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DEC 29 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-190 / 92-1346

IN RE THE MARRIAGE OF NEOLA A. WAGNER AND EDGAR A. WAGNER

Upon the Petition of

NEOLA A. WAGNER,

Appellant,

And Concerning

EDGAR A. WAGNER,

Appellee.

Appeal from the Iowa District Court for Wright County, Newt Draheim, Senior Judge.

Neola A. Wagner appeals the district court's division of property in the parties' dissolution decree. **AFFIRMED AS MODIFIED**

Robert E. Walker of Walker Law Office, P.C., Fort Dodge, for appellant.

Robert W. Brinton and David R. Johnson of Brinton & Bordwell Law Firm, Clarion, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

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DONIELSON, P.J.

Neola A. Wagner ("Nikki") and Edgar A. Wagner ("Ed") began cohabiting in September of 1976. At that time Ed was a partner with his father in "Wagner's Feedlot" and Nikki was a waitress in Goldfield, Iowa. In September of 1977 Ed purchased a home in Goldfield for $34,000. He paid a $2,000 down payment and received a $14,550 allowance for his old house. The parties moved into the residence and Edgar subsequently purchased adjacent lots. On September 20, 1982, Ed and Nikki signed a document, witnessed by two individuals, indicating as of August 1977, "we commenced holding ourselves out to the public as husband and wife."

On April 10, 1991, Nikki filed a petition for dissolution of marriage. She was forty-five years old at the time of trial and Ed was forty-two. The case was tried on three issues: (1) when did the common law marriage exist, (2) should the marriage be dissolved, and (3) how should the property be divided.

The district court concluded the parties' common law marriage existed since August 1977 and the marriage should be dissolved. The court further determined Nikki was not entitled to spousal support. The court then awarded Nikki all of the property in her possession, personal property listed in exhibit 11, a 1990 Chevrolet automobile valued at $10,500, and a matrimonial award of $15,000 payable in $3,000 annual installments.

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Ed received the property in his possession, three vehicles valued at $18,000, a 1981 Honda motorcycle, an insurance policy, and bank accounts. Finally, the district court ordered Ed to pay fifteen percent of Nikki's attorney fees.

Nikki filed an Iowa Rule of Civil Procedure 179(b) motion. The district court amended its findings of fact to include (1) the appraisal of the homestead and adjacent lots at $47,000, and (2) the findings respondent paid $15,000 on his property prior to the marriage and Nikki had received approximately half of the $32,000 balance on this property as a matrimonial award. The court further determined sufficient evidence supported its conclusion a $16,000 deposit by Edgar constituted a premarital asset. The court therefore overruled in part and sustained in part the rule 179(b) motion.

Petitioner appeals. She contends the property division was inequitable. Specifically, she argues (1) $1,425 of the Lutheran Brotherhood Life Insurance was marital property, acquired during the marriage; (2) a portion of the $60,000 deposited at Humboldt Bank is traceable to the conversion of an IDS investment fund, into which Nikki alleges $2,910 of marital funds were paid; (3) the district court failed to award her a portion of a Kemper High Yield fund; (4) she received only thirty-six percent of the net value of the personal property awarded to the parties; and (5) she received only about twenty-five percent of the

total property acquired during marriage and is entitled to approximately $12,000 in additional funds.

Edgar responds that many of Nikki's assertions are not supported by the record. Edgar also asserts Nikki's appeal may not satisfy the amount in controversy requirement of Iowa Rule of Appellate Procedure 3.

Both parties seek attorney fees on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The partners in the 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 of 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). Although the financial contributions may not be equal, other types of contributions such as being a homemaker are recognized as

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being substantial. In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa 1982).

Ed brought more into this marriage than Nikki. The district court set aside to him his premarital property. Since the parties kept their finances separate during most of the marriage, it is difficult to determine the financial contributions of each. Complicating the calculation and tracing of assets is Ed's conversion of non-exempt property to exempt property just prior to filing bankruptcy. Nikki makes several arguments based on attempts to trace premarital and marital funds. We do not find sufficient evidence in the record to disturb the findings of the district court concerning which assets are marital or premarital. We do find, however, after careful consideration of the record and the factors enumerated in Iowa Code section 598.21(1), the court did not apportion the undisputed marital property equitably.

Adopting the district court's valuation of the property, Nikki received $13,730 and Ed received $20,915. We find an even division of the marital assets equitable and modify the decree to require Ed to pay Nikki $3,600, which represents half of the difference between the property awarded to each.

Ed argues this appeal fails to meet the $5,000 jurisdictional amount. See Iowa R. App. P. 3. We disagree. The difference between the marital property

awards or the proposed tracing of premarital property both exceed the amount necessary for us to take this appeal.

Both parties seek attorney fees on appeal. 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). We find it equitable for Ed to pay half of Nikki's appellate attorney fees. Costs of this appeal shall be divided evenly between the parties.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I would affirm the trial court.