FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-228 / 91-1298

IN RE THE MARRIAGE OF MICHAEL LEE STALLSMITH AND TONI BLAIR STALLSMITH

Upon the Petition of

MICHAEL LEE STALLSMITH,

Appellant,

And Concerning

TONI BLAIR STALLSMITH,

Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

The husband appeals certain economic provisions of the decree of dissolution entered by the district court. **AFFIRMED.**

Russel A. Neuwoehner, Dubuque, for appellant.

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Michael and Toni Stallsmith were married on April 14, 1972. They have one child, Billy Jo Stallsmith, born on July 24, 1978. The parties lived in Dubuque, Iowa, during the marriage.

Michael was thirty-nine years old at the time of the dissolution decree. He was employed by William C. Brown Publishing Company. Michael has gross income of about $31,680 per year, and his net income is $1,764 per month.

Toni was thirty-eight years old at the time of the dissolution decree. She works part-time at a children's preschool, where she earns between $100 to $200 per month. Toni has no plans for education or job training and at the time of the dissolution had made no efforts to improve her employment situation.

During the marriage Toni received an inheritance from her grandmother. She placed the inherited assets in a trust over which she exercises sole control. The trust is valued at $83,816. Toni receives net income of $400 per month from the trust funds. She spent some of the trust funds for family purposes.

Following the parties' stipulation, the district court awarded the parties joint legal custody of Billy Jo, with Toni having primary physical care. The court applied the child support guidelines and ordered Michael to pay child support of $427 per month. Toni was not awarded any spousal support.

The issues before the court primarily concerned the division of property. The court set Toni's inheritance aside to her as her own personal property. Of the marital assets, the court awarded Toni the house valued at $42,000, a car with no value, and personal property valued at $3,000. Thus, Toni received $45,000 in marital assets. Michael was awarded a car valued at $6,600, his retirement plan valued at $60,444, and personal property valued at $5,300. Michael received $72,344 in marital assets.

The court ordered Michael to pay Toni a property settlement of $14,000, payable at $400 per month for thirty-five months. Considering the property settlement, Toni received total marital assets of $59,000 and Michael received $58,344. Michael was also ordered to pay $500 toward Toni's attorney fees. Michael has appealed.

I. Our scope of review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Id.

II. Michael first contends the district court erred in finding his retirement plan had a present value of $60,444. He believes the court should have discounted the value of the plan to account for income tax consequences and the fact that he will not receive any payments from the plan for quite some time.

A court should consider the income tax consequences when allocating property in a dissolution. In re Marriage of Hogeland, 448 N.W.2d 678, 681 (Iowa App. 1989). Generally, the income tax consequences should be considered where the allocation of property in a dissolution will in all probability require the liquidation of capital assets. Id. The full value of a retirement plan, without figuring in the potential tax liability upon liquidation, may be considered where a spouse has not been ordered to liquidate the retirement plan and the court's orders may be met without liquidation of the plan. In re Marriage of Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983).

Michael has presented no evidence to show he will be forced to liquidate his retirement plan in order to pay the amounts required by the decree. Further, he has presented no evidence of the amount of any potential tax liability upon liquidation. We affirm the district court's valuation of Michael's retirement plan.

III. Michael also contends that a portion of Toni's inherited funds should be considered marital assets. Apparently about $33,000 of the $83,816 in the trust fund has accumulated as income during the parties' marriage. Michael states that his employment generated the money to pay the income taxes on the accumulated trust income.

Iowa Code section 598.21(2) requires that property given to or inherited by either party ordinarily is to be considered the property of that party. The inheritance

received by one party during a marriage should not be considered by the court in a property division at the time of a dissolution of marriage unless the failure to divide the inherited property is inequitable to the other party. In re Marriage of Hansen, 465 N.W.2d 906, 910 (Iowa App. 1990).

Michael does not show how he believes the property division is inequitable. He states only that he contributed some unknown amount for taxes paid on Toni's inheritance. We agree with the district court's conclusion that the total amount of Toni's inheritance should be set aside to her. We affirm the property distribution as set forth by the district court.

IV. Michael contends the district court abused its discretion in ordering him to pay $500 toward Toni's attorney fees. He points out that Toni has her trust fund, plus she received marital assets.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award, the complaining party must show that the trial court abused its discretion. Id.

We conclude the district court did not abuse its discretion in ordering Michael to contribute $500 toward Toni's attorney fees.

V. Toni seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests

within the court's discretion and the parties' financial positions. Id. We determine each party should pay his or her own attorney fees for this appeal.

We affirm the terms of the dissolution decree entered by the district court. Costs of this appeal are assessed to Michael.

AFFIRMED.

Donielson, P.J., concurs; Sackett J., dissents.

SACKETT, J. (dissenting)

I find no equity in not establishing the true value of a retirement plan at the time of dissolution. If In re Marriage of Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983) holds to the contrary, it should be overruled.