IN THE COURT OF APPEALS OF IOWA

No. 1999-398 (9-651) / 99-58
Filed April 28, 2000

IN RE THE MARRIAGE OF ANITA VONDIELINGEN and KEVIN VONDIELINGEN

FILED
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CLERK SUPREME COURT

Upon the Petition of
ANITA VONDIELINGEN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KEVIN VONDIELINGEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Kevin Vondielingen appeals the property and support provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Carl J. Petersen of Rutherford, Trewet & Petersen, Atlantic, for appellant.

Jon E. Heisterkamp of Peters Law Firm, P.C., Council Bluffs, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

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STREIT, J.

Kevin and Anita Vondielingen each appeal separate portions of the district court's dissolution decree. Kevin claims the trial court erred in its division of the property and in not ordering a precise amount for their son's postsecondary education expenses. Anita cross-appeals claiming the trial court erred in demanding she pay one-third of the postsecondary education. Upon reviewing the evidence de novo, we order the family home sold, award Anita transitional alimony in the amount $500 per year for three years, order Kevin to pay $275.75 a month and Anita to pay $150 a month in postsecondary education child support, and affirm the decree in all other respects.

I. Background Facts & Proceedings.

Kevin and Anita Vondielingen married in 1977 and have three children: Eric, age nineteen; Kristi, age sixteen; and Ryan, age ten. Anita has an associate degree in social work and has spent her career as a sales clerk earning about $9700 per year. She does not work full time. Kevin has an associate degree in engineering and earns roughly $44,000 a year.

Anita filed for dissolution of marriage in the early summer of 1998. The court in dissolving the marriage entered a decree with the following provisions: (1) Anita was to have primary care of Kristi and Ryan; (2) Kevin was to pay $934 per month in child support until June 1999 and then $635 per month until the youngest child graduates from high school; (3) Kevin was to pay the first house mortgage of $419 and one-half the second house mortgage ($150) until

December 2003 when the home would be sold; (4) Kevin was to assume most of the debt and less than half the assets of the marriage; and (5) each party was given one child as a tax exemption and ordered to pay one-third of the children's postsecondary educations after deducting all student loans and scholarships.

Kevin appeals, and Anita cross-appeals. Kevin claims the court erred generally in equitably dividing the marital property and debt and specifically in regard to Kevin's obligation to pay the home mortgage, in failing to set a specific amount Anita is to pay for the eldest child's postsecondary education, and in failing to grant Kevin both children as exemptions for tax purposes. Anita cross-appeals claiming the trial court erred in forcing her to pay a third of the eldest child's college expenses.

II. Standard of Review.

In an equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

III. The Property Division.

Kevin claims the trial court erred in its dividing of the assets and in failing to grant him both children as exemptions for tax purposes. As both these issues are enmeshed in those factors utilized in equitably dividing a couple's property we address them jointly.

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.* When distributing the property, we take into consideration the criteria codified in Iowa Code section 598.21(1) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). Among the many factors to consider are: the length of the marriage, each party's contribution to the marriage, the parties' earning capacities, the desirability of awarding the family home to the party having custody of the children, the amount and duration of alimony, and the tax consequences to each party. Iowa Code § 598.21(1). The allocation of marital debts is an integral part of property division. *See In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980).

Kevin's primary complaint with the court's property division is the provision forcing him to pay the first home mortgage and half the second home mortgage while Anita remains living in the marital home. Kevin likens such payments to alimony without the tax benefits.[1] He urges this court to sell the home or at minimum convert his mortgage payments to an alimony award.

The inherent, overarching goal of Iowa Code chapter 598 is to provide parties seeking a dissolution of marriage finality and closure. Binding the parties for an additional five years by way of mortgage payments from one party to the

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[1] Kevin's characterization of the tax consequences under the trial court's decree is not entirely accurate. Kevin may receive some tax benefits for paying the mortgage as he may deduct the interest accrued on the mortgage under 26 U.S.C. §§ 163(a), (h)(2)(D), (h)(3), (h)(4)(A)(i)(I), 121(d)(3)(B) (1998).

other does not promote this end. We considered the proposed alternative of awarding the marital home solely to Anita, but given the large encumbrances on the homestead, the minuscule equity accumulated in the home, and Anita's present earning capacity, we found it unlikely Anita would be able to refinance the home solely in her name, although we will give her this option. *See In re Marriage of Lovetinsky*, 418 N.W.2d 88, 89 (Iowa App. 1987). In the event Anita was unable to refinance, Kevin would remain liable on the mortgage without receiving any ownership interest in the property. That lack of equity coupled with Anita's current financial situation would offer Kevin little protection in the event of a foreclosure. *See id.* Therefore we cannot simply award the home to Anita without some assurances she could refinance or hold Kevin harmless.

Although we recognize the statutory preference for keeping the custodial parent in the home, the present arrangement is truly untenable. The parties remain bound to one another defeating the finality of dissolution, their remaining child is of such an age that a move will not have deleterious effects on his well being, and the mortgage payments appear to be a form of quasi-alimony. The only viable alternative is to order the home sold. *See In re Marriage of Hoffman*, 493 N.W.2d 84, 88 (Iowa App. 1992). Anita may take the entire home by procuring financing of the entire two mortgages solely in her name. In the event she elects not to buy out Kevin's share in this fashion, the home is to be sold contingent on Anita's right of first refusal if it is to be sold for less than the present encumbrances on the home. The proceeds or liabilities incurred in the sale are to be split equally between the parties.

We find it just and equitable to award Anita rehabilitation alimony for a transitional period in the amount of $500 per month for three years from date procedendo issues. During the couple's twenty-year marriage, Anita was the primary caregiver and bore the lion's share of the domestic tasks. Anita's earning capacity is also substantially lower given her familial sacrifices. The award of transitional alimony will give Anita ample opportunity to acquire the necessary education to better herself should she decide to do so.

With regard to Kevin's claim regarding the children as tax exemptions, we find the amended property division both fair and equitable. Kevin was awarded the tax exemption for the youngest child while Anita received the tax exemption for a child rapidly approaching the age of majority.[2] Kevin clearly received the greater benefit. We see no reason to disturb the trial court's award regarding the tax exemptions.

We therefore modify the decree with respect to Kevin's mortgage payments, order the home sold subject to the aforementioned conditions, award Anita transitional alimony in the amount of $500 per month for three years from date procedendo issues, and affirm the property division in all other respects.

IV. Postsecondary Education Subsidy.

Kevin next claims the trial court erred in failing to set a precise amount the parties are to pay for Eric's postsecondary education. Anita cross-appeals

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[2] We recognize the trial court granted Kevin both children as exemptions in calculating child support. By doing so, the court skewed the calculation in Kevin's favor. Whether such action was appropriate, however, has not been raised by either party

claiming the court erred in ordering her to pay one-third of the postsecondary education subsidy.

In a dissolution decree, the court may order each parent to pay a portion of his or her children's postsecondary educations. Iowa Code § 598.21(5A) (1999). Such an order is only appropriate upon the showing of good cause. *Id.* § 598.21(5A)(a). The factors relative in determining the existence of good cause include: "the age of the child, the ability of the child relative to postsecondary education, the child's financial resources, whether the child is self-sustaining, and the financial condition of each parent." *Id.*

The costs of postsecondary education are based on in-state tuition at a public institution in Iowa plus reasonable costs for all necessary education-related expenses. Iowa Code § 598.21(5A)(a)(1). After determining that amount, we assign to the child a portion of that amount considering such factors as the availability of scholarships, grants, or student loans and the ability of the child to earn income while attending school. *Id.* § 598.21(5A)(a)(2). The child's expected contribution is then deducted from the total cost, and the remainder apportioned to each parent. *Id.* § 598.21(5A)(a)(3). The amount paid by each parent cannot exceed thirty-three and one-third percent of the total cost. *Id.*

Neither parent argues the absence of good cause in ordering a postsecondary education subsidy. Rather, both parents allege independent errors with regard to the calculation of that subsidy. We will therefore limit our analysis to the appropriate calculations under the Code.

We first determine the total cost of a postsecondary education as detailed by Iowa Code section 598.21(5A). We find the following total cost based on the record:

Necessary Expenses:	Tuition	$ 2,666
	Fees	202
	Books	818
	Room/Board	5,184
	Personal Expenses	1,130
	Total	$10,000

The next step is to consider the amount the child may be reasonably expected to pay. Eric is eligible for a student loan in the amount of $2625 and is capable of providing for an additional $1000 through part-time employment during the school year and summers. After deducting these amounts, the remaining balance of $6375 is attributed to the parents.

The remaining balance is apportioned to each parent as long as the amount attributable to each parent does not exceed thirty-three and one-third percent of the *total* cost of the postsecondary education. We, therefore, attribute to Kevin, based on his earning capacity and financial position, the maximum permitted under the statute or $3333 per year (one-third of the postsecondary education cost of $10,000). We attribute to Anita, based on her somewhat limited earning capacity and strained financial status, a substantially lower amount of $1800 a year ($150 a month). Based on the above calculations, there remains an unaccounted balance of $1242. As we cannot statutorily attribute this remaining amount to any particular person, it must fall upon the student or his parents to resolve. We therefore order Kevin to pay $277.75 a month and Anita $150 a month in postsecondary education subsidies. These subsidies shall

be paid to the child or the educational institution pursuant to Iowa Code section 598.21(5A)(b). Costs are taxed equally between the parties.

AFFIRMED AS MODIFIED.

Huitink, P.J., concurs; Miller, J., concurs specially.

MILLER, J. (concurring specially)

I concur in the result and most all of the court's opinion. I do not agree, however, with certain statements in the opinion.

Our child support guidelines were adopted in the late 1980s, and since then child support has been determined by applying those guidelines. *See* Iowa Child Support Guidelines (July 1, 1995). Property division is not a factor in determining net income for guidelines purposes or in applying the guidelines. *Id.* Income tax dependency deductions for children are, however, part of the child support determination. *In re Marriage of Habben*, 260 N.W.2d 401, 402-03 (Iowa 1977); *In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa App. 1996); *In re Marriage of Anderson*, 509 N.W.2d 138, 144 (Iowa App. 1993); Iowa Child Support Guidelines (July 1, 1995). Because property division is not a factor in determining child support and income tax dependency deductions are, I do not agree with the statement in Division III that the issue of income tax dependency exemptions for the parties' children is "enmeshed in those matters utilized in equitably dividing a couple's property ... " and a statement later in the same division that relates income tax exemptions for the children to property division.