IN THE COURT OF APPEALS OF IOWA

No. 5-585 / 94-1992

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IN RE THE MARRIAGE OF LINDA HUSTON CALLAWAY AND REX E. CALLAWAY

Upon the Petition of
LINDA HUSTON CALLAWAY,

Appellant/Cross-Appellee,

And Concerning
REX E. CALLAWAY,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn, Judge.

Petitioner appeals and respondent cross-appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Curtis A. Ward of Brooks & Ward, Marshalltown, for appellant.

Mitchel T. Behr of Wilson & Craig, Eldora, for appellee.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Linda and Rex Callaway appeal and cross-appeal from the economic provisions of their dissolution decree. Our scope of review is de novo. Iowa R. App. P. 4. We modify the decree to award Linda a greater interest in the parties' homestead and to redivide the parties' IRA and pension interests. We affirm the remainder of the decree in its entirety.

Linda and Rex Callaway were married March 8, 1968. Linda filed a petition for dissolution in May 1994, and a decree of dissolution was entered on November 1, 1994. Linda was forty-seven years of age and Rex was forty-six when the decree was filed. The parties have four children, two of whom were minors at the time of entry of the decree. The parties agreed to a split custody arrangement for their twelve- and fourteen-year-old children.

For twenty-five of the parties' twenty-six year marriage Rex was employed as a machinist with Fisher Controls. He continued to be employed by Fisher at the time of the dissolution and had a net monthly income of $2,903 per month.

Prior to and intermittently during the marriage, Linda worked at the Marshalltown Savings Bank. During the marriage Linda also worked as a waitress, took on housecleaning jobs, served as primary caretaker for the parties' children and home schooled the children for eleven years. Linda had completed work on her bachelor's degree in May 1994 and had returned to full-time employment at the bank. At the time of the dissolution trial she had a net monthly income of approximately $1,943.

I. INHERITED PROPERTY.

The parties were married in March 1968 and shortly thereafter Rex inherited a one-half interest in eighty acres in Hardin County with his sister. His inheritance had a value of $50,000. Rex and Linda farmed this property, and in 1973 Rex, Linda and Rex's sister divided the inherited property. At this time the deed listed Rex and Linda as owners in joint tenancy of the forty acres partioned to them, and they continued to farm the land.

In 1975 Rex and Linda sold the forty inherited acres to Rex's sister for $64,000. Rex and Linda used the $64,000 as a down payment, and with a $31,000 loan, they purchased eighty acres in Marshall County. The parties built a home on this acreage and their homestead remained there at the time of the dissolution.

Rex and Linda farmed the eighty acres until 1982 when they sold 65 of the acres for $146,000. They used the proceeds to pay off the encumbrance on the remaining fifteen acres, to pay other debts and to establish individual retirement accounts. The fifteen acres upon which the homestead rests remains uncumbered and are worth $110,000. From the time Rex moved out in October 1991 until June 1994, only Linda and the children occupied the homestead.

The trial court determined $64,000 of the equity in the parties' remaining fifteen acres should be set aside to Rex. The court did this because it concluded the acquisition of the property was made possible by the application of the proceeds from the sale of Rex's inherited property as a down payment toward the purchase price. The court divided the remaining $46,000 equity equally between the parties. As a result, Rex was awarded a $87,000 equity interest in the real estate, and Linda received a $23,000 interest. Linda had the care of the parties' youngest child, Micah, and wished to remain in the homestead. To minimize the disruption the dissolution would have on Micah, the court gave Linda the option to buy out Rex's $87,000 interest within ninety days of entry of the decree. If Linda did not exercise the option, the court directed Rex to pay Linda $23,000 for her share of the equity in the property.

Linda argues the trial court should not have set aside the value of the inherited property. She points out the parties jointly owned the property and sold it to acquire different real estate which they substantially improved through their joint efforts and joint assumption of debt. She argues the parties' circumstances make it inequitable to set aside the value of the inherited property. Finally, she contends even if the value of the inherited property should have been set aside, the trial court should not have included in its value the appreciation which occurred during the six years the parties owned and farmed the property.

The Iowa Code provides --

> 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 a property division under this section 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) (1993). The intent of the donor and the circumstances surrounding the inheritance control whether the inheritance is to be set off in the dissolution. *In re Marriage of Higgins*, 507 N.W.2d 725, 727 (Iowa App. 1993). The placement of the inheritance in joint ownership is not controlling. *Id.* Factors such as the length of a marriage, contributions to preservation of the property and the impact of an inheritance on the parties' standard of living are to be considered in determining whether to set aside an inheritance to one spouse. *See In re Marriage of Geil*, 509 N.W.2d 738, 741 (Iowa 1993).

We find it was equitable to set off the value of Rex's inheritance to him. He was the intended beneficiary of the inheritance. The acquisition of the parties' present homestead was the direct result of application of the proceeds from the sale of the inherited property. We find nothing in the trial court's decree or the record to justify a conclusion that refusal to divide the property is inequitable to the other party or to the children of the marriage.

While we find it was equitable to set aside the value of the inheritance, we modify the amount of the value of the inherited property to reflect the actual value

($50,000) of the property at the time of the inheritance. We find this amount is more equitable than use of the appreciated value which followed from six years of ownership and farming of the land. As a result, $50,000 of the asset's equity is set off to Rex and the remaining $60,000 equity is equally divided between the parties. We approve of the trial court's decision to allow Linda an opportunity to buy out Rex's interest in the land. We deem it equitable to give Linda six months from the date procedendo issues in this case to buy out Rex's $80,000 equity interest in the property. If she does not do so, Rex is ordered to pay Linda $30,000 for her interest.

II. ALIMONY.

The dissolution decree ordered Rex to pay Linda $400 a month in alimony for three years. The alimony will cease upon the death of either party or Linda's remarriage. Linda claims she should receive substantially more alimony over a longer period of time and it should not terminate upon her remarriage. In his cross-appeal Rex argues he should not have to pay any alimony.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *Id.* We consider property division and alimony together in evaluating their individual sufficiency. *Id.*

The trial court used the term "transitional support" in describing the alimony it awarded Linda. The court recognized permanent alimony was not appropriate given Linda's level of education, her income and secure employment. However, it was obvious from the record Linda would be confronting a major period of transition following the dissolution. She would no longer have the benefit of Rex's higher level of income and she would be assuming a substantial housing expense whether she obtained alternative housing or bought out Rex's interest in the homestead. We have previously affirmed an award of transitional alimony assistance when a spouse is making the adjustment from dependency on a spouse's income to self-supporting status. *See In re Marriage of Wertz*, 492 N.W.2d 711, 714 (Iowa App. 1992).

"The focus of the determination of spousal support is the need of the payee spouse and the ability of payor spouse to pay." *In re Marriage of Vanderpol*, 529 N.W.2d 603, 606 (Iowa App. 1994). We may consider one spouse's receipt of inherited property when considering the issue of alimony. *In re Marriage of Meerdink*, 530 N.W.2d 458, (Iowa App. 1995). Given the disparity in the parties' levels of income and the significant amount of the property offset made to Rex for his inheritance, we find the amount and duration of the alimony awarded by the trial court to be equitable. We further find it was equitable for the trial court to direct the alimony payments cease upon Linda's remarriage.

III. EXPENDITURE OF SIP FUNDS.

In March 1994 Rex withdrew approximately $15,000 from the savings and investment plan (SIP) he had at his place of employment. At the time he withdrew the funds the parties were separated, but a petition for dissolution had not yet been filed. Rex testified he used part of these funds to pay for: his 1993 income taxes; hay; seed; lime; truck repairs; a horse for Micah; and for school clothing and Christmas and graduation gifts for the children. Approximately $9,000 of the funds remained in a savings account at the time of the dissolution trial, and the trial court ordered those funds to be divided equally between the parties.

Linda disputes that Rex's expenditures of the SIP funds were for family purposes. She argues the court erred in not offsetting Rex's award by the amount of the money he withdrew and spent prior to the dissolution trial. Nothing in the record contradicts Rex's assertions that the funds were used for family purposes. Equity did not require an offset against Rex's property award to compensate Linda for the withdrawal of the SIP funds.

IV. IRA/PENSION AWARDS.

At the time of the dissolution trial Linda had an IRA worth $8,409 and Rex had a vested pension through his employer. Estimates of the present value of Rex's pension varied from approximately $23,000 to $29,000 depending upon what age of retirement was used. The trial court awarded Linda her IRA and ordered the parties' attorneys to prepare a QDOR in which $8,409 of Rex's pension would be set aside to him to equalize the award of the IRA to Linda. The court ordered the remainder of the pension be divided into two equal parts, one to be maintained in Rex's name and the other in Linda's.

Linda objects to the fact the court set aside $8,409 of Rex's pension to him to equalize her receipt of the IRA. The IRA and Rex's pension were the only assets the parties had available to fund their retirements. We find it more equitable to order an equal division of the IRA between the parties and to divide Rex's pension in accordance with the pension formula which has been often used by this court. *See In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994); *In re Marriage of Hornung*, 480 N.W.2d 91, 95 (Iowa App. 1991).

We modify the decree to award Linda a portion of Rex's pension equal to fifty percent of a fraction of the pension: the numerator of the fraction being twenty-five years, the number of years Rex worked for Fisher Controls during the marriage; and the demonimator of the fraction being the total number of years during which benefits are accumulated prior to being paid. Counsel for the parties are directed to prepare a QDOR consistent with this opinion and take any steps necessary to ensure its implementation.

AFFIRMED AS MODIFIED.