



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF
MARGARET ANNE FRERICHS AND EUGENE BEN FRERICHS

97

Upon the Petition of	)	
MARGARET ANNE FRERICHS,	)	
Petitioner-Appellee,	)	Filed August 26, 1987
And Concerning	)	
EUGENE BEN FRERICHS,	)	<u>7-167</u>
Respondent-Appellant.	)	<u>86-1093</u>

Appeal from the Iowa District Court for Sioux County (No. 15904), Phillip S. Dandos, Judge.

Respondent husband appeals from a decree of dissolution entered in the district court. **AFFIRMED.**

P. D. Furlong, Sioux City, for respondent-appellant.

Harold O. Postma, Orange City, for petitioner-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

SNELL, J.

The parties to this appeal, Eugene and Margaret Frerichs, were granted a dissolution of their nineteen-year marriage by the District Court for Sioux County on May 13, 1986. The district court, in those parts of the dissolution decree pertinent to the present appeal, divided the marital property, placed certain restrictions and periodic financial obligations with respect thereto on Eugene, and awarded attorney fees to Margaret. This appeal follows Eugene's unsuccessful motion for new trial. He challenges the above-mentioned portions of the decree; Margaret requests attorney fees and costs associated with this appeal. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I.

Eugene maintains the property division is inequitable; his monthly payments in settlement of that division are too high; and the restrictions placed upon his farming operation in connection with the division are unreasonable. The pertinent portions of the decree awarded Margaret \$40,704.98 equity in the parties' farm to be paid her by Eugene in increments of \$340.00 per month for ten years. The entire outstanding balance becomes due and payable if any of the following four conditions occurs:

- a) Eugene permits the completion of the forfeiture of the farm real estate awarded to him, or permits any additional payments to come due on said real estate so that the unpaid payments due exceed \$35,000.00.
- b) Eugene becomes delinquent in his payments under this property settlement in an amount in excess of \$2,600.00.
- c) Eugene reduces his dairy herd below 20.
- d) Eugene ceases to engage in farming.

In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property is based upon each marital partner's right to a just and equitable share of the property accumulated as a result of the efforts of both parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981).

Eugene first argues the district court, in the property division, improperly considered \$6,000.00 of property which he inherited from his father and \$19,000.00 of property which he brought to the marriage. The inherited property consists of farm machinery and implements; the property brought to the marriage consists of farm machinery, livestock, grain, a bank account, and a car. The parties married in 1967; Eugene received his inheritance in 1971. The district court considered this property to have been assimilated into the marriage and accordingly divided it as marital property.

Iowa Code section 598.21(2) (1985) provides as follows:

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

In In re Marriage of Thomas, 319 N.W.2d 209 (Iowa 1982), our supreme court characterized this section as "substantially a codification of principles . . . established by case law." Id. at 210. The Thomas court listed the following factors as illustrative of those which might bear on a claim that property should be

divided under this section:

- (1) contributions of the parties toward the property, its care, preservation or improvement;
- (2) the existence of any independent close relationship between the donor or testator or the spouse of the one to whom the property was given or devised;
- (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
- (4) any special needs of either party;
- (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

Id. at 211. The court added that

[o]ther matters, such as the length of the marriage or the length of time the property was held after it was devised or given, though not independent factors, may indirectly bear on the question for their effect on the listed factors.

Id. at 211.

The district court included the inherited property in its division of the farm operation equity which, as the record demonstrates, was the product of the parties' traditional division of labor during their nineteen-year marriage. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa App. 1982) (wife's contribution as homemaker and mother recognized as substantial in context of division of property brought into marriage by husband). The court then divided this equity essentially equally between the parties. In light of her contribution, see In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1986), the district court's denial of alimony, see In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975), her responsibilities as physical custodian of the parties' minor daughter, her limited education and employment background, the duration of the parties' marriage, and the fifteen years which had passed since the inheritance,

we think the district court's consideration of the inherited property was appropriate.

Likewise, and by a similar rationale, we find no error in the district court's consideration of the property brought to the marriage by Eugene. See Iowa Code §§ 598.21(1)(b) (1985).

Eugene maintains the \$340.00 monthly payment he is obligated to pay Margaret as a result of the district court's property division is unreasonably high. We disagree. We believe that Eugene's actual cash flow will allow him to make the payments on the schedule designed by the district court. See In re Marriage of Callenius, 309 N.W.2d 510, 512 (Iowa 1983) (depreciation deductions considered in determining actual cash flow). Resultingly, we reject his contentions to the contrary.

Neither do we agree with Eugene's contention that the district court placed unreasonable restraints upon his farming operation. Similar measures are not completely foreign to our jurisprudence in the area, see In re Marriage of Callenius, 309 N.W.2d 510, 513 (Iowa 1981), and we are loathe to label as an abuse of discretion the district court's decision that such measures were appropriate to a situation that court was apprised of first-hand. See Freel v. Freel, 253 Iowa 327, 330, 112 N.W.2d 371, 373 (1961) (district court's property division reviewed for abuse of discretion).

II.

Finally, Eugene argues the district court erred in awarding Margaret attorney's fees. The court, in the dissolution decree, ordered Eugene to pay \$750.00 toward Margaret's attorney's fees. Recognizing that the district court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution decrees, In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983), we

think the allowance of attorney's fees here is reasonable and should not be disturbed. See In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984).

Margaret requests attorney's fees for this appeal. In evaluating such a request, we 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 conclude the parties should be responsible for their respective attorney's fees incurred upon this appeal. See Pittman, 346 N.W.2d at 37. Costs are assessed one-half to each party.

AFFIRMED.

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

HAYDEN, J. (dissenting)

I respectfully dissent.

I conclude Eugene is entitled to receive credit for the value of assets he brought into the marriage and value of his inheritance. I would increase the value of his share of property division by \$25,000.

Eugene's periodic monthly payments to Margaret should be lessened to \$230 per month. The payments should be extended until the property division amount is paid in full.

I determine it was unnecessary and unreasonable for the trial court to impose such extreme restraints upon Eugene. The trial court has procedures to deal with changes that may occur in the future. It is inappropriate to so severely shackle the respondent in this case. I would strike these restrictions from the decree.

The majority acknowledges our review of this dissolution appeal is de novo. The majority states "we are loathe to label as an abuse of discretion the district court's decision that such measures were appropriate to a situation that court was apprised of first-hand," and directs us to the case of Freel v. Freel, 253 Iowa 327, 330, 112 N.W.2d 371, 373 (1961). In Freel, the Iowa Supreme Court found the trial court committed an abuse of discretion, and modified the divorce decree. My interpretation of Freel is judicial discretion will only be disturbed when a clear abuse thereof is shown. I observe this court and the Iowa Supreme court have not been hesitant or loathe to change or modify a trial court's order or decree in a de novo review appeal in the past, when the court determined in fairness and equity it should be done.

The property division of a dissolution decree must be equitable to both parties. In re Marriage of Callenius, 309 N.W.2d 510, 514 (Iowa 1981) (emphasis added).