IN THE COURT OF APPEALS OF IOWA

No. 0-640 / 00-0172
Filed December 22, 2000

Upon the Petition of
DEANNA LANG,
Plaintiff-Appellant,

vs.

and Concerning
ROBERT LANG,
Defendant-Appellee.

FILED
DEC 22 2000
CLERK SUPREME COURT

Appeal from the Iowa District for Johnson County, Kristin L. Hibbs, Judge.

Plaintiff-Appellant appeals the trial court's decision effecting the economic provisions of the dissolution decree of the parties. **AFFIRMED AS MODIFIED.**

Patricia C. Kamath of Kamath Law Office, Iowa City, for appellant.

Margaret Lainson of Meardon, Sueppel & Downer, PLC, Iowa City, for appellee.

Considered by Sackett C.J. and Vogel, J. and Honsell, S.J.*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

The parties were married on June 27, 1987. They separated during May of 1998, and were divorced on December 14, 1999. They are the parents of a twelve-year-old daughter. Robert appeals the property valuation and time of valuation provisions of the divorce decree. He asserts that the court erred by valuing Deanna's retirement accounts at a time other than the date of trial. He also takes issue with the trial court's valuation of the home acquired by the parties during the marriage, and the value placed on the equipment and tools he acquired while self employed during the marriage.

The trial court alludes to some of the facts shown by the evidence presented during trial and makes a determination concerning the date of valuation of Deanna's retirement funds as follows.

> Deanna has accumulated retirement funds in TIAA/CREF from her employment during the marriage. Deanna requests that the value of these assets be determined as of the time of the parties' separation in May of 1998. Robert requests that the valuation be made as of the time of trial or as of the time Deanna filed for dissolution of marriage in November 1998. Because Robert has made no contribution to the growth of this asset since the time of separation, the date of separation should be the date of valuation of this asset. As of June 30, 1998, Deanna's TIAA account B705695-1 had a value of $17,045.18. Her CREF account Q705695-8 was valued at $16,663.91 at that time. Her TIAA payout contract #IF23886-0 had a value of $11,978.10 on September 30,1998. The total accumulation at the time of the separation was $45,687.19. Each party should receive one-half that value which amount is included in this property division.

The evidence also shows that after moving from the family home in May of 1998, until December of that year Robert contributed no more than a total of $150 to the support of the family. After Robert left the home and until late in the year,

1998, he made no contribution to the family that could be said to increase or contribute to the increase in value of the family's assets. Additionally, during this period of time the deductions, along with the contributions from her employer, from Deanna's pay for TIAA/CREF continued as usual. From the time of the separation to the date of the divorce, the contributions made by Deanna and her employer amounted to $6726 of the approximate $11,000 increase to her retirement funds. The total value of the TIAA/CREF accounts, including the transfer payout annuity, at time of trial was $55,670.91.

The parties bought their home on June 1, 1993. The purchase price was $82,000. In 1996 a fire caused considerable damage to the kitchen area of the home. Not all of the insurance proceeds received were used to repair the damage. Some of the repairs remained unfinished as of the time of trial. The general condition of the house has to some extent deteriorated since the purchase date. While the assessed value of the home has risen to $97,860 and Robert asserts that its value is at least $100,000, we concur with the trial court's value of $87,500 that is supported by the testimonial and photographic evidence also produced at trial.

Robert was employed as a maintenance person. About a year after the marriage, he went into business for himself doing remodeling, roofing, painting and other small repair jobs. While being self-employed he bought saws, ladders, painting supplies, roofing supplies, other hand tools, snow blade for a truck, riding lawnmowers, lawnmower accessories and other equipment necessary to operate the business. He operated this business for about nine years, and then went to

work for the owner of an apartment complex as an on-site maintenance person. After the petition for dissolution had been filed Robert sold some of the equipment. He estimated he received $2500 to $3000 for the items sold. Robert did not share any of the proceeds with Deanna. At time of trial Robert still possessed many of the tools and some of the equipment that he had had when conducting his own business. We again concur with the trial court's valuation of the tools at $12,500. Having an investment of $10,000 to $15,000 in equipment and supplies in a viable maintenance business seems to us to be a very reasonable conclusion to arrive at from the evidence produced at trial.

I. Robert asserts that the trial court failed to make an equitable distribution of the assets accumulated during the marriage of the parties.

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

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In Re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). When distributing the property, we take into consideration the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). Among the many factors to consider are the length of the marriage; the property brought to the marriage by each party; the contribution of each party to the marriage, giving appropriate

economic value to each party's contribution in homemaking; and the earning capacity of each party. Iowa Code § 598.21.

We hold the trial court did not err in its equitable distribution of the property. We find the value placed on the assets by the trial court to be well within the permissible range of evidence and will not disturb them on appeal. *See In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

II. In *In re Marriage of Driscoll*, 563 N.W. 2d 640 (Iowa App. 1997), the court indicates that ordinarily the assets acquired during a marriage should be valued as of the date of trial, citing *Locke v.Locke*, 246 N.W.2d 246 (Iowa 1976). However, "[t]here may be occasions when distributions require flexibility, and concrete rules of distribution may the court's goal of obtaining equitable results." *Driscoll*, at 42.

Having examined the record presented on appeal, we conclude that the assets of the parties including the TIAA/CREF accounts should be valued as of the date of trial.

III. Deanna requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994).

In considering all of the circumstances alluded to above and reviewing the submitted record de novo; we find that the valuation of all of the assets in this case must be as of the date of trial. The only asset the trial court did not value as of the date of trial was Deanna's retirement account. That account increased approximately $11,000 between the time the parties separated and the date of trial. As alluded to above, most of that accumulation was a result of deductions from Deanna's pay. We find that the distribution of assets made by the trial court reflected an equitable distribution of the assets accumulated by the parties during their marriage.

We do not award attorney fees.

AFFIRMED AS MODIFIED.

Hecht, J., concurs; Sackett, C.J., concurs specially without opinion.