IN THE COURT OF APPEALS OF IOWA

No. 7-769 / 97-0449
Filed July 31, 1998

IN RE THE MARRIAGE OF ANN MARIE WOJDYLA AND RICHARD PAUL WOJDYLA

Upon the Petition of
ANN MARIE WOJDYLA,
Appellant,

And Concerning
RICHARD PAUL WOJDYLA,
Appellee.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

Ann Wojdyla appeals from the provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Ann M. McDonough, Dubuque, for appellant.

Mary M. Schumacher, Dubuque, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

Ann Marie Wojdyla appeals the economic provisions of the district court's decree dissolving her marriage to Richard Paul Wojdyla. We affirm as modified.

I. Background Facts and Proceedings.

Ann Wojdyla and Richard Wojdyla were married in September 1981. The decree dissolving their marriage was entered on February 7, 1997. Both parties were forty-six years old at the time of the decree. Ann earns $36,000 per year as director of professional services at a residential care facility. Richard earns $32,000 annually as a counselor.

The disputed issues at trial included division of home equity, Richard's pension, and his tax deferred annuity (TDA). The parties' home was appraised at $180,000. It was encumbered by a $137,417 mortgage. The decree granted Richard the right to purchase Ann's share of home equity by paying her $23,560. The court arrived at this amount by adjusting the parties' net home equity to account for an equalization cash payment of $5140 to Ann and an additional $5000 for one-half of an estimated real estate commission payable if the home were sold. If Richard fails to purchase Ann's equity, the decree provides for the sale of the home and division of equity after the foregoing adjustments.

Richard's pension is a defined benefit plan with limited benefit options. There is no evidence of the pension's present actuarial value. The record indicates

Richard's longevity and earnings history entitled him to a $936 monthly retirement benefit, despite the absence of such evidence.

The court valued Richard's retirement pension at $3000. In lieu of its division, Richard was credited with its $3000 value and Ann's property award was adjusted proportionately.

The balance of Richard's TDA as of the trial was $50,773. Richard withdrew $14,913 prior to trial. Richard was awarded the entirety of his TDA based on its value as of the date of trial. The court rejected Ann's demands to adjust the property division to account for Richard's withdrawals from his TDA before trial.

In this appeal, Ann challenges the equity of the district court's property division. She contends Richard's pension should have been proportionately divided based on the duration of his employment and length of their marriage. Ann also argues the court should not have reduced her home equity share for an estimated real estate commission if Richard purchases her interest.

II. Standard of Review.

We review this equitable action de novo. Iowa R. App. P. 4; *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the trial court's findings of fact, but we do give them deference because the trial court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Property Distribution.

The parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1). *See In re Marriage of Estlund,* 344 N.W.2d 276, 280 (Iowa App. 1983). These factors include the length of the marriage, the property brought into the marriage by each party, and the parties' earning capacities. Iowa Code § 598.21(1).

A. Pension Plan.

The district court found Richard's pension has a present value of $3000. Ann argues this finding is unsupported by the record. She requests a remand on this issue for entry of an order dividing the pension equally between the parties. Richard also requests this issue be remanded for an accurate valuation of his pension plan and appropriate division.

The appellate courts of this state have devised several schemes for the distribution of pension benefits in a dissolution. The first scheme is to award a percentage of the benefits already being received. *In re Marriage of Mott*, 444 N.W.2d 507, 510-11 (Iowa App. 1989). The second is to award a lump-sum percentage based on the present value of the pension. *Id.* The third scheme is to

award a percentage of the pension, as it becomes payable, in the form of periodic alimony. *Id.* The fourth scheme for dividing pension benefits is to award a portion of the pension benefits if and when they accrue. The fourth system differs from periodic alimony in that it awards a portion of the pension benefits in the property division. *Id.*

Upon reviewing the record, we find no evidence supports the district court's valuation of Richard's pension. We accordingly remand this issue to the district court for a determination of the pension's actual value and an equitable distribution of the pension in accord with one of the four alternatives noted. Because we do not retain jurisdiction, the district court is free to determine which of the four alternatives noted is equitable in this case.

We vacate the pension award made by the district court.

B. Home Equity.

In the decree, the district court granted Richard the option of purchasing Ann's interest in the marital home for $23,560. This amount reflects adjustments for an equalized cash payment to Ann of $5140 and $5000 for one-half of the estimated costs of sale.[1]

[1] In the event Richard does not choose to exercise this option, the court ordered the home be sold and the parties' home equity be divided after adjustments for the cash payment to Ann and estimated costs of sale.

In this appeal, Ann disputes the court's reduction of Richard's buy-out obligation by $5000 to account for costs of sale because the district court did not order the parties to sell the home under this circumstance. We agree.

The district court's order the home be sold is conditional upon Richard waiving his right to purchase Ann's interest. If Richard chooses to exercise his buy-out obligation, their will be no sale. We hold the district court erred in considering the costs of sale in adjusting the parties' home equity. *See In re Marriage of Freidman*, 466 N.W.2d 689, 691 (Iowa 1991) (accounting for estimated expenses of capital gains, taxes, and selling costs in distributing corporate stock is inappropriate where sale of the stock was not pending). *Id.* at 691. The court stated:

> [W]here there is no evidence to support a discounting based on a sale and the trial court has not ordered a sale, the effect of considering income tax consequences on a sale is to diminish the asset value to the nonowning spouse.

Id.

We reverse the district court on this issue. We note we leave in tact the court's adjustment to the parties' home equity for costs of sale if Richard chooses to let his option to purchase Ann's interest lapse and the court's order to sell the home becomes effective.

C. Tax Deferred Annuity (TDA).

Ann challenges the equity of the district court's property distribution based on the court's failure to consider Richard's pretrial withdrawal of $14,913.24, from his TDA in the marital property.

At the time of the trial, November 1996, Richard's TDA was valued at $50,773. In August 1996, Richard withdrew $14,913.24 from this account. Richard testified he spent the money on marital expenses, including mortgage payments, insurance and registration for the parties' vehicles, marriage counseling, tractor repairs, and Starview Homeowner's Association costs. The district court rejected Ann's unsubstantiated assertions to the contrary. Our review of the record also fails to disclose evidentiary support for Ann's contention that these funds were expended for something other than marital expenses. In the absence of supporting evidence, we defer to the district court's assessment of the parties' respective credibility and affirm on this issue.

AFFIRMED AS MODIFIED.