IN THE COURT OF APPEALS OF IOWA

FILED
FEB 28 1996
CLERK SUPREME COURT

No 5-468 / 94-1024

IN RE MARRIAGE OF MERLE G. FRANZMEIER AND LEAH R. FRANZMEIER

Upon the Petition of
MERLE G. FRANZMEIER,

Appellant,

And Concerning
LEAH R. FRANZMEIER,

Appellee.

Appeal from the Iowa District Court for Buena Vista County, Joseph J Straub, Judge.

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

Michael D. Andrew, Des Moines, for appellant.

Paul D. Havens of Havens & Havens, Storm Lake, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

PER CURIAM

Merle and Leah Franzmeier were married on July 12, 1958. They have three children, all of whom have reached the age of majority. Merle and Leah are both high school graduates with no further formal education. At the time of trial Merle was fifty-six years of age, and Leah was fifty-three. Merle's income varies as he is paid on commission. Leah was the primary caretaker of the couple's three children during the marriage. Merle is generally in good health. Leah suffers from asthma, lower back problems, and arthritis. In August 1993 Leah broke her leg above her ankle, damaging her Achilles tendon. At the time of trial, the leg had not yet totally healed, restricting Leah's ability to walk or stand for an extended period of time.

Until their separation, Merle and Leah lived on an acreage, part of which was devoted to the planting and selling of Christmas trees. Although they both carried on the business together for several years, Leah has most recently run the business by herself. The most valuable assets owned by Merle and Leah are the marital home and acreage. The marital home has been in Leah's family for four generations. Merle and Leah purchased the home from Leah's father after Leah received a $20,000 inheritance from her uncle. The proceeds from the inheritance were also used to pay off an existing mortgage on a house in which they were previously living. This house was later sold and the proceeds used towards the home and acreage. Merle and Leah added on to the home and built several other buildings on the property. Prior to their separation, Merle

inherited $28,000 from his father. After filing the present petition, Merle moved to an apartment in Pocahontas, and Leah continued to reside in the marital home. Prior to trial the parties entered a stipulation setting forth the marital assets to be divided. Merle and Leah also stipulated as to the amount of inheritance each received during the marriage.

The district court concluded the parties had accumulated assets of $79,657. Before dividing the marital property, the court set off to each party the inheritances each received during the marriage. The court then awarded Leah $35,969 and $24,188 to Merle. Leah was awarded the marital home. The court also ordered Merle to pay Leah permanent alimony in the amount of $600 per month. The court concluded, if the marital property had been divided equally, Merle would have been obligated to pay $750 per month in alimony. Merle has appealed arguing the property distribution is inequitable. He further argues the amount and duration of alimony is excessive as Leah has some employment skills.

I. Scope of Review.

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 district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Property.

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.* In fact, we reject precise percentage divisions because "[t]he question is always what is an equitable and just award in a given set of circumstances." *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975). The determining factor is what is fair and equitable in each circumstance. *Russell*, 473 N.W.2d at 246. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). It is important to note, 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); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

First, Merle argues Leah's inheritance should not have been set aside for her. We reject this argument and find the district court did not err in setting of Leah's inheritance. Generally, a court does not divide inherited property. Iowa Code § 598.21(1). Iowa Code section 598.21(2), however, provides an exception upon finding the refusal to divide the property is inequitable to the other party. In this case, both Merle and Leah inherited money which the district court set off to each party. As such,

we cannot say the failure to divide Leah's inheritance as marital property was inequitable to Merle.

Next, Merle argues the property division as a whole was unequal and inequitable. Although the district court's property distribution was not equal, after full consideration of the facts and circumstances in this case, we determine the division was fair and equitable. As stated above, the most valuable asset was the marital home. The only way in which an equal division of property could have been accomplished in this case would have been to sell the home. This home, however, has been in Leah's family for many years. We find such a sale unnecessary particularly in light of the alimony reduction this court will order. As stated above, we consider property division and alimony together in evaluating their individual sufficiency. *Dahl*, 418 N.W.2d at 359 Because Merle is required to pay less alimony than would normally be awarded to Leah, it is fair and equitable for Leah to receive a greater amount in the property distribution.

III. 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; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350

(Iowa App. 1983) 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." *Estlund*, 344 N.W.2d at 281 (citation omitted). As stated above, we consider property division and alimony together in evaluating their individual sufficiency. *Dahl*, 418 N.W.2d at 359; *Griffin*, 356 N.W.2d at 608.

The district court found Merle's earning capacity, after deducting employee business expenses, at $25,000 per year. Leah, however, has few employment skills and will not be able to support herself. Leah currently works as a telephone answerer earning $35 per month, and a church treasurer earning $37.50 per month. She also sells Christmas trees on the family acreage. The district court set her net monthly income at $200 per month. Clearly, there is not enough money to cover the full living expenses of both parties. After considering the earning capacity of each party, Merle's ability to pay alimony, and the relative needs of Leah, we determine the alimony award of $600 was excessive. This is particularly true in light of the fact the property division favored Leah. Consequently, we determine the alimony should be reduced to $400 per month until Leah reaches age sixty-five. When Leah is sixty-five, alimony shall be further reduced to $200 per month as Leah will then be eligible to draw social security against Merle's earnings.

IV. Attorney Fees and Costs.

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 order Merle to pay his attorney fees and $600 toward Leah's attorney fees on appeal. The costs of this appeal are assessed to Merle.

AFFIRMED AS MODIFIED.