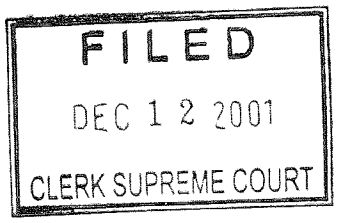
IN THE COURT OF APPEALS OF IOWA

No. 1-606 / 99-1781
Filed December 12, 2001



IN RE THE MARRIAGE OF DEE ANN TUBBS AND MICHAEL DAVID TUBBS

Upon the Petition of
DEE ANN TUBBS,
Petitioner-Appellee,

And Concerning
MICHAEL DAVID TUBBS,
Respondent-Appellant.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson, Judge.

The respondent appeals from the property distribution provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Laurie A. Ristau of Taylor, Ristau & Lett, Des Moines, for appellant.

R. Thomas Price of Price & Pearson, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Respondent-appellant Michael David Tubbs appeals contending the property division made by the district court in dissolving his marriage to petitioner-appellee Dee Ann Tubbs is not equitable. We affirm as modified.

We review de novo. Iowa R. App. P. 4; *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995). We give weight to the trial court's factual findings, especially when considering the credibility of witnesses, but are not bound by them. *Bolick,* 539 N.W.2d at 359.

Michael and Dee Ann were married in 1987. At the time of the filing of the petition Dee Ann was forty-one and Michael was thirty-seven. The parties have three children born in 1988, 1989 and 1991. Dee Ann was granted custody of the children and that provision of the decree is not challenged on appeal.

Dee Ann works at the Frigidaire Company in Webster City, Iowa. She earns $13 an hour and is provided health insurance for herself and her family. Her income in the prior year was approximately $25,000. Michael is serving a ten-year indeterminate sentence at the Mount Pleasant Correctional Facility. He receives a monthly annuity as the result of a Workers Compensation claim following a head injury. The annuity is $240 a month. The annuity continues until he reaches sixty-five years of age. It also pays each of his three children $10,000 upon reaching age eighteen. Michael also received an award for a work-related hand injury. The money was held by the lawyer representing him on the claim. After the dissolution was filed, $5,481.63 from the fund was paid to Michael for the purpose of paying fees to the attorney representing him in the criminal action and in this dissolution. At the time of trial the account totaled

$40,597.72. As a result of the hand injury Michael suffers a thirty-nine percent disability to his right hand. The parties also own a home in Duncombe, Iowa, with a market value of $38,000 subject to a mortgage securing a note for $14,051. The parties also own household goods of an undetermined value. Additionally the parties' debts amounted to, in Dee Ann's determination, $30,491.17.

The district court ordered Michael to pay child support of $50 a month. The home and all the household goods were awarded to Dee Ann. She also was given all savings and checking accounts in her name and a 1998 Ford van valued at $17,000. According to Dee Ann's financial statement the van was not encumbered.[1]

Michael was awarded a Kawasaki motorcycle valued at $500, model airplanes, tools and all checking and savings accounts currently in his name. The trust money for his hand injury was to be transferred to Dee Ann's attorney in order to pay the debts of $30,491.17 and then was to be divided with sixty percent to Michael and forty percent to Dee Ann. Michael was also to pay Dee Ann's attorney $2000. Michael's monthly annuity was to be paid toward the mortgage on Dee Ann's home or towards a mortgage on any other home she may own until March 1, 2009, at which time the annuity payment was to be Michael's property. It appears that this left Michael with approximately $6666.[2]

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[1] In Dee Ann's brief she indicated the van had a debt but fails to refer to the part of the record indicating the amount of that debt.

[2] Dee Ann's attorney advances in his brief that he paid the debts and was left with a trust balance of $15,715.43 because four creditors did not reply to inquiries or commit to a resolution of their claims. This is not evidence from the record and, consequently, we do not consider it in assessing the equities.

Michael was ordered to pay for his own attorney fees.

Michael makes a claim that he received ineffective assistance of counsel in the dissolution proceeding and contends as a result he was treated unfairly in the division of assets. Michael cites no authority, nor are we aware of any, to support his contention that we should address this claim of ineffective assistance of counsel in these proceedings or that we should consider what his trial attorney did or did not do in assessing the equities of the property division. Consequently we do not address this claim.

We next consider Michael's claims that the property division was not equitable and that he was being punished for the crime that resulted in his incarceration.

Dee Ann received approximately $4444 from the money held in trust, a home with equity of approximately $24,000 and a van valued at $17,000. She also received household goods, which she valued at $1680 and an annuity of $2880 a year for ten years. The annuity ultimately will pay her $28,800, but it is worth less when reduced to present day value.

The partners in 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 Ct. App. 1991). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular case. *In re Marriage of Plasencia*, 541 N.W.2d 923, 925 (Iowa Ct. App. 1995). In making this assessment we consider the factors set forth by the legislature in Iowa Code section 598.21(1)

The legislature has not made fault a factor in dividing property in a dissolution case. *See In re Marriage of Goodwin*, 606 N.W.2d 315, 324 (Iowa 2000); *In re Marriage of Williams*, 199 N.W.2d 339, 346 (Iowa 1972). Similarly criminal acts are not a factor to be considered. Domestic abuse should not be considered a factor in the division of property in a dissolution. *Goodwin*, 606 N.W.2d at 323-24. To do so would introduce the concept of fault into a dissolution-of-marriage action, a model rejected by the Iowa legislature in 1970. *Id.* See Iowa Code § 598.21(1) (listing factors to be considered by the court in equitably dividing the property of the parties).

Michael is ordered to pay $50 a month in child support. In *In re Marriage of Walters*, 575 N.W.2d 739, 743, (Iowa 1998) the court, in addressing a modification of child support sought by a father whose income had decreased due to his criminal activity, said that although the father's financial status was the result of his voluntary criminal activity, some consideration of his earning capacity and ability to pay was necessary. The amount fixed as child support in this case is not contested and is fair under the circumstances. However, Michael's only source of income is the annuity, which the trial court required he pay in total toward the mortgage on the house given to Dee Ann. We agree with Michael that giving Dee Ann the entire annuity is not equitable.

We modify to give Dee Ann $75 per month from Michael's annuity until March 1, 2009. We also provide that Dee Ann should give Michael the amount of $10,000 to be secured by a lien on the home. No interest shall accrue on the $10,000, and it shall not be payable until six months after Michael's child support obligations terminate. In the event that Dee Ann desires to sell her current home

and invest in another, Michael shall release his lien upon assurance that the lien will be imposed on the new residence. The $10,000 shall be payable to Michael within six months of the date upon which he is no longer required to pay child support. In the event that Dee Ann fails to pay the $10,000, the lien shall draw interest at six percent per annum until paid.

Michael complains he should not have been required to pay Dee Ann's attorney fees of $2000. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial position. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa Ct. App. 1987). The trial court did not abuse its discretion in awarding attorney fees. *See In re Marriage of Crotty*, 584 N.W.2d 714, 719 (Iowa Ct. App. 1998).

We award no appellate attorney fees. Costs on appeal are taxed one half to each party.

AFFIRMED AS MODIFIED.