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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JOSEPHINE M. GENESER AND JOHN F. GENESER

Upon the Petition of)
JOSEPHINE M. GENESER,) Filed March 24, 1981
Petitioner-Appellant,)
And Concerning)
JOHN F. GENESER,) 0-441 / 64542
Respondent-Appellee.)

Appeal from Dallas District Court - Van Wifvat, Judge.

Petitioner-wife appeals and respondent-husband cross-appeals economic provisions of their dissolution decree. MODIFIED AND AFFIRMED.

F. H. Becker of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, Iowa, for petitioner-appellant.

Ronald L. Sutphin of Peddicord, Simpson & Sutphin, P.C., Des Moines, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner-wife appeals and respondent-husband cross-appeals economic provisions of their dissolution decree. The issues primarily involve the valuation of certain assets and whether other assets should have been included in or excluded from consideration for disposition. Our review is **de novo.** Iowa R. App. P. 4. We modify and affirm.

John and Josephine Geneser were married in 1947. Their four children have all reached their majority and are self-supporting. Josephine filed this petition on June 1, 1978; trial to the court was held on June 12, 1979. In its findings and conclusions, the court found the parties' net worth to be $956,336. Most of that is directly related to John's wholly-owned farm implement dealership. The court awarded Josephine the marital residence worth $57,000, furnishings worth $10,000, the parties' one-half interest in a certain 60-acre farm site (that interest valued at $62,500), $6,255 representing one-half of the parties 1978 income tax refunds and a lump sum cash property settlement of $364,702. John was to pay this in monthly installments of $1,500 each, that amount increasing by five percent annually. Interest on the unpaid balance was specifically disallowed. This resulted in a total award to Josephine of $478,168, or exactly one-half of the parties' net worth as determined by the trial court.

In response to John's motion to reconsider, the court on October 5, 1979, ruled that various tractors and other equipment, valued at $112,974, should not have been included as marital property since they were encumbered in amounts equalling their value and that Josephine's cash award should be reduced from $364,702 to $303,215. The final decree was filed on January 8, 1980. This decree incorporated the above changes and also provided that the cash property settlement was to be a lien against all stock owned by John in his implement company. He was ordered to pay $15,000 for Josephine's attorney fees, disbursements of $2,350.70 made by her attorney and court costs. She filed her notice of appeal on January 21, 1980; John's notice of cross-appeal came two days later.

The trial court determined, after considering the appropriate factors in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding fault, that the marital estate should be divided equally between the parties. The parties apparently agree that this is a desirable goal as do we. The disputes center around which assets are subject to distribution and the valuation of certain other assets.

I. Josephine claims that the trial court erred in excluding from consideration as marital property certain equipment leased by John from his business and which was valued at $112,974. At the hearing on his motion to reconsider, John testified that he owes the bank an amount equalling the cost of the equipment such that the rent payments he receives are paid in turn to the bank. We agree with the trial court that this circumstance precludes consideration of the equipment as a marital asset.

Josephine also claims that the trial court should have considered John's $60,000 interest in a profit-sharing plan as a marital asset. John has no present ability to obtain those funds and he will not be able to do so until he retires. While we believe that this represents a marital asset, its present worth is less than $60,000. Nevertheless, we adjust Josephine's award upward, as hereinafter indicated, to reflect our recognition of this asset.

II. Josephine further claims that the trial court should have awarded interest on the unpaid balance of the cash property settlement. We agree. The trial court gave no reason for its refusal to award interest. Given the size of the award and the comparatively small monthly payments required by the decree, we think that she should be compensated for the fact that John will be able to make interim use of the unpaid balance. We therefore award Josephine interest on that balance accruing at the annual statutory rate of seven percent. This award is to be made retroactive so that interest will be deemed to begin accruing on the date of the decree, January 8, 1980, payable annually.

III. In his cross-appeal, John claims that the trial court should not have considered as a marital asset a land contract on a farm under which he has already received the balance due of $101,500. He testified that, on receipt of that amount, he loaned $90,000 to his implement store and used the rest to help make a payment on a note owing to a bank. This resulted in increasing his accounts receivable by the amount of the loan and decreasing his liabilities by the amount of the note payment. The figures for John's assets and liabilities, which were accepted by the trial court, appear to have already taken into account that increase and decrease. We agree with John that the court's further inclusion of the land contract in the marital estate was a duplication. We therefore further modify the decree so as to reduce Josephine's award by half this amount.

IV. John further claims that Josephine should not have been awarded the one-half interest in the 60-acre farm site. He alleges that ownership of that site is subject to a

partnership agreement between him and a Mr. Moran which governs disposition of the land in the event that either of them is sued for divorce. We disagree. Although John testified at the post-trial hearing as to the terms of this alleged agreement, there was no other evidence indicating the existence of either the agreement or the partnership itself. Even assuming the existence and validity of the agreement, it appears that it is Mr. Moran, not John, who would have the right to enforce its provisions. The trial court properly awarded the one-half interest in the land to Josephine.

V. Josephine in her brief states: "This (alimony) is not really a concern of Petitioner or this Court if fair treatment both as to assets and interest is accorded." In light of this statement, we do not grant alimony.

VI. Both parties present numerous other issues relating to valuation and inclusion in the marital estate. We have considered all of these issues and find nothing in them to warrant further modification of the decree.

In order to reflect the adjustments made in Division I and Division III of this decision we reduce Josephine's cash award from $303,215 to $268,215.[1] The other assets awarded to her are not disturbed nor are any other provisions of the trial court's decree. The $268,215 cash award shall be payable initially in monthly installments of $1,500 with annual interest installments on any unpaid balance payable on the anniversary dates of the final trial court decree at the rate of seven percent per annum. The amount of the annual principal payments shall be increased five percent annually as provided in trial court's decree.

Josephine requests an award of attorney fees incurred for this appeal. Such an award is not a matter of right, but depends upon the financial circumstances of each party. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). We do not think an award is appropriate in this case given her sizeable award and the fact that John was already ordered to pay $15,000 towards her attorney fees at trial. Compare, Craft v. Craft, 226 N.W.2d 6, 9 (Iowa 1975). Costs will be assessed equally between the parties.

AFFIRMED AS MODIFIED.

Johnson, J., and Oxberger, C.J., concur specially; Carter, J., and Donielson, J., dissent.

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[1] This reduction represents one-half of the $101,500 adjustment made in Division III less one-half of the conservatively valued present worth of John's profit-sharing plan, which we fix at $31,500.

JOHNSON, J. (specially concurring)

I would award interest at nine percent per annum on the unpaid balance of the lump sum award. See In re Marriage of Stamp, 300 N.W.2d 275, 281 (Iowa 1980). However, given the division of the court in this case, I have agreed to the seven percent as set forth in the court's opinion because only by so doing could petitioner obtain any of the interest to which she is entitled.

Oxberger, C.J., joins in this special concurrence.

CARTER, J. (dissenting)

I dissent from the result achieved in division II of the decision of the court. While I recognize that balance sheet equality may call for the payment of interest on a property settlement payable over a period of time, I cannot agree that this is a good result in the present case.

Several factors suggest the contrary. These include:

1) If both parties wanted a cash settlement it is doubtful that the business assets would permit an award upon liquidation of twice that which is awarded to Josephine. Thus, in this regard, she may be receiving more than an equal division of the worth of the business.

2) Incident to John's retention of the implement dealership, he incurs a substantial amount of risk. His obligation to pay Josephine's property settlement is not conditioned upon the return which he in fact receives from the business assets.

3) Under the decision of the court, Josephine can enforce payment of her property settlement out of John's share of the business assets as well as her own. This security militates against a precisely equal division of assets in the present case.

4) Given the size of the property settlement, the amount of the annual interest payments will be staggering.

I would affirm the trial court's denial of interest, raise somewhat the amount of the monthly principal payment, make the adjustment provided in division I and division III of the court's decision, and otherwise affirm the trial court's decree.

Donielson, J., joins this dissent.