IN THE COURT OF APPEALS OF IOWA

No. 0-709 / 90-286

IN RE THE MARRIAGE OF HELEN LEE JOHNSON AND RICHARD EDWARD JOHNSON

FILED
AUG 27 1991
CLERK SUPREME COURT

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Upon the Petition of

HELEN LEE JOHNSON,

Petitioner-Appellee/Cross-Appellant,

And Concerning

RICHARD EDWARD JOHNSON,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Boone County, Carl D. Baker, Judge.

Both parties appeal from a dissolution decree, challenging its economic provisions. **AFFIRMED.**

Dorothy L. Dakin of Dakin & Blanshan, Boone, for appellant/cross-appellee.

Steven K. Nalean of Nalean & Nalean, Boone, for appellee/cross-appellant.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Helen and Richard Johnson were married on November 10, 1956. Their two surviving children are adults. A third child, also an adult, was killed in an auto accident in July of 1989.

Richard was born on November 30, 1935. At the time of the marriage Richard was in the military. Later he worked for his father as a farm laborer. Since 1966 he has worked at a fertilizer plant near Boone, Iowa. The plant has changed hands several times, and is presently owned by Con-Agra Fertilizer Company. In 1989 Richard's gross income was about $26,000.

Helen was born on June 4, 1941. She did not work outside the home during most of the marriage. She did operate a dog kennel from their home for some years. In 1983 Helen became certified as a nurse's aide. She began working at the Riverside Care Facility in 1984. She earned $6.18 per hour and in 1988 her income was $11,341 from that job. Helen quit her employment in May 1989. She began work as a residential counselor at Mainstream Group Home in Story City in August 1989. She is paid $4.30 per hour at this job.

The district court divided the personal property between the parties. The court awarded each party their own IRA worth $16,545 and one-half of a $15,507 CD. The court also divided proceeds from the 1989 corn crop, worth about $5,600.

The court awarded Richard the marital home, which was an acreage adjacent to a farm owned by Richard's mother, Viola Johnson. The marital home was valued at $60,000. Richard was awarded the $100,000 life insurance policy on Viola. He also received his pension plan, valued at over $12,000. Furthermore, Richard received his one-third remainder interest in 160 acres which is held by Viola as a life tenant.

Helen was awarded her savings account of $9,424. The court also awarded her a lump sum property settlement of $35,000 payable over ten years. Helen was awarded alimony of $400 per month until she reaches the age of 65, remarries, or either of the parties dies.

In addition, the parties' deceased son, Kenneth, had a life insurance policy through his work. Richard was named as the beneficiary of this policy, which was worth $20,626. Richard also received $5,022 from the sale of Kenneth's pickup. The parties had stated that these proceeds should be divided between the two living sons. The court ordered that if the proceeds were not given to the children within thirty days, the proceeds should be divided between Helen and Richard.

Richard appealed the decision of the district court and Helen cross appealed.

I. In this equity action our review is de novo. Iowa R. App. P. 4. 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).

II. Richard first contends the division of property was inequitable. He claims that the premiums on the $100,000 insurance policy on Viola's life were paid with gifts from Viola, and the policy should not be included in the marital property. He also claims that the insurance proceeds he received from Kenneth's death should not be included as marital property.

Because precedent is of little value in dissolution cases, our decision must ultimately depend on the particular facts relevant to each issue. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). Generally, under Iowa Code section 598.21(1), a court should divide all marital property equitably. In re Marriage of Byall, 353 N.W.2d 103, 105 (Iowa App. 1984). However, under section 598.21(2), property inherited or received by gift is not subject to a property division except upon a finding that refusal to divide the property is inequitable. Id. at 106. Exceptions may be based upon unfairness to a spouse and children or the length of the marriage. In re Marriage of Mentel, 359 N.W.2d 505, 506 (Iowa App. 1984). We affirm the division of property made by the district court.

III. Richard also contends that Helen is not entitled to alimony. He claims that the court based its award on Helen's voluntarily-reduced present income instead of her earning capacity.

Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. In re Marriage of Cooper, 451 N.W.2d 507, 508 (Iowa App. 1988). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. Id. When determining the appropriateness of alimony, the court must consider the earning capacity of each party, and their ability to pay balanced against their relative needs. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989).

Helen testified that she had planned for two years to quit her job at the Riverside Care Facility during the summer of 1989 and that Richard had approved of her plan. If Helen had resumed employment at Riverside, her gross income would be about $780 per month, compared to her present gross income of about $670 per month. The amount of alimony awarded by the district court is justified in this case even if we consider the larger amount to be her earning capacity. Richard's earning capacity greatly exceeds that of Helen. We affirm the award of alimony made by the district court.

IV. In her cross-appeal, Helen contends that the court incorrectly valued Richard's Con-Agra Savings Plan. The court valued the plan at $6,511, which took into consideration income tax and a penalty for early withdrawal. Helen claims that the plan should have been valued as of the date of trial, $13,332.25, and no deductions should have been made. Helen asks that her lump sum property settlement be increased to $41,000.

As discussed in Part II, above, the ultimate question is whether the property division is equitable. See In re Marriage of Byall, 353 N.W.2d 103, 106 (Iowa App. 1984). A court should properly consider the tax consequences of its awards. Id. We believe that the lump sum property settlement of $35,000 is most equitable to both parties. We affirm the property settlement made by the district court.

V. Helen also contends that the court should have required Richard to pay interest on the lump sum property settlement, or required him to pay the full amount immediately. She seems to believe that Richard has this amount on hand and will be able to earn interest on it over the ten years he has to pay the settlement. However, the financial affidavits of the parties show that Richard does not have $35,000 which he could invest, but instead he will most likely have to mortgage the marital home in order to pay the property settlement. Because Richard will probably be paying interest on $35,000 instead of earning interest on $35,000, we believe the district court was correct in not requiring Richard to pay interest to Helen on her property settlement.

After considering all of the issues raised by the parties, we affirm the district court. Court costs are taxed one third to Helen; two thirds to Richard.

AFFIRMED.