IN THE COURT OF APPEALS OF IOWA

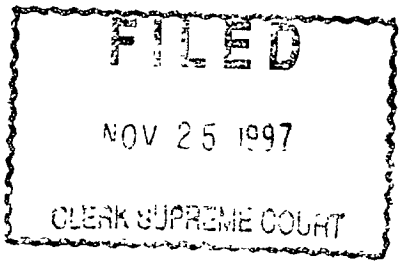
No. 7-443 / 96-571

000187

IN RE THE MARRIAGE OF LEON L. KLEIN AND CONNIE S. KLEIN

Upon the Petition of
LEON L. KLEIN,
Appellee,

And Concerning
CONNIE S. KLEIN,
Appellant.



Appeal from the Iowa District Court for Dubuque County, Lawrence Fautsch, Judge.

Connie appeals the district court's dissolution of marriage decree. **AFFIRMED.**

Joseph J. Bitter, Dubuque, for appellant.

Monica L. Ackley, Dubuque, for appellee.

Considered by Cady, P.J., and Huitink and Vogel, JJ.

000188

VOGEL, J.

Background facts. Connie and Leon Klein's twelve-year marriage was dissolved in 1995. The parties were awarded joint custody of their two minor children and Leon was awarded primary physical care. Connie was ordered to pay $5.00 per month child support and Leon was ordered to pay Connie $500.00 per month alimony for ten years.

Connie appeals arguing the court erred in: (1) distributing the parties' assets; (2) awarding her alimony for a period of ten years rather than for life; and (3) failing to award her the full amount of attorney fees incurred in the action.

Scope of review. In this equity action, our scope of review is de novo. Iowa R. App. P. 4; *State ex rel. Tack v. Sandholdt*, 519 N.W.2d 414, 416 (Iowa App. 1994). 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. Connie argues the district court's distribution of the parties' marital assets was inequitable. She contends the parties' assets grew during the marriage in part due to her efforts. She also maintains that Leon undervalued the assets. She requests that she should be awarded a property settlement of $71,855 to be paid to her in ten yearly installments.

The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App. 1994). The determining factor is what is fair and equitable to both parties under each circumstance. *Id.;* Iowa Code § 598.21 (1995). Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). The equitable distribution of property should be made in consideration of the criteria codified under Iowa Code section 598.21. *Starcevic*, 522 N.W.2d at 857; *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Following a hearing on economic issues, the court found the parties' assets, including a farm, household items, hogs, cattle, and machinery, were valued at $397,412, and that their debts amounted to $268,045 with a net value of 129,367. It awarded these assets and assigned this debt to Leon. Connie was awarded personal property, a vehicle, and one-half of the portion of Leon's pension that had accumulated during the parties' marriage.

In examining property valuations, we have generally upheld values set by the trial courts if they are "within the permissible range of evidence." *See In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). While Connie contends the property was undervalued, we find the assigned values are reasonable. We find the

court duly assessed the credibility of the appraisers' figures and further find them to be within the permissible range of evidence presented to the trial court.

With respect to Connie's contention the parties' assets grew during the marriage in part due to her efforts, we look first to the parties' net worth at the time of their marriage.

The parties' premarital assets are difficult to determine by the scant record before us on that issue. However, in Connie's brief, she asserts that parties' net worth in 1984, fifteen months after their marriage, was $196,600. This was comprised mainly of crops, livestock, machinery and equipment. She obtained that figure from the financial statement used at the time they applied for financing to purchase the farm. Connie then set out what she considers to be the parties' total assets and liabilities at the time of trial, leaving a net worth of the parties of $152,519.[1]

Upon reexamination of the figures presented by both Leon and Connie, we find the net worth of the parties did not substantially change from 1984, the earliest figures we have before us, and the time of trial. The record further supports that the assets were primarily farm assets brought to the marriage by Leon. Premarital assets are not set aside as gifted or inherited property; rather, these assets are a factor to consider, together with all other facts and circumstances of each individual case in making an

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[1] This figure does not have the John Deere pension included, which would increase the parties' net worth. As there is no dispute regarding the division of the pension, we need not consider it further.

equitable distribution of assets. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996); Iowa Code § 598.21(b). The trial court, after making the distribution of assets, then awarded Connie substantial alimony. In doing so, the court reasoned, "In light of the fact that this decree leaves [Connie] at a financial disadvantage, [Leon] shall be required to pay to [Connie] spousal support in the sum of $500.00 per month for a period of ten years." The award would terminate upon Connie's death but not upon her remarriage. This has a potential value to Connie of $60,000. Thus, the court considered the property division in conjunction with the award of alimony. *See In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996).

An additional and significant factor to bring into the balance is Leon's financial responsibility for the parties' two children born in 1984 and 1987. *See In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992). He was granted primary physical care and yet Connie was only ordered to pay minimal child support of $5.00 per month. Leon also provides medical insurance for the children and pays all amounts not covered by insurance for their health care.

We review the equities of the property distribution in light of the other terms of the decree which have a financial impact on the parties to determine whether equity has been accomplished. Under the unique facts of this case, we find the trial court made an equitable distribution of the assets.

II. Alimony award. The district court ordered Leon to pay Connie $500 per month in spousal support for ten years. It ordered that alimony cease upon Connie's death if that occurred prior to the expiration of ten years, but not upon her remarriage.

Connie argues she should be awarded alimony for her life rather than for a ten-year period, with interest accruing at a rate of 10% per annum.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995); *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Welchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995).

In determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against the relative need of the other. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony may be used to remedy inequities in a marriage and to compensate a spouse who leaves a marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993).

The court found Leon, who works at John Deere Dubuque Works, had a net monthly income of $3665; Connie was unemployed at the time of trial. Generally, permanent alimony, as requested by Connie, is only awarded to a spouse who was in a long-term marriage, who has never been in the work force, or has been out of the work force for many years, and who has no marketable skills and has thus not demonstrated any cognizable earning capacity, and who has spent much of the marriage caring for the children instead of developing an income-generating skill. *See Geil*, 509 N.W.2d at 741-42. Connie and Leon were only married twelve years. At the time of the dissolution of the marriage in 1995, Connie was thirty-seven years old and healthy, with the ability to return to the work force. Although Connie related she felt she was unable to hold down a job due to her alcoholism, she indicated in her testimony she "would like to get a full-time job, maybe go to school." She has a high school education. Prior to and at times during the course of the marriage Connie worked outside the home. Some of the positions she held were in a supervisory capacity.

We agree with the district court and affirm the award of alimony, both in amount and duration.

III. Trial attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994).

Following trial, Connie's attorney submitted an application for attorney fees in the amount of $2500. Included on the application was the statement, "We will submit an itemized statement in support of such fee application at the direction of the Court." The court then awarded $1000. In an order following a 179(b) motion the court justified its award on the fact that "no itemization of services rendered" were made part of the file. Connie now argues that because the court did not request an itemization, it was an abuse of discretion to base an award on a lack thereof. We find this argument to be without merit. The court should not have to take the additional step of requiring evidence in the form of an attorney affidavit before it makes an award of fees.

We determine the court did not abuse its discretion as it was the attorney's duty to submit an affidavit without court direction. We find the award was reasonable and affirm.

IV. Appellate attorney fees. Connie requests that this court direct Leon to pay $1500 toward her appellate attorney fees. 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 district court's decision on appeal. We determine Connie is not entitled to appellate attorney fees.

Having carefully considered all issues on appeal, we affirm the district court.

AFFIRMED.

Huitink, J., concurs; Cady, C.J., dissents.

CADY, C.J. (dissenting)

I respectfully dissent. The majority uses the award of alimony to Connie to help justify an award of nearly all the property to Leon, without considering Connie's independent right to alimony based on her financial disadvantages. I agree alimony must be considered in conjunction with the property award, but this is done to evaluate their individual sufficiency. *See In re Marriage of Coulter,* 502 N.W.2d 168, 172 (Iowa App. 1993).

Here, the majority uses alimony to determine the sufficiency of the disparate property award, then finds Connie's economic disadvantage due to the disparity in earning capacities between the parties will be satisfied by the same alimony award. Thus, the sufficiency of the alimony award is greatly diminished. *See In re Marriage of Conley,* 284 N.W.2d 220, (Iowa 1979) (an award of periodic monthly alimony to wife provided no basis for tempering goal of approximate equal division of property).

Courts should determine an equitable distribution of the property before determining an award of alimony. Only then, should the property award and alimony award be considered together in determining their individual sufficiency.

Clearly, Leon's disparate property award cannot be justified by the farm implements he brought into this twelve-year marriage. Connie was a full partner in the marriage and made substantial contributions to the marriage. Although the parties' net worth did not increase substantially during the marriage, this does not diminish Connie's contributions. Moreover, the type of property Leon brought into

the marriage was subject to a steady decline in value. I would give Connie a property award of $50,000, in addition to her alimony award.