IN THE COURT OF APPEALS OF IOWA

No. 0-316 / 99-867
Filed January 24, 2001

IN RE MARRIAGE OF FRED M. FELDMAN AND CAROLE J. FELDMAN

Upon the Petition of
FRED M. FELDMAN,
Petitioner-Appellee,

And Concerning
CAROLE J. FELDMAN,
Respondent-Appellant.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Louisa County, John G. Linn, Judge.

Carole Feldman appeals from the property and alimony provisions of the parties' dissolution decree. **AFFIRMED.**

John W. Wunder, Muscatine, for appellant.

Steven A. Sents of Newell & Sents Law Office, Columbus Junction, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

PER CURIAM

Carole Feldman appeals the economic provisions of the parties' divorce decree. She claims the court erred in not considering the value of a forty-acre homestead when dividing assets. She also claims the court did not consider its division of the property of the parties in awarding alimony. Finally, she claims the district court should have awarded her attorney fees. We affirm.

Factual background. Fred and Carole married in 1966. They divorced in 1999. They had no children. When they married, Carole sold her home and she and her two daughters from a previous marriage, ages twelve and ten, moved into Fred's home. The family lived in the house Fred and his brother had inherited from their grandfather and in which the two brothers had been raised. After the marriage, a room was added to the home. At the time of their marriage, twenty acres of the property was used as a sod farm. In 1972 Fred stopped sod farming and about 1800 trees were planted on the former sod-farm acreage. Fred started a highway construction company at which he and Carole worked until his retirement in 1998 and her retirement shortly thereafter. Fred receives monthly social security of $872; Carole receives $533 monthly.

Dissolution proceedings. In 1998 Fred filed a petition for dissolution of marriage. The parties examined the balances in their various bank accounts and investments and tried to come to an agreement to divide them approximately equally. After some disputes over division of their assets, the case proceeded to trial on the issues of property division and spousal support. Major issues at trial were the value of the trees, the value of the homestead, and whether it would be factored into the property division since it was property inherited before the

marriage. The court divided the parties' savings, investments, and tangible personal property so that Fred received about $208,000 and Carole about $195,500. Most of the difference is attributable to the value of a car and miscellaneous equipment given to Fred. The court concluded it would be unjust to award Carole any portion of Fred's undivided half interest in the homestead and farm he and his brother inherited before Fred's marriage to Carole.

Concerning Carole's request for alimony, the court considered the length of the marriage, the parties' health, the division of assets which could yield interest income, and the parties' living situations with Fred having a home and paying only expenses and upkeep and Carole renting an apartment. The court also considered the difference in monthly social security. The court concluded Fred should pay "a modest amount" of alimony for five years and set the monthly amount at $100.

Finally, the court denied Carole's request for attorney fees of $2,000 citing her significant assets, monthly social security, and modest alimony. The court also noted many of the issues she raised at trial lacked merit. The court denied Carole's subsequent Iowa Rule of Civil Procedure 179(b) motion.

Property division. Carole first claims the district court should have included the value of the forty acre homestead when dividing the parties' property. She argues it would be inequitable not to include it, even though it is both inherited property and premarital property, because of the improvements made to the home during the marriage and because of the value she claims for the hardwood trees planted on the sod-farm acreage. She also claims the court should have taken into account the value of the tangible personal property given

to Fred. She seeks an additional award of almost $19,000 to equalize the division of assets. Fred responds the home was a premarital, inherited asset which should not be divided. He argues most of the improvements claimed were normal maintenance. He also argues the trees have only aesthetic value currently because they are too large for nursery use and too small to harvest for lumber. Concerning the personal property, it included a car and some old farm equipment which has little monetary value and is useful only to Fred. He cites to support of Carole's daughters and gifts to them as adults as justification for the not-exactly-equal division of 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.* 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). *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997) Iowa Code section 598.21(1) generally exempts inherited property from division in a dissolution. Subsection (2) provides the exception to the general rule, if a court finds "that refusal to divide the property is inequitable to the other party or to the children of the marriage." This court, in *In re Marriage of Van Brocklin*, 468 N.W.2d 40, 44-45 (Iowa App. 1991), enumerated several factors which might bear on a claim it would be unjust not to divide inherited property.

Fred and his brother inherited the farm and homestead as tenants in common before Fred knew Carole. She had no independent relationship with

Fred's grandfather. Fred testified approximately $4,000 was spent to plant and maintain the trees during the marriage. When the trees were small enough to have value as nursery stock, Fred and Carole gave trees worth $26,000 to Carole's older daughter and trees worth $7,500 to her younger daughter. The trees now are too large to have value as nursery stock and will not be large enough to have value as lumber for another thirty to sixty years. Both parties agree the trees currently have only aesthetic value. Marital funds apparently did pay for adding a room to the home when the parties married and for normal maintenance and upkeep. Even with the addition to the home, its tax assessment valuation is $17,262. Fred has an undivided half interest in the homestead and farm. Considering Fred's support of and gifts to Carole's children, and the fact Fred inherited the farm prior to the marriage, we find it is equitable to set aside to Fred his interest in the family farm.

The district court awarded Fred $208,082 and Carole $195,530. A property division need not be equal as long as it is equitable. *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa App. 1998). We have not distinguished between liquid and illiquid assets as the district court did. Instead, we have examined the entire property distribution to determine whether it was equitable. We conclude it was.

Alimony. Carole next claims the court failed to consider the uneven property division and Fred's higher social security income when it awarded alimony to her. She argues she has to pay rent while Fred has the family homestead and pays no rent. She seeks a change to permanent alimony of $150 per month. Fred responds that the court gave both parties nearly equal

liquid, income-producing assets and he has maintenance and upkeep costs which approximate the amount of rent Carole pays.

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). The district court carefully set forth an analysis of the various types of alimony, but did not specify which type it was awarding in this case. 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). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App. 1997). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution. *Id.* The district court awarded Carole alimony of $100 per month for five years. The court reasoned Fred should pay this modest sum because he already had a homestead and had a slightly greater social security payment than Carole. We agree with the court's conclusion and affirm the alimony award.

Attorney fees. Carole next claims the court should have awarded her $2,000 in attorney fees. She argues she received fewer assets, has only 61% of Fred's monthly income, and has greater living expenses than Fred. Her attorney also suggests he offended the district court judge and that factored into the court's refusal to award fees.

Ordinarily an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney's fees depends upon the ability of the respective parties to pay, depending upon the financial circumstances and earnings of each. *In re Marriage of Williams*, 303 N.W.2d 160, 167 (Iowa 1981). Given the amount of property distributed to each party and their current financial circumstances, we find no abuse of discretion and affirm the district court decision on attorney fees.

Finally, by motion Carole requests an award of appellate attorney fees. Both parties submitted affidavits of attorney fees in an amount in excess of $2,000. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). Given the similar financial positions of the parties and their similar abilities to pay, we determine no award of appellate attorney fees is appropriate.

AFFIRMED.