IN THE COURT OF APPEALS OF IOWA

No. 3-314 / 92-1524

FILED
JAN 25 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF DEBBIE ANN MEEKS AND TERRY ROBERT MEEKS

Upon the Petition of

DEBBIE ANN MEEKS,

Appellee/Cross-Appellant,

And Concerning

TERRY ROBERT MEEKS,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Benton County, Thomas L. Koehler, Judge.

The husband appeals and the wife cross-appeals certain economic provisions of the parties' dissolution decree. **AFFIRMED.**

Stephen B. Jackson, Cedar Rapids, for appellant.

John A. Stitely of William F. Olinger Law Firm, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., Hayden, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

Debbie Ann and Terry Robert Meeks were married in June 1980. They have three children: Stephanie, born July 14, 1981; Christina, born June 2, 1983; and Victoria, born April 9, 1986. During the marriage the parties lived in rural Benton County.

Debbie was thirty-one years old at the time of the dissolution. She was not employed outside the home during the marriage. After the parties separated, she began baby-sitting three children forty-five hours per week. She also cleans houses six hours per week. Debbie's total annual income from these two jobs is $13,221. The district court found her net monthly income was $655.

Terry was thirty-seven years old at the time of the dissolution. He is self-employed as a farmer. Terry operates two farms on a share-cropping arrangement. Additionally, Terry's father, Robert Meeks, owns four hundred acres of farmland, and Terry helps farm these. The district court found Terry had net monthly income of $1,740 from his farming activities.

The district court entered a dissolution decree for the parties on August 13, 1992. The parties were granted joint custody of the children, with Debbie having primary physical care. Terry was ordered to pay child support of $668 per month. He was also ordered to maintain medical and dental insurance for the children.

The court divided the parties' property to award Debbie all of the assets in her possession, which included her vehicle and household goods, and to award Terry all of the assets in his possession, which included the farm equipment and livestock. Each party was ordered to pay certain debts. Terry was ordered to pay Debbie a cash property settlement of $60,373, payable in installments over five years. Debbie received net assets worth $63,339 and Terry received net assets worth $67,987. Terry was also ordered to pay $750 towards Debbie's trial attorney fees.

Terry appealed certain economic provisions of the dissolution decree, and Debbie has cross-appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Terry contends his child support obligation is excessive. He claims the district court improperly calculated his income. The district court considered Terry's average income from 1990 and 1991. Terry believes the court should also have considered his income in 1989, probably due to the fact his income was much lower in that year. He also claims the court should have considered the full amount of depreciation he deducts for income tax

purposes. Terry argues the court should have found his net monthly income was $600, not $1,740.

There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). In order to apply the guidelines, the court must determine the parents' current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). Where a parent's income is subject to substantial fluctuations, it may be necessary to average the income over a reasonable period when determining the current monthly income. Id.

In the present case, the district court found it was fair and reasonable to consider Terry's average income in 1990 and 1991. We agree. It appears that his income in 1989 was an aberration and was not representative of his earning capacity.

We also find the district court correctly considered only a portion of the depreciation deduction taken by Terry on his income tax returns. See In re Marriage of Gaer, 476 N.W.2d 324, 328 (Iowa 1991). The court gave Terry credit for 35% of the depreciation he claimed for tax purposes. Terry presents no support for his argument he should be given credit for the full amount of accelerated depreciation he deducts for tax purposes.

We affirm the decision of the district court ordering Terry to pay child support of $668 per month. We also affirm the provision requiring him to maintain medical and dental insurance for the children.

III. Both parties have raised issues on appeal concerning the division of property.

A. Terry contends the property distribution is inequitable to him. He claims that requiring him to pay the cash property settlement of $60,373 will jeopardize his farming operation. He also claims the court should have set aside to him a gift of $10,000 he received from his parents.

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). 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 circumstance. Id.

The district court found the testimony of Terry and his parents concerning the gift of $10,000 was not credible. We also find there is insufficient evidence to show a gift of $10,000.

Furthermore, while the payment of the cash property settlement will be a burden to Terry, we note that he currently has very little debt on his farming operation and that he was not required to pay alimony.

B. In her cross-appeal, Debbie claims Terry was in a farm partnership with his father. She believes that Terry's share of the partnership assets should have divided as marital property.

A partnership is defined in Iowa Code section 486.6(1) (1993), formerly designated section 544.6(1), as an association of two or more persons to carry on as co-owners of a business for profit. In Iowa, the terms of a partnership agreement need not be formally expressed, but may be inferred or established, in whole or in part, from the acts of the parties. Welker v. Langtry Farm Partnership, 463 N.W.2d 97, 100 (Iowa App. 1990).

Four elements are necessary to create a partnership: (1) an intent by the parties to associate as partners; (2) a business; (3) earning of profits; and (4) co-ownership of profits, property, and control. Thorp Credit, Inc. v. Wuchter, 412 N.W.2d 641, 647 (Iowa App. 1987). An intention to associate is the crucial test of a partnership. Id.

We determine the evidence does not support a finding Terry and Robert were in a partnership. While they owned some equipment together and helped each other out, there was no evidence they intended to create a partnership. There was also no evidence they shared profits. Because we have found no partnership, there are no assets which we may consider as partnership assets.

We find the property division as set forth by the district court is fair and equitable. Under the circumstances of this case, we affirm the property division.

IV. Terry also contends the district court should not have ordered him to pay $750 towards Debbie's trial attorney fees. 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 an abuse of discretion. Id. We find no abuse of discretion here, and affirm the award of attorney fees.

V. Debbie claims the district court should have awarded her rehabilitative alimony. She points out that she currently has no training to earn anything greater than minimum wage. She asks for alimony of $200 per month for a period of five years.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989).

We note Debbie is presently self-supporting. She has the ability to earn annual income of $13,221.

Additionally, we consider property division and alimony together in evaluating their individual sufficiency. Whelchel, 476 N.W.2d at 110. We note that Debbie received a cash property settlement of over $60,000. Debbie may invest this amount, which will give her some additional income. She may also choose to spend a portion of this amount to increase her education, thereby making an investment in her earning capacity.

We affirm the decision of the district court denying Debbie's request for rehabilitative alimony.

VI. Finally, Debbie 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. Hunt, 476 N.W.2d at 103. We determine each party has the ability to pay his or her own attorney fees for this appeal.

VII. In summary, we affirm the district court on each issue raised in the appeal and cross-appeal. Costs of this appeal are assessed one-half to each party.

AFFIRMED.