IN THE COURT OF APPEALS OF IOWA

No. 5-147 / 94-570

IN RE THE MARRIAGE OF JANET LUCILLE ACREA AND STANLEY J. ACREA

Upon the Petition of
JANET LUCILLE ACREA,

Petitioner-Appellant,

And Concerning
STANLEY J. ACREA, a/k/a S.J. ACREA,
Respondent-Appellee.

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

Petitioner appeals from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Deborah L. Petersen of Perkins, Sacks, Hannan, Reilly & Petersen, Council Bluffs, for appellant.

Drew H. Kouris, Council Bluffs, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

Janet and Stanley (S.J.) Acrea were married in 1984. It was a second marriage for both parties.

At the time of the dissolution hearing, Janet was fifty-two years old. Janet was the executive director of Culavin Heights Low Rent Housing for ten years. She had annual income of about $13,200 from this employment. By the parties' agreement she left that employment. She then began operating her own baking business, The Cake Lady, out of the parties' home. In 1992, she had net profits of about $7,500 from this business.

At the time of the hearing, S.J. was fifty-one years old. His father, Stanley, owned 299 acres of farmland. S.J. and his two brothers entered into a partnership, known as the Acrea Brothers Partnership, to purchase a 36% interest in Stanley's land. S.J. farms the entire 299 acres on a 50-50 crop share basis. He also rents some additional land owned by an aunt. His average income from farming has been about $41,000.

The district court entered a dissolution decree for the parties on January 26, 1994. The district court recognized that each party had brought a substantial amount of assets to the marriage. The court found S.J. experienced an increase of approximately $157,000 in equity during the course of the marriage and Janet experienced an increase in equity of about $37,000. To equalize matters, the court ordered S.J. to transfer about $60,000 to Janet. This included a cash property settlement of $12,250 and assets worth $47,793. The court also ordered S.J. to pay Janet rehabilitative alimony of $250 per month for a period of twenty-four months. The court ordered Janet to surrender an insurance policy she held on S.J.'s life.

Janet filed a motion for new trial. She claimed the court improperly valued certain assets. She also asked for a lump-sum alimony award instead of periodic payments. The court denied her motion. The court noted that after the decree, Janet did not retain an insurable interest on S.J.'s life. Janet appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

II. Janet has appealed several aspects of the property distribution.

A. Janet claims the court improperly valued the marital residence at $85,000. She presented an appraisal which valued the residence at $117,000. S. J. testified the house was worth about $90,000. At the time of S.J.'s first divorce in 1983, the house was valued at $80,000. The house does not have its own well or driveway, but used that of S.J.'s family, who own the surrounding land. A new owner would be required to install these items.

Where the value placed on an asset by the trial court is well within the permissible range of the evidence, we will not disturb it on appeal. *In re Marriage* *of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Here, the district court discounted the value of the house due to the need to install a driveway and well. We find the court's value is within the permissible range of the evidence and we affirm.

B. Janet also contends the district court erred by not implementing her proposed theory for distribution of property, called the shared enterprise theory. Under this theory, each spouse is entitled to share only the property that is acquired under the joint efforts of the spouses during the marriage.

She claims that S.J. did not contribute to the increase in the value of the assets she brought to the marriage. These assets included rental property and investments, and Janet states these assets increased in value merely due to the economy. She believes she did contribute to the increase in value of the assets S.J. brought to the marriage, which includes his interest in the farm and farm machinery. Under Janet's theory, she believes she is entitled to a cash property settlement of $285,000.

Janet apparently believes that all assets she brought to the marriage and any increase in their value belong solely to her. However, she believes all assets S.J. brought to the marriage and any increase in their value are marital assets to be divided between the parties. We reject this proposed property division.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *Id.* The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*

The district court awarded Janet property worth $93,189, which included a rental house, a vacant lot, her van, insurance policies, and investment accounts. In addition, she was awarded a cash property settlement of $12,250, which gives her total assets of $105,439. S.J. was awarded assets with a net value of $107,160. This includes his interest in farmland, machinery, and crops, and deducts his responsibility for debts and the cash property settlement. We find the distribution of property as set forth by the district court is fair and equitable under the facts of the case.

C. Janet additionally claims that the district court did not take the tax consequences of its distribution into consideration. She points out she was awarded some tax deferred accounts, the proceeds of which will not be available to her until she reaches retirement. Janet asks to be awarded a larger cash property settlement in lieu of these accounts.

Here, the district court had to take into consideration not only Janet's needs, but also S.J.'s ability to pay. A larger cash property settlement to Janet could compromise S.J.'s ability to continue to engage in farming. We conclude the cash property settlement of $12,250 is equitable under the circumstances of the case.

III. Janet contends the district court should not have required her to cancel and surrender her life insurance policies on S.J.'s life. Janet owns policies which will pay her $300,000 upon S.J.'s death. She claims these policies are an investment. She denies they were entered into with a fraudulent intent or for the purpose of speculation on the duration of S.J.'s life. Janet believes the district court did not have authority to order her to cancel the policy.

In order to maintain an insurance policy, a person must have an insurable interest. *Brown Township Mutual Insurance Association v. Kress,* 330 N.W.2d 291, 297 (Iowa 1983). An insurable interest requires a pecuniary interest in the life of another. *In re Marriage of Schissel,* 292 N.W.2d 421, 428 (Iowa 1980). If one has a reasonable expectation of economic advantage in the continuation of another's life, an insurable interest exists. *Lynch v. Bogenrief,* 237 N.W.2d 793, 797 (Iowa 1976). The supreme court had held that a divorced wife receiving alimony is a creditor and has an insurable interest in her former husband's life. *Id.*.

In the present case, Janet was awarded alimony of $250 per month for twenty-four months, which means she will receive total alimony payments of $6,000. Janet's insurance policy on S.J.'s life will pay death benefits of $300,000, which far exceeds her insurable interest. We find Janet does not need the insurance policy to ensure she will receive her alimony payments.

We also find the district court had the authority to order Janet to divest herself of the insurance policy. We have previously affirmed a district court's order requiring the parties in a dissolution decree to sell certain assets. *See In re Marriage of Hoffman,* 515 N.W.2d 549, 551 (Iowa App. 1994). We affirm the district court on this issue.

IV. Janet claims the district court abused its discretion by awarding her periodic alimony payments instead of a lump-sum alimony payment. She states a lump-sum payment would sever the financial ties between the parties. She also states that S.J. should be able to borrow the money to pay her alimony in a lump-sum.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. *In re Marriage of Oler*, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. *Id.*

In the present case, we must balance Janet's need for a lump-sum alimony payment against S.J.'s ability to pay. We find Janet is receiving a cash property settlement of $12,500, and has not shown an immediate need for the additional $6,000 she will receive in alimony. Furthermore, as Janet recognizes, S.J. would probably have to borrow in order to pay Janet the $6,000 alimony payment now. We conclude the award of alimony in periodic payments should be affirmed.

V. Janet claims the district court abused its discretion by not awarding her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award, the complaining party must show that the trial court abused its discretion. *Id.* We find no abuse of discretion in the present case. Janet was awarded sufficient funds to pay her own trial attorney fees.

VI. Janet seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. We determine each party should pay his or her own attorney fees for this appeal.

We affirm the district court. Costs of this appeal are assessed to Janet.

AFFIRMED.