IN THE COURT OF APPEALS OF IOWA

No. 2-154 / 91-551

FILED
SEP 29 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MONTE JOHNSON AND SANDRA JOHNSON

Upon the Petition of

MONTE JOHNSON,

Appellee,

And Concerning

SANDRA JOHNSON,

Appellant.

Appeal from the Iowa District Court for Mahaska County, Robert Bates, Judge.

Respondent wife appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Lance A. Grotewold of Heslinga, Heslinga, Dixon & Grotewold, Oskaloosa, for appellant.

Robert W. Conrad, Knoxville, and Michael P. Brice, Oskaloosa, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

Monte and Sandra Johnson were married in August 1975. They have four children, born between August 1977 and April 1983. In September 1990, Monte filed a petition for dissolution of the parties' marriage.

On March 7, 1991, the district court administrator notified the parties the case was scheduled for trial March 11, 1991. On March 8, 1991, Sandra's counsel filed a motion for continuance. He asserted Sandra "has been unable to assist with the preparation of this case up until the current time." Sandra has a history of physical and emotional problems and had been hospitalized during that time. He also indicated Sandra had been unable to file a financial affidavit. The motion was denied.

On March 11, 1991, at the start of trial, Sandra's counsel renewed the motion for continuance. He asserted Sandra had just been released from a hospital in Iowa City, but was having car trouble twenty-seven or twenty-eight miles from the courthouse in Oskaloosa. The district court stated it would allow counsel time to return with Sandra to the courthouse, but that it would not continue the trial date. The court stated "this problem will persist to later dates if [a] continuance is granted." Sandra's counsel indicated Sandra wanted him to proceed without her if the district court would not continue the trial date. Trial then proceeded.

During trial, Monte testified he works for a waste water treatment plant and earns about $1,400 net per month. He also testified Sandra is a registered nurse, but has been unable to work for three years because of medical problems including alcoholism, mental and emotional problems, and arthritis. Monte also testified Sandra frequently went on drinking binges, spent large amounts of money while using alcohol and drugs, and has damaged the family residence and cabin. He further testified Sandra had completed numerous treatment programs for alcoholism but has failed to maintain sobriety for any length of time. He testified Sandra had been committed to treatment twice in the last year by the Judicial Hospitalization Referee of Mahaska County. Monte also testified a worker from the Department of Human Services told him the children would be removed from the home if Sandra and Monte were to reconcile.

On March 14, 1991, the district court entered a dissolution decree. Monte was awarded sole custody of the parties' four children, and Sandra was directed to pay child support of $100 per month. Each party was directed to pay his or her own attorney fees. Sandra was awarded the parties' cabin, pickup truck, motor home, household goods in the cabin and house and the personal property in her possession. Many of the goods Sandra was awarded were purchased with an inheritance she received three years ago. Sandra was also awarded the funds remaining from her

inheritance. Monte was awarded the parties' house, a car he had purchased after the parties separated, the children's personal property, and the personal property in his possession, including the parties' video camera and some tools. Sandra was directed to pay twelve debts and Monte was directed to pay ten debts. Sandra appeals.

Sandra alleges, inter alia, the district court erred in awarding the family residence to Monte. She contends that when the parties became married, she owned a duplex. In 1975, Sandra sold the duplex and contributed a large portion of the net proceeds from the sale to the down payment on a house. Monte testified she contributed between $8,000 and $9,000 towards the $15,000 down payment. According to Monte, the house is currently valued at $26,000 with a $15,000 encumbrance. He testified they received a $10,000 loan for home repairs and owe an additional $5,000 on the original mortgage. As noted, Sandra was not available to testify nor did she file a financial affidavit. In her brief, Sandra requests the family home be returned to her now or when the children no longer reside with Monte.

Scope of Review

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).

Property Distribution

The criteria for division of property in dissolution actions is codified in Iowa Code section 598.21(1)(a)-(m) (1991). In this case, we must carefully balance the following considerations as set forth in the Code:

> (b) The property brought to the marriage by each party. . . .
> (d) The age and physical and emotional health of the parties. . . .
> (g) The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children, . . . and
> (m) Other factors the Court may determine to be relevant.

Iowa Code § 598.21(1)(b),(d),(g) (1991).

Monte does not dispute Sandra applied between $8,000 and $9,000 of assets she acquired prior to the marriage to the down payment on the family residence. We recognize Sandra's health problems, but note her refusal to abstain from alcohol despite numerous treatment experiences. Our chief concern is providing for the four children. We, therefore, grant the family residence to Monte while the parties' children reside with him. When the youngest child attains the age of eighteen, Sandra shall receive either $9,000, her initial investment, plus statutory interest, or the family home. If Sandra elects to take the home, she shall pay Monte the difference between her initial investment and the equity he has contributed since the

original decree was entered. If the parties cannot agree on disposition of the house, the house shall be placed on the market for sale within thirty days of the youngest child reaching eighteen years of age. The net proceeds shall be divided with the first $9,000 plus statutory interest to Sandra, and the balance to Monte. We grant Sandra a lien on the family residence, located at 815 A Avenue East, Oskaloosa, Iowa, until she receives either the property or the $9,000 plus statutory interest. See In re Marriage of Stamp, 300 N.W.2d 275, 281 (Iowa 1980).

Sandra also contends the district court erred in granting the video camera purchased with funds from her inheritance to Monte. Monte does not dispute that the video camera was purchased with funds from Sandra's inheritance. Iowa Code section 598.21(2) (1991) provides that inherited property "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 hold that while Monte, as custodian of the parties' four children, may have greater use for the video camera, equity does not require that we award it to him. Thus, we modify the trial court's decree and award the video camera to Sandra.

AFFIRMED AS MODIFIED.