as a

"rollover" which would minimize the tax consequences of the transaction. To the extent Karen chooses to utilize such a "rollover" to provide Frank with his $10,500 share of the account, this court approves of such an action.

Karen seeks attorney fees on appeal. An award of attorney fees on appeal may be granted depending upon the parties' respective abilities to pay. 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 order the parties to pay his or her own attorney fees. The costs of this action are to be divided between the parties.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm.