IN THE COURT OF APPEALS OF IOWA

No. 1999-206 (9-430) / 98-1956
Filed November 23, 1999

IN RE THE MARRIAGE OF PATRICIA HOCKENSON AND ARLEY HOCKENSON

Upon the Petition of
PATRICIA HOCKENSON,
Petitioner-Appellant,

And Concerning
ARLEY HOCKENSON,
Respondent-Appellee.

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Appeal from the Iowa District Court for Floyd County, Paul W. Riffel, District Judge.

On appeal from the entry of the parties' dissolution decree, Patricia argues the district court erred in: 1) valuing and equitably distributing the marital assets; 2) declining to award her alimony; 3) failing to adequately set aside her inherited property; 4) considering the tax consequences of business assets awarded to Arley; and 5) failing to award her trial attorney's fees. She also requests an award of appellate attorney's fees. **AFFIRMED.**

DeDra L. Schroeder-McCarty of the Schroeder Law Office, Charles City, for appellant.

Christopher F. O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, New Hampton, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Petitioner-Appellant Patricia Hockenson appeals challenging the economic provisions of the decree dissolving her marriage to the respondent-appellee Arley Hockenson. She contends trial court erred in failing to (1) properly value and distribute property, including property she inherited, (2) award her alimony, and (3) award her attorney fees. As part of her claim concerning the valuation and distribution of property, she claims the trial court erred by taking tax consequences of the depreciable business assets into consideration. She requests appellate attorney fees. We affirm.

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). 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).

Patricia and Harley were married May 2, 1959. Patricia filed her petition for dissolution of marriage in January of 1997. The parties' youngest child, Reid, was eighteen years of age at the time of trial. For about twenty years the parties have owned and operated Hockenson Truck Lines, a trucking business engaged primarily in hauling grain. Prior to the parties' separation in April 1997, Patricia did not work outside the home during their marriage, but worked as the bookkeeper and dispatcher for the family trucking business.

Patricia was fifty-six years of age at the time of trial in April 1998. She has only a tenth grade education. She is in good health, but testified that her "hand has been going to sleep since I've been working at the Lamplighter." The Lamplighter is a hotel at which she works a limited number of hours each week cleaning rooms. She earns about $80 per week. She acquired this employment about April of 1997. Since filing the dissolution of marriage in January 1997, the Lamplighter is the only place where she has sought employment.

Harley was fifty-seven years of age at the time of trial. He has only an eighth grade education. He is in generally good health, but has high blood pressure and back problems.

The parties' income tax returns for 1993 through 1997 show an average annual pre tax net profit of $11,166 from their trucking business. The net profit for 1997 was $8772. In 1997 both gross receipts and total expenses were substantially less than in the three immediately preceding years. In 1997 Harley hired others to do part of the accounting for the business, work which Patricia had previously done.

During the marriage Patricia received significant inheritances and a significant gift. Upon her intestate mother's death, she and her two sisters each inherited an undivided one-sixth share in a forty-acre tract of land (which later became the parties' homestead) and an adjoining 63.61-acre tract. Patricia's father owned the other one-half interest in each tract. Upon her father's death in 1986, Patricia traded her one-sixth interest in the 63.61-acre tract, plus about $1848, for her sister's interest in the

forty-acre tract. The $1848 in whole or large part came from Patricia's one-third of approximately $5000 received by the sisters from a life insurance policy of their father's. At the time of her father's death, the forty acres were worth about $40,000. Harley and Patricia subsequently purchased the 63.61-acre tract from Patricia's sisters.

During the parties' marriage Patricia received a $10,000 cash gift from her father. She placed it in a savings account in a credit union, where it remained at the time of trial.

We will below address the issues raised by the appellant, stating additional facts as necessary.

I. Property Valuation.

Patricia argues that the trial court erred in its valuation of certain real and personal property. The trial court placed values on assets as to which the parties were unable to agree concerning values. It set aside to Patricia as her separate property the value of the $10,000 gift and the value of the inheritances she had received during the marriage. It reduced the values of certain depreciable business assets which were awarded to Arley by the amount of estimated income taxes which would be incurred when those assets were sold or exchanged. Based on the values which it had then placed on assets, the court divided the parties' assets which it had not set aside to Patricia and the parties' liabilities in a manner which resulted in each of the parties receiving almost exactly the same amount of net assets.

Patricia first complains that the trial court should have decreased the value of the parties' homestead by seven percent, which represents the commission fee upon sale of the property. She cites *In re Marriage of Richards*, 439 N.W.2d 876 (Iowa App. 1989) for this proposition. In *Richards*, it appears the property was to be sold as a direct result of the dissolution. *Id.* at 882. In this case the trial court did not order sale of the homestead, but awarded it to Patricia. She makes no claim or showing that she must or will be selling it. Therefore, the trial court did not act inequitably in not subtracting a sales commission in order to determine the value of the homestead.

Patricia next disagrees with the value the court assigned to several guns owned by Arley. The trial court specifically noted that it gave no weight to the values submitted by Arley because he had tried to hide some of the guns. Instead, the court noted that it would value the guns at the conservative end of the range of values testified to by an expert witness called by Patricia. It explained that it valued them at the conservative end because the witness did not personally see or inspect the guns. Within the realm of the evidence, the trial court is at liberty to accept or reject any or all opinion evidence as to the values of property in the dissolution action. *Schantz v. Schantz*, 163 N.W.2d 398, 404 (Iowa 1968). When the values found by the trial court are well within the permissible range of the evidence, we are not inclined to disturb them. *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994); *In re Marriage of Versluis*, 521

N.W.2d 760, 761 (Iowa App. 1994). The figure used by the trial court was within the realm of the evidence and we will not disturb it on appeal.

Patricia next complains of the values which the trial court placed on personal property items. The trial court noted that it would give considerable weight to the appraisal of those items by an experienced auctioneer called as an expert witness by Patricia who had personally viewed the personal property items. It noted that it gave little weight to the testimony of another witness called by Patricia, because that witness had not seen the items. The values which the trial court placed on personal property items are not always those which Patricia's expert witness auctioneer placed on them. They are, however, within the range of the evidence presented and we will not disturb them on appeal.

Patricia's other complaint concerns the values which the trial court placed on the three semi tractors and nine trailers used by Hockenson Truck Lines. Arley testified that approximately one year prior to trial the estimated value of these items was $96,300, based on an estimate done by an expert in the field. At trial Arley testified that the value of this property had decreased about $11,000 to $12,000. He testified that the loss in value over the past year was due to the fact they "wear out when you use them", and that after an additional year's use they needed general maintenance, including tires and brake pads. No evidence was presented that the tractors and trailers had not in fact depreciated over the previous year. The trial court apparently accepted $10,000 as a reasonable estimate of the depreciation that had

occurred, and valued the tractors and trailers at a total of $86,300. Property should be valued as of the trial date. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa App. 1998). The trial court's valuation of the tractors and trailers was within the range of evidence submitted, and we will not disturb it on appeal.

II. Alimony.

Patricia contends the trial court erred by failing to award her alimony. She was not employed outside the home during the marriage, and for the last twenty years of the marriage she worked as bookkeeper and dispatcher for the parties' trucking business. She now earns only about $4000 per year in her present part-time employment as a bookkeeper. She has not looked for other employment. With her years of work experience it would appear highly likely that in today's economy she could secure full-time minimum wage employment or its equivalent in part-time positions. If she were to do so she would have gross income of approximately $11,000 per year. It thus appears she has the capacity to earn that amount.

Arley continues to run the trucking business, with the additional overhead of a hired bookkeeper to replace Patricia. The parties' income tax returns indicate an average annual pre tax net profit from the trucking business for 1993 through 1997 of $11,166.

Factors for the court's consideration in determining whether or not an order for spousal support is appropriate, and, if so, the amount and duration or an award, are set forth in section 598.21(3) of the Code of Iowa. *In re Marriage of Ask*, 551

N.W.2d 643, 645 (Iowa 1996). Any form of alimony is discretionary with the court. *Id.* The trial court is vested with come discretion in considering the ability to pay. *Mitvalsky v. Mitvalsky*, 191 Iowa 8, 10, 179 N.W. 520, 521 (1920). We consider the division of property in determining alimony. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa App. 1998). Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998).

The trial court carefully outlined its reasons for not awarding alimony to Patricia. The thirty-nine-year length of the parties' marriage would support an award of alimony if other factors did also. However, the parties are both in relatively good health, have about the same levels of education, and appear to have approximately equal earning capacities. The trial court found that the "trucking business has not been generating sufficient net profits to make it financially feasible for Arley to pay alimony to Patricia." This finding is supported by the evidence. The trial court did not abuse its limited discretion in determining that Arley did not have the ability to pay alimony, and did not abuse its discretion or fail to do equity by declining to order it.

III. The Inherited Property.

Patricia complains that the trial court did not completely set aside to her the property which she had inherited. She first asserts that the trial court did not, but should have, set aside to her the approximately $1,800, representing money she

received from her father's life insurance policy and paid her sisters to complete the acquisition of the homestead. However, because the $1800 was invested in the homestead, the homestead had a value of $40,000 at acquisition, and the trial court set aside to her the $40,000 value of the homestead, the trial court did in fact set aside the $1800 to her. It did so by setting aside the $40,000, of which the $1,800 was a part. Patricia also appears to assert that the trial court should have set aside to her the entire $84,636 fair market value of the homestead, not just the $40,000. It is important to note that the parties acquired the homestead by exchanging Patricia's interest in another tract of real estate, which she had earlier inherited from her mother, to her sisters along with about $1800 from her father's life insurance, for the two sisters' interests in the homestead. It appears clear that the parties' decision to do so was a family decision. The parties invested approximately $43,500 in the homestead after acquiring it in 1986. (Although Arley characterizes these expenditures as improvements, it appears more correct to say that some were improvements, some were maintenance or repair, and some were a combination.) The parties were married thirty-nine years. They owned the homestead some twelve years. Earnings attributable to both went into its maintenance and improvement. It was used and enjoyed by Arley as well as by Patricia.

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to property division except upon a finding that refusal to divide the property is

inequitable to the other party or to the children of the marriage. Iowa Code § 598.21(2) (1999). The requirement to set aside to a party the property which has thus been inherited or received as a gift is not absolute, and division may nevertheless occur to avoid injustice. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Contributions by a party to the care, preservation or improvement of inherited property is a factor which bears on a claim that inherited property should be divided, and the length of the marriage and the length of time the property was held after it was devised or given may indirectly bear on the question, for their effect on this and other relevant factors. *Id.*

Where the parties' inheritances were in cash, and were then invested in assets which appreciated in value, the Iowa Supreme Court stated that decisions on how to use the property during the marriage, including inherited property, bear most of the characteristics of a family decision; stated that barring special circumstances the resulting appreciation or loss may be characterized as marital property; and did not disturb the trial court's decision which set off the parties' inherited property to them based on its values at the time of inheritance. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). Although Patricia's inheritance was in large part real estate rather than cash, the parties' situation here is realistically not greatly different than in *White*. In *White*, the parties used one asset they had inherited, cash, to purchase another asset which then appreciated in value. *Id.* At 746. Here, the parties used land and cash which Patricia had inherited to purchase her sisters' interests in another tract

of land which then appreciated in value. The decision to do so bears all the characteristics of a family decision.

A justified property division is one that is equitable under the circumstances *In re Marriage of Stewart*, 356 N.W.2d 611, 612 (Iowa App. 1984). A division of the appreciated value of gifted or inherited assets has been found appropriate when justified by attendant circumstances. *See, e.g., In re Marriage of Friedman*, 466 N.W.2d 689 (Iowa 1991); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989). Given the length of the parties' marriage, the fact that other inherited assets were in substantial part used to acquire the homestead, the length of time the homestead was held after the parties acquired it, the financial and other contributions Arley made to the homestead's care, preservation and improvement, and the fact that Arley as well as Patricia had the use and enjoyment of the homestead, we find that the trial court's decision to not set aside the appreciation in value of the homestead to Patricia was not erroneous or inequitable.

IV. The Tax Consequences Of Arley's Depreciable Business Assets.

Patricia asserts the trial court erred in considering the tax consequences to Arley on certain depreciable business assets used in the trucking business.

As a result of the property division, Arley will receive three semi tractors and nine semi trailers. The three tractors are fully depreciated and have a fair market value of $18,000. The nine trailers have been depreciated to where their remaining undepreciated basis is $11,841, and they have a fair market value of $86,300. Arley

testified that if the tractors were sold there would be tax consequences of $3600 and that the tax on sale of the trailers would be $11,292. In determining the property division the trial court considered tax consequences to Arley of $14,892, the sum of the two figures. It is apparent that each of the two figures is twenty percent of the amount by which fair market value exceeds basis. Patricia does not complain about the amount of the tax consequences considered by the trial court, which appears to be reasonable if tax consequences are considered. Rather, she complains of the fact that the trial court considered tax consequences, claiming that the tax consequences are speculative.

Section 598.21(1)(j) of the Code of Iowa states that in dividing property the court is to consider the tax consequences to each party. The Iowa Supreme Court has recognized that income tax consequences to a party may be taken into account in the division of property. *In re Marriage of Hoak*, 364 N.W.2d 185, 193 (Iowa 1985). However, in *In re Marriage of Friedman*, 466 N.W.2d 689 (Iowa 1991), the trial court reduced the value of certain corporate stock awarded to a party for capital gains taxes and costs of selling the stock, but the Iowa Supreme Court rejected the reduction under the facts of the case. It noted that there was no evidence that a sale was pending or even contemplated, and that the trial court had not ordered a sale. *Id.* at 691. It stated the reduction was the result of the inappropriate infusion of tax consequences on an illusory future sale of stock. *Id.*

In making a property division we have taken into consideration the tax consequences a party is expected to face in satisfying a property distribution. *See, e.g., In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). We also have held that where payment of a lump sum of cash to a spouse will in all probability require the liquidation of capital assets, the income tax consequences of such a sale should be considered by the trial court in assessing the equities of the property and alimony award. *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa App. 1989).

The key to these and other cases seems to be that where sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate, and where sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. In this case the three tractors were from model years 1977, 1984 and 1989, one was not roadworthy, and Arley testified he planned to sell them in the near future, whenever he had enough money to sell them and buy better ones. The nine trailers were from 1972, 1978, 1980, 1981, 1982, and four from 1990. Two were not roadworthy, one had been sold, and others needed maintenance. Arley testified that he did not intend to sell the eight remaining trailers immediately, if he could find someone to run them, but that they would be sold at some point in time.

We believe the nature and use of the assets under consideration, the tractors and trailers, are important. They are the type of assets that are used in a business and would normally be sold when a business ends or is sold. They are not held or kept for

family, household, personal or investment purposes. They are depreciable business assets that are used in a business. They are the type of assets that are normally used in a business for a number of years and then sold or exchanged. Most are old. These facts are consistent with Arley's testimony that he intended to sell the tractors whenever he could afford to sell them and buy new ones, the fact that he had apparently already sold one of the trailers, and his testimony that the remaining trailers would be sold at some point in time. Based on the nature of the assets involved and the evidence presented at trial, we conclude the trial court did not err or act inequitably in considering the tax consequences of awarding the tractors and trailers to Arley.

V. Attorney Fees.

Patricia complains that the trial court did not award her attorney fees. Trial court's have considerable discretion in awarding attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn an award the complaining party must show that the trial court abused its discretion. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). Awards of attorney fees must be for fair and reasonable amounts, and based on the parties' respective abilities to pay. *Id.* An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Id.* We are to consider the needs of the party making the request and the ability of the other party to pay. *Id.* Although the separate tract of 63.61 acres would soon be sold as part of the property division, at the time of

trial Patricia was receiving the rent of $7,400 per year from it. In addition she was earning $4000 per year from her part-time employment. The trucking business, which Arley intended to continue to operate and which was apparently his only source of income, had generated a pre tax net profit of only $8772 for 1997. The parties appear to have relatively equal earning capacities. Although Patricia had a need for an award of trial attorney fees, Arley had very little ability to pay. The trial court viewed firsthand any reluctance on Arley's part to cooperate with the discovery process, yet found no reason to award Patricia attorney fees. We find that the trial court did not abuse its discretion in ordering that each party pay their own attorney fees.

Patricia requests appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). In determining this question, we 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. Although Patricia needs an award of attorney fees, Arley has very limited ability to pay. Patricia challenged the trial court's decision, rather than being obligated to defend it, and has been unsuccessful in doing so. We decline to award appellate attorney fees.

AFFIRMED.

Zimmer, J., concurs; Sackett, C.J. specially concurs.

SACKETT, C.J. (specially concurs)

The financial provisions of the district court's decree are equitable and I concur with the majority they should be affirmed.