IN THE COURT OF APPEALS OF IOWA

No. 5-579 / 94-1953

FILED
MAY 31 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LINDA MARIE CARLSON AND JACK A. CARLSON

Upon the Petition of
LINDA MARIE CARLSON,

Appellee,

And Concerning
JACK A. CARLSON,

Appellant.

Appeal from the Iowa District Court for Clay County, Frank B Nelson, Judge

Respondent appeals various economic provisions of the parties' dissolution decree **AFFIRMED AS MODIFIED.**

Steven D Hamilton of the Hamilton Law Firm, P C , Storm Lake, for appellant

Bradley Howe of Berg & Howe Spencer, for appellee

Considered by Habhab, P J and Huitink and Streit, JJ. Sackett and Vogel, JJ , take no part

HUITINK, J.

Jack Carlson appeals certain economic provisions of the decree dissolving his marriage to Linda Carlson. We affirm as modified.

Jack and Linda were married in 1965. Linda was not employed outside the home during the marriage and cared for the parties' three children while they were growing up. Jack was employed at a dairy and meat packing house early in the marriage and began working for United Parcel Service in 1969. Jack worked for UPS until 1989 when he suffered a work-related injury which eventually led to termination of his employment. As a result of his injury, Jack received a weekly compensation check of approximately $418 per week while off work. He ultimately received a $22,000 lump sum workers' compensation settlement, $14,500 of which remained unspent at the time of trial.

In 1973 Linda received a substantial inheritance from her grandmother resulting in her receipt of $300 monthly payments. These payments, which continued until 1983, were used to pay the mortgage on the parties' home. Linda also received a $35,000 lump sum payment and used some of this sum for home improvements. She also received a $10,000 advance on her inheritance which contributed to purchase of a rental house. Jack and Linda also used the inheritance to purchase a new car, pay for a daughter's college education and purchase new furniture.

The parties' marriage was dissolved by decree issued on November 4, 1994. The district court set aside to Linda forty-one percent of her inheritance contribution to the mortgage but treated the remaining $14,500 of Jack's workers' compensation settlement as a marital asset. Linda was awarded the marital home along with a $30,129 equalization payment from Jack, part of which was to be used to pay the parties' debts. The decree also ordered Jack to pay Linda $200 per month alimony and $1000 of her attorney's fees. Jack appeals.

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).

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 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) (1993). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Jack first contends the district court erred in failing to set aside the proceeds of his workers' compensation settlement as his sole and separate property. He claims that because Linda had no part in the pursuit of this claim, the proceeds of the settlement should be his alone. We disagree.

Settlement proceeds do not automatically belong to the injured spouse. *In re Marriage of McNenrey* 417 N.W.2d 205, 208 (Iowa 1987). Instead, their disposition depends on the circumstances unique to each case. *Id.* Likewise, the treatment of a lump sum payment of workers' compensation benefits depends on the circumstances of each case. *In re Marriage of Swan*, 526 N W 2d 320, 325 (Iowa 1995).

On our de novo review, we find it was equitable for the district court to treat Jack's workers' compensation settlement as marital property for the purposes of property distribution During the course of the marriage, Linda used a substantial portion of her inherited property for the benefit of the marital unit She paid the mortgage and made improvements on the parties' home, financed a child's college education, and contributed $10,000 to the purchase of a rental home Although the district court took Linda's inheritance into account by setting aside forty-one percent of the marital home as gifted property we believe the court's treatment of Jack's workers compensation settlement was equitable based on Linda's financial contributions apart from those made to the home. The district court correctly included Jack's workers' compensation settlement as marital property

Jack next contends the district court awarded Linda an excessive amount of alimony. Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right, but instead depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party and (2) present standards of living and ability to pay balanced against relative needs of the other. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App 1983) (citation omitted). 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)

After considering the parties' earning capacity relative to the property distribution, we find the district court erred in ordering Jack to pay Linda $200 per month in alimony At the time of trial Jack was earning approximately $1000 per month as a janitor and received $288 per month for a Navy related disability Linda was also employed at the time of trial and had a net income of approximately $847 per month We find this difference to be insignificant in light of the property division as a whole The district court allowed Linda a forty-one percent set-aside for her inheritance contribution to the marital home She also received the home in which she is able to live rent and mortgage free, while Jack has rental expenses of $350 per

month. Under these circumstances we find equity does not support an award of alimony.

Linda also requests an award of appellate attorney's fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine each party should pay his or her own attorney's fees and one-half of the court costs

The decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.