IN THE COURT OF APPEALS OF IOWA

No. 0-158 / 99-0673
Filed June 14, 2000

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF SONDRA PETERSON OAKLEY AND RAYMOND OAKLEY

Upon the Petition of
SONDRA PETERSON OAKLEY,
Petitioner-Appellant,

And Concerning
RAYMOND OAKLEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

The petitioner appeals a district court ruling that it lacked personal jurisdiction over respondent regarding issues of property division, allocation of debts, and other economic issues arising from the parties' marriage except for custody and child support. Petitioner maintains the district court had personal jurisdiction to decide all economic issues. **REVERSED AND MODIFIED.**

Dale L. Putnam of Putnam Law Office, Decorah, for appellant.

Raymond Oakley, East Elmhurst, New York, pro se appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Petitioner-Appellant, Sondra Peterson Oakley, appeals from that portion of a decree dissolving her marriage to Respondent-Appellee Raymond Oakley where the district court found it did not have subject matter jurisdiction to divide the property of the parties. She contends the district court did have subject matter jurisdiction to make the division and contends the district court should be reversed. Reserved and modified.

On May 13, 1998, Sondra filed a petition for dissolution of her marriage to Raymond. The petition was filed in the district court for Winneshiek County, Iowa. Sondra alleged in the petition that Raymond was a resident of New York state and would be served with an original notice of suit there. At the same time, Sondra filed a motion in the dissolution action asking the Iowa court to complete the sale of property the parties owned in New Jersey. Raymond was served by a process server in New York on May 27, 1998. On June 2, 1998, Richard D. Zahasky, as attorney for Raymond, filed an appearance in the dissolution action and also filed a motion to continue a hearing on the motion to compel. A ruling was entered on the motion to compel. Then on June 16, 1998, Raymond filed an answer wherein he denied that Sondra was a resident of the state of Iowa and affirmatively alleged that her residence in the state was not in good faith and was for the sole purpose of proceeding with dissolution of marriage. He requested that the petition for dissolution be dismissed. On March 23, 1999, Richard D. Zahasky asked the court for permission to withdraw from the representation of Raymond. The district court subsequently granted Zahasky permission to withdraw.

The case came on for trial. Sondra appeared with her attorney. Raymond did not appear but made a telephone call to the court requesting a continuance, which was denied. After hearing the evidence the district court determined it did not have personal jurisdiction over Raymond. The court determined because it lacked personal jurisdiction it could not decide issues of property division, allocation of debt and other economic issues. The district court went on to dissolve the marriage. The court found Iowa to be the home state of the minor child of the parties and placed his sole custody and primary care with Sondra and set child support obligations ordering Raymond to pay $443.82 in child support plus certain medical expenses.

Sondra filed a Rule 179(b) motion challenging the court's refusal to divide the property and the debts. The motion was denied and this appeal follows.

In reviewing a district court's decision to exercise personal jurisdiction, we accept as true the allegations of the petition and the contents of uncontroversial affidavits. *In re Marriage of Wallick*, 524 N.W.2d 153, 156 (Iowa 1994); *State ex rel. Miller v. Internal Energy*, 324 N.W.2d 707, 709 (Iowa 1982). We are not bound by the trial court's conclusions of law or by its application of legal principles. *Larsen v. Scholl*, 296 N.W.2d 785, 787 (Iowa 1980).

Sondra contends the district court incorrectly found that Raymond in his answer challenged the jurisdiction of the Iowa court over his person. Raymond did allege in his answers that Sondra had not been a good faith resident of Iowa, he did not at any time challenge the jurisdiction of the Iowa court over his person.

The issue of personal jurisdiction never having been raised distinguishes this case from *Wallick* where the spouse filed a motion to dismiss a modification

petition due to lack of personal jurisdiction because, among other things, she lived in and was served in Vermont.

A jurisdictional issue can be decided in a ruling on a preanswer motion. *See* Iowa R. Civ. P. 104(a) (providing want of jurisdiction of the subject matter may be raised by preanswer motion). This motion replaces the special appearance, which is no longer in our rules of civil procedure. *See* Iowa R. Civ. P. 66 ("The special appearance is abolished. A defendant may not appear specially for the sole purpose of attacking the jurisdiction of the court."). Raymond filed two pleadings and an answer and at no time challenged the Iowa court's personal jurisdiction over him. In answering the petition and filing responsive pleadings Raymond consented to the personal jurisdiction of the Iowa court. *See In re Estate of Borrego*, 490 N.W.2d 833 (Iowa 1992) (Claiming the probate court did not have personal jurisdiction to enter an order because he had neither been served with an original notice nor voluntarily consented to the jurisdiction of the court. The court concluded party had consented to personal jurisdiction of the court by a request for fees.)

While we find that Raymond had submitted to the personal jurisdiction of the Iowa court for Sondra to obtain an Iowa dissolution, she must show that the Iowa court had the jurisdiction to grant the divorce and render other relief.

Iowa Code section 598.6 governs the power or jurisdiction of the district court to grant a dissolution of marriage. *See In re Marriage of Bouska*, 256 N.W.2d 196, 198 (Iowa 1977). It provides:

> Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, . . . must state that the petitioner has been for the last year a resident of the state, specifying the county in which the

> petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only.

According to section 598.6 Sondra had to establish that: (1) she resided in Iowa for at least one year before the petition was filed; and (2) her residence here was in good faith and not just for the purpose of obtaining a marriage dissolution. Sondra, who originally was from the Decorah, Iowa area, testified she had lived in the area for approximately two years before the dissolution hearing. The district court found she met the requirements of section 598.5 and the Iowa court had subject matter jurisdiction to dissolve the marriage. Raymond presented no evidence and there is nothing to support the request in Raymond's petition that the court did not have subject matter jurisdiction to dissolve the marriage. We therefore agree with the district court that it had subject matter jurisdiction.

Sondra has asked that we reverse and remand. However, a record was made on the property and debts of the parties and her request for an equitable disposition of the assets and debts. Consequently a remand is not necessary.

We apply the law of Iowa in making the distribution, there being no request to apply the law of another forum. In Iowa the partners in 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 case. *Id.*

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). The date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). We value property for division purposes at its value at the time of the dissolution. *See Locke*, 246 N.W.2d at 252. It is the net worth of the parties at the time of trial which is relevant in adjusting property rights. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979). With these principles in mind we review the evidence presented.

The parties have $24,556.50 in an account in New Jersey from the sale of their house. Sondra has equity of about $25,000 in a house in Decorah, and the parties have debts of about $243,000. Sondra testified she believed Raymond has a personal injury action in New Jersey and asks to be given a half interest in that action. She requests she be credited for one-half of the child support paid for a child of Raymond's, who is not her child, from the proceeds of the sale of their home as well as a judgment for delinquent child support for the child of this marriage. She requests attorney fees.

The money from the sale of the New Jersey house shall be divided equally. Each party shall be responsible for one-half of the debt and hold the other party harmless on the other half. The Decorah house shall be the property of Sondra free and clear of any claim of Raymond. Having given Sondra more in property than is given Raymond, we make no adjustment for the child support judgment paid from the house sale proceeds.

We next address Sondra's claim she should have a portion of Raymond's personal injury claim. Sondra does not specifically request the decree reserve any consortium claim she may have to her. At the time a dissolution decree is entered, all rights acquired by marriage are forfeited unless "specifically preserved in the divorce decree." Iowa Code § 598.20 (1995). A loss of consortium claim is a "right acquired by marriage" and it is forfeited unless specifically preserved. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 167 (Iowa 1984); *Michael v. Harrison County Rural Elec. Coop*, 292 N.W.2d 417, 420 (Iowa 1980). Language in the decree must specifically preserve the loss of consortium claim. *See Ohlen v. Harriman*, 296 N.W.2d 794, 795-96 (Iowa 1980); *Michael*, 292 N.W.2d at 420; *Bowman v. Bennett*, 250 N.W.2d 47, 50 (Iowa 1977); *Van Ellen v. Meyer*, 207 N.W.2d 552, 554 (Iowa 1973). The proceeds of a personal injury claim are divided according to the circumstances of each case. *In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987). Settlement proceeds do not automatically belong to either party. *Id.* at 208. Raymond's claim is for injuries he sustained and should be his claim. *See In re Marriage of Plasencia*, 541 N.W.2d 923, 926 (Iowa App. 1995).

We reserve to Sondra any consortium claim she may have as a result of Raymond's injuries. We further provide that she shall receive any portion of the claim paid for family support.

Sondra has requested an award of attorney fees. 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). Sondra has received more in property than Raymond. Raymond,

however, has failed to cooperate in selling the house causing Sondra to incur additional fees. We award Sondra attorney fees of $2,500. Costs of this appeal shall be taxed to Raymond. Sondra asked that an additional judgment be entered on past due child support. There is no basis for this request and it is denied.

REVERSED AND MODIFIED.