IN THE IOWA COURT OF APPEALS

IN RE THE MARRIAGE OF ROBERT J. LANE AND MARY LOU LANE

Upon the Petition of

ROBERT J. LANE,

Petitioner-Appellee,

Filed May 26, 1981

1-116
2-65222

FILED
MAY 26 1981
CLERK SUPREME COURT

And Concerning

MARY LOU LANE,

Respondent-Appellant.

Appeal from Humboldt District Court. Newt Draham, Judge.

Respondent-wife appeals the alimony, property division, and attorney fees provisions of a dissolution of marriage decree. AFFIRMED.

Eldon J. Winkel, of Winkel, Nitchals & Winkel, Algona, Ia., for respondent-appellant.

James L. Kramer and Dale A. Johnson, of Johnson, Erb, Latham & Gibb, Ft. Dodge, Ia., for petitioner-appellee.

Submitted to Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent-wife, Mary Lou Lane, appeals the alimony, property division, and attorney fees provisions of a dissolution of marriage decree. Mary Lou also asks for attorney fees incurred on appeal. We affirm.

Robert and Mary Lou Lane were married on October 2, 1965. Robert completed his sophomore year in high school and nets approximately $1200 per month as an inspector of chicken flocks. Mary Lou has completed two years of college and nets approximately $670 per month as a receptionist-cashier. In September, 1978, Robert separated from Mary Lou and returned in April or May, 1979. In June, 1979, Robert's father died, leaving Robert's mother a life estate in 500 acres of farmland, and leaving a 1/5 remainder interest to Robert. In September, 1979 Robert separated from Mary Lou and filed a petition culminating in this dissolution. The parties' two children, Steven and David, were ages 14 and 12 respectively as of the time of trial. The trial court gave Mary Lou custody of the children and ordered Robert to pay her child support of $150 per month per child. Not including personal property, the trial court awarded Mary Lou net assets amounting to $42,640, including the parties' residence, and awarded Robert net assets amounting to $2300. Mary Lou was awarded no alimony. When the 14-year-old marriage was dissolved in May, 1980, Robert was 37 and Mary Lou 35 years of age.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of fact, but we give weight to them, especially regarding the credibility of witnesses. Iowa R. App. P. 14(f)(7). In reviewing the property and alimony provisions of a dissolution decree, we consider the factors articulated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

I. Mary Lou contends that the property division of the dissolution decree was unfair. In determining the propriety of the property division provisions of a dissolution decree, we are not guided by statutorily sanctioned percentages; we must determine what is an equitable and just award under the circumstances. Locke v. Locke, 246 N.W2d 246, 251 (Iowa 1976).

Mary Lou contends that the trial court unfairly divided the marital property by failing to award her an interest in Robert's future interest. Robert's 1/5 remainder interest is in the 500 acres of farm land, which is conservatively estimated at $2000 per acre.

Mary Lou argues that Robert's future interest should be a part of the property distribution and that, considering Robert's future interest as a marital asset, it is clear that she was shortchanged in the property distribution.

We find that refusal to award Mary Lou a share of Robert's future interest is not inequitable to her or the children. Mary Lou asked the trial court for $300 monthly child support which the trial court awarded her and is a reasonable amount in our view. The trial court decree provided that child support may be extended if either child desires to continue his education beyond high school, as provided by section 598.1, The Code 1979. Robert acquired his future interest ten months after he first separated from Mary Lou and three months prior to filing a petition leading to the dissolution.

It is obvious that since the trial court awarded Mary Lou 95% of the marital assets and Robert 5%, not counting Robert's future interest as a marital asset, it considered the imbalanced division offset in so far as Robert's future interest gives him the promise of a strong financial future. In this fashion the trial court considered Robert's future interest in its property division, short of actually dividing and distributing it as a marital asset. The trial court's reasoning is analogous to that used in In re Marriage of Schissel, 292 N.W.2d 421, 422-27 (Iowa 1980) (Iowa Supreme Court affirmed the trial court's decision to add $8000 to the wife's share of the property division based on the husband's entitlement to retired military pay, but did not actually award the wife a fraction of the husband's entitlement). We affirm the trial court's property division provisions as reasonable.

II. Mary Lou contends that the trial court unfairly refused to award her alimony. Her monthly net income is $670 and Robert's is $1200. After Robert pays child support, his monthly net income is $900. Mary Lou's housing expense is minimal because she was awarded the parties' residence, which has a value of $40,000, makes mortgage payments of less than $100 per month, and owes a balance of approximately $1700 on the mortgage loan. With the child support award Mary Lou is able to meet her reasonable monthly expenses, and the standard of living that her salary, the property division, and child support afford her is not significantly, if at all, below that which Robert can currently enjoy on his salary. We affirm as reasonable the trial court's failure to award Mary Lou alimony.

III. Mary Lou contends that the amount of attorney fees awarded her at trial is

unfairly low. Attorney fees are not allowable as a matter of right. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The allowance depends on the financial conditions of the parties and their respective abilities to pay. Id. Mary Lou incurred attorney fees at trial of $1140. We affirm the trial court's $700 award of attorney fees to Mary Lou because of Robert's superior ability to pay.

Mary Lou asks for attorney fees incurred by this appeal, and Robert asks that she be awarded none. In evaluating a request for attorney fees incurred on appeal 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 Erickson, 228 N.W.2d 57, 59 (Iowa 1975); In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). Applying these factors to the case at bar, we decline to award Mary Lou attorney fees on appeal.

Costs are assessed against Mary Lou.

AFFIRMED.

All judges concur, except Donielson, J. who dissents.

DONIELSON, J. (dissenting)

I view it as inconsistent that the majority affirms this property division after acknowledging that inherited property is generally not subject to a property division. For all practical purposes, the trial court treated petitioner's future interest as an asset in dividing the property: the award to the respondent of 95% of the marital assets obviously reflects the trial court's effort to offset the value of the petitioner's future interest in the farmland. Moreover, it was unreasonable to even consider the future interest as a factor in the property division because, realistically speaking, the petitioner may never have a possessory interest in the land in his lifetime. His mother is in excellent health and has a life expectancy of approximately 19 years; it is entirely possible that the petitioner could predecease her. For these reasons, I think that the property division is highly inequitable. Furthermore, I believe that the parties should each receive one-half the equity in the house. I therefore would make them joint tenants and provide that the house be sold and the proceeds divided when the youngest child attains the age of 18, when the respondent dies or remarries, or when (and if) the respondent co-habits in the house with a member of the opposite sex, whichever occurs first.