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IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 7-733 / 96-1529
Filed February 25, 1998

IN RE THE MARRIAGE OF KRISAN LEE PAUSTIAN AND RANDAL LEE PAUSTIAN

Upon the Petition of
KRISAN LEE PAUSTIAN,
Appellant,

And Concerning
RANDAL LEE PAUSTIAN,
Appellee.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

Krisan appeals certain economic provisions of the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

David R. Treimer, Davenport, for appellant.

Arthur L. Buzzell, Davenport, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

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HUITINK, P.J.

Krisan Paustian appeals from the division of property ordered in the district court's decree dissolving her marriage to Randall Paustian. We affirm as modified.

I. Background Facts and Proceedings.

The Paustians were married July 29, 1975. At the time of trial, Krisan was forty and Randall was thirty-nine years of age. They have three children: Nathan, born October 4, 1976; Gabriel born June 5, 1978; and Benjamin, born May 4, 1980. The joint custodial and divided physical care arrangements ordered by the district court are not issues raised in this appeal.

Randall works as a pipe fitter. His gross annual employment earnings, including overtime, are $57,000. Krisan has an associate of arts degree in physical education. She works part-time as a grounds keeper and soccer coach. Krisan earns $19,750 gross annual income.

Randall and Krisan were also involved in a family farming operation with Randall's parents and brother. During the marriage they acquired substantial farming assets, including land, machinery, livestock, and crops. The value of the Paustians' farm assets was not disputed at trial. Randall was awarded net assets of $214,190 ($344,375 gross assets less debts of $130,266). Krisan received net assets of $11,315 ($11,500 gross assets less debts of $185). The $101,397 disparity was adjusted and equalized by a cash award to Krisan of $95,000. This adjustment was based on the parties' 1995 income tax liability and credit for Randall's premarital equity. Randall

was ordered to pay the $95,000 cash balance in installments of $15,000, due July 1, 1996, and semi-annual payments of $5000 thereafter until July 1, 2000, when the entire unpaid balance is due. The district court also ordered that the unpaid balance bear interest at the rate of five percent annually.

Krisan's post-trial motions included a request for new trial. She argued the stipulated value of the parties' real estate and farm-related assets were based on mutual mistake of fact and newly discovered evidence indicated these values were substantially greater than that determined by the district court. The district court rejected Krisan's theory of mutual mistake citing the parties' joint statement of assets and liabilities and the absence of any evidence Randall concealed the true value of the assets at trial.

On appeal Krisan argues the payment terms of her cash award are inequitable. She also contends the district court erroneously determined the parties' net worth by including a $42,000 debt to Randall's parents that was, in fact, a gift. Lastly, Krisan argues her motion for new trial should have been granted.

II. Standard of Review.

We review this equity case de novo. Iowa R. App. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the trial court's finding of fact but is not bound by them. Iowa R. App. P. 14(f)(7).

III. Motion for New Trial.

Krisan's motion for new trial was grounded on newly discovered evidence of the true value of the parties' farm assets. "Newly discovered evidence" sufficient to merit a new trial is evidence which existed at the time of trial which, for excusable reasons, a party was unable to produce at that time. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). "In ruling upon motions for new trial, the court had broad but not unlimited discretion . . . ." Iowa R. App. P. 14(f)(3).

The record indicates that, following trial and entry of the decree, Krisan obtained appraisals which placed substantially higher values on the parties' farm assets. The district court denied Krisan's motion for new trial because the court determined this evidence was available to Krisan at the time of trial and there was no reasonable explanation for failing to obtain and offer it at trial. The record made on the motion supports the district court's conclusions. We find no abuse of discretion and affirm on this issue.

IV. Property Division.

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) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

A. Debt to Randall's Parents. As noted earlier, the district court included a $42,000 obligation to Randall's parents in its calculation of the parties' net worth. The record includes Krisan's acknowledgment of receipt of this amount from Randall's parents for principal payments on the farm purchased during the marriage and construction of a machine shed located on the parties' homestead. The record also includes a 1991 promissory note made by Randall and Krisan payable to Randall's parents for $42,000.

Randall testified the machine shed was intended for use in his farming operation and his parents expected repayment. There is no evidence, other than Krisan's assertions, supporting her claim that the proceeds evidenced by the note were intended as a gift. We defer to the district court's findings of fact and affirm on this issue.

B. Krisan's Cash Award. The amount and terms of Krisan's cash award reflect the district court's express intention to accomplish an equal property division without catastrophic disruption of Randall's farming operation or Krisan's subsistence. The factors cited by the trial judge in support of this arrangement include Randall's income, the farm's cash flow history, income tax implications, Krisan's income, and the amount of her rehabilitative alimony.

The Paustians' assets were accumulated over the twenty-one year duration of their marriage. These assets, by their nature, do not lend themselves to practical division in kind or summary liquidation. Payment of Krisan's cash award in installments over a four-year period maximizes the net award to each party without disproportionate financial hardship. We do, however, find the interest rate on the unpaid balance of the cash award is insufficient and increase the rate to seven percent.

V. Attorney Fees.

Krisan requests an award of appellate attorney 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).

After considering the parties' incomes, the property division, and the disposition made on appeal, we decline to award attorney fees. Costs are taxed to Krisan.

AFFIRMED AS MODIFIED.