IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN RE MARRIAGE OF DONNA M. McCLAIN AND JACK F. McCLAIN

UPON THE PETITION OF
DONNA M. McCLAIN,

Petitioner/Appellant/Cross-Appellee,

AND CONCERNING
JACK F. McCLAIN,

Respondent/Appellee/Cross-Appellant.

Filed April 8, 1983

2-442
2-67752

Appeal from Floyd District Court, Ralph F. McCartney, Judge.

Petitioner-wife appeals and respondent-husband cross-appeals from the decree dissolving the parties' marriage. AFFIRMED.

Gary J. Boveia, Waverly, for petitioner-appellant.

E. W. Henke, Charles City, for respondent-appellee.

Considered en banc.

OXBERGER, C.J.

Petitioner-wife appeals and respondent-husband cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner wife asserts (1) that the property division was inequitable, and (2) that she should be awarded attorney fees and costs on appeal. On cross-appeal, respondent husband asserts (1) that petitioner wife did not establish the existence of a common law marriage; (2) that the $13,500 cash settlement he is to make to petitioner-wife should be reduced to $7,500; and (3) that he should be awarded attorney fees and costs on appeal. We affirm.

Petitioner Donna M. McClain and respondent Jack F. McClain were married at a formal ceremony in 1951. In 1971, the marriage was dissolved. Less than a year later, the parties resumed living together. They were not, however, formally remarried, and there was conflicting evidence at trial as to the existence of a common law marriage. Donna, a teacher, earns about $20,000 per year. Jack is a truck driver, and earns about $12,500 per year.

The trial court found that a common law marriage did exist. It awarded each party his or her personal property and half of the parties' sporting goods. Donna was also awarded two cars, a motorcycle, a snowmobile, a $13,500 cash settlement, and certain household goods. Jack was also awarded a car, a motorcycle, a snowmobile and trailer, a tractor and trailer rig, lawn equipment, tools, the parties' house (which he had received in the 1971 dissolution), and certain household goods. Each party was to pay the indebtedness on the property he or she received. Donna was to pay other debts of about $10,700 and Jack was to pay other debts of about $7,800. No alimony was awarded.

I. Scope of Review

Our review of dissolution proceedings is de novo. Iowa R. App. P. 4. We review the facts as well as the law and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to the trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. The Common Law Marriage

Common law marriages are valid in Iowa. In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979); In re Winegard, 257 N.W.2d 609 (Iowa 1977); In re Malli's Estate, 260 Iowa 252, 149 N.W.2d 155 (1967); Gammelgaard v. Gammelgaard, 247 Iowa 979, 77 N.W.2d 479 (1956). For the marriage to be valid, the following elements must be proved by clear and convincing evidence: intent and agreement to be husband and wife in praesenti, continuous cohabitation, and public declaration or "holding out." In re Estate of Dallman, 228 N.W.2d 187 (Iowa 1975); In re Fisher's Estate, 176 N.W.2d 801 (Iowa 1970); In re Long's Estate, 251 Iowa 1042, 102 N.W.2d 76 (1960).

From the voluminous record taken in this case, the court concluded that a common law marriage existed between the parties. We agree. Within a month after the dissolution of their marriage in April, 1971, Donna returned to the home in which she had resided with her ex-husband. Except for two rather brief periods of time, she resided there continuously. Evidence supporting the existence of a common law marriage, in addition to the fact that the parties resided together over a period of many years, included the following: Donna and Jack occupied the same bedroom and enjoyed conjugal relationships. Over the years, Donna maintained or helped maintain the home, providing painting, repairs, and

appliances. After Jack underwent heart surgery, Donna took leaves from her employment, and paid for transportation, food, and lodging in order to be with Jack. She maintained Jack's clothing, prepared meals, and did other household chores. When Jack bought his own truck-tractor and semi trailer, Donna assisted in its design and accompanied him to Tennessee to obtain the truck and to Indiana, where further work was done to the truck-tractor. The financing for this equipment was obtained through a credit application executed by Donna as Jack's wife. The nationally circulated magazine, Overdrive, carried a two-page centerfold advertisement by Consolidated Peterbilt in August of 1978 in which Donna and Jack were pictured. The caption under the picture referred to them as "Mr. and Mrs. Jack McClain." They vacationed together and frequently referred to one anotner as husband and wife. Some months after Donna's return to the McClain residence, Jack requested a change of beneficiary on an insurance policy, naming Donna as his beneficiary and as his wife.

There is much more evidence than this in the record, but this is sufficient to indicate clearly that the tests are met. Despite the fact that there is evidence supporting the contrary view, we conclude, on de novo review, that a common law marriage exists between these parties.

III. Division of Property

The principles governing property division are enumerated in section 598.21(1) of the Iowa Code, and need not be repeated here. There is no rule requiring a percentage division of the parties' assets. In re Marriage of Callenius, 309 N.W.2d 510 (Iowa 1981). Our objective is to determine whether the award was equitable and just under the circumstances. Id.

Donna's principal contention is that she should be awarded the family home valued at $55,000, with a division of other assets and liabilities that would leave each of the parties with approximately equal net worth. This argument assumes that the first divorce of the parties and the property division that took place at that time should be ignored as if they had never occurred. The fact is, however, that the parties were divorced and that at that time, the family residence was awarded to Jack. The home in which Jack resided and to which Donna returned after their divorce was brought to this second marriage by Jack. Under the principles governing division of property in a dissolution action, we will attempt, as far as possible, to preserve the rights of each party to property which he or she brought to the marriage. We agree in the instant case with the trial court that any claim which Donna might have to the family residence is minimal at best. See Iowa Code § 598.21(2)(1981). We have already noted that we do not follow any rule which would require us to divide property according to a percentage formula. In re Marriage of Callenius, supra. We find that the property division ordered by the court was just and equitable, and therefore affirm it.

IV. Attorneys Fees and Costs

Attorneys fees are not recoverable as a matter of right, but rest within the court's discretion. Locke v. Locke, 263 N.W.2d 694 (Iowa 1978). The controlling factor is the ability of each of the parties to pay. In re Marriage of Williams, 303 N.W.2d 160 (Iowa 1981).

Donna has requested attorney fees and costs incident to this appeal. On cross-appeal, Jack has asked that he be awarded attorney fees and costs.

We find that the property division left each of the parties in a position to pay his or her own costs on appeal. The petitions of both parties for attorney fees and costs are therefore rejected.

In sum, we find that a common law marriage existed between the parties prior to this dissolution, and that the property division ordered by the court was just and equitable. Costs assessed equally to both parties.

AFFIRMED.