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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SARAH E. HEMMES AND HARLAN B. HEMMES

Upon the Petition of)
SARAH E. HEMMES,)
Petitioner-Appellant,) Filed April 30, 1985
And Concerning)
HARLAN B. HEMMES,) 5-43
84-755
Respondent-Appellee.)

Appeal from the Iowa District Court for Franklin County - Newt Draheim, Judge.

Petitioner appeals from a dissolution decree, contending her property award and alimony award are inadequate. She also contends the trial court erred by declining to award her attorney's fees. AFFIRMED AS MODIFIED.

R. Michael Sweesy, Mason City, for petitioner-appellant.

James E. Coonley II and John E. Coonley of Coonley & Coonley, Hampton, for respondent-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

DONIELSON, P.J.

Petitioner wife appeals from a dissolution decree. She contends that her property award and alimony award are inadequate. She also contends that the trial court erred in failing to award her attorney fees and has requested attorney fees on appeal. We affirm as modified.

Sarah and Harlan Hemmes were married in 1957. They have four adult children, although one is still in college.

The parties have farmed throughout the marriage; prior to their separation neither had any other significant employment experience. Since their separation in 1982, Sarah has obtained a two-year degree from a community college and has become a chemical dependency counselor. She earns a net salary of $1010.38 per month. Harlan remains a farmer.

The trial court awarded Harlan the parties' farmland and all the farm-related personal property such as livestock, machinery, trucks, and grain. The parties stipulated that the farm and farm-related assets were worth approximately $500,000. The court also directed that Harlan assume all the parties' debts except for the educational debts which Sarah incurred.

Sarah was awarded a car, household goods, her checking account valued at $100, a piano, and pump organ, and $30,000. Pursuant to the decree, she was also awarded $200 in alimony per month until her death or remarriage. The court did not award attorney fees to either party. Sarah has appealed from this determination.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we give considerable weight to the fact findings of the trial court, we are not bound by them. Iowa R. App. P. 14(f)(7).

I.

The division of property pursuant to a dissolution of marriage is governed by Iowa Code § 598.21(1). That section codifies prior Iowa case law which held that

marital property is to be divided equitably between the parties, taking into account certain specified factors. See Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), and In re Marriage of Winter, 223 N.W.2d 165, 169 (Iowa 1974). Those factors include the duration of the parties' marriage, their respective ages and earning capacities, and the property brought into the marriage by each. The ultimate test is whether, considering all of the circumstances, the division is fair and just. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976).

Upon consideration of the record, we conclude that the property award to Sarah should be increased. Sarah and Harlan were married 26 years. During the marriage, Sarah assisted in raising their four children, worked as a homemaker, and helped her husband in the farming operation. Evidence also indicates that Sarah spent a considerable amount of time assisting in the remodeling of the parties' home. An award of $30,000 and a few items of personal property appears inequitable. Such an award does not reflect the length of the marriage or Sarah's contributions over the years.

In arriving at an equitable property settlement, we need to consider the parties' arguments concerning certain assets and debts. The assets in question consist of the following farmland:

Home Farm - 100 acres	$200,000
Kratz Farm - 95 acres	81,000

The home farm was given to Harlan by his parents in 1970. At the time it was valued at $60,000. The gift included the house where Harlan and Sarah had been living during the course of their marriage. Harlan argues that this farm should not be subject to division. We disagree.

Pursuant to section 598.21(2) of the Code, gifts received during the course of the marriage are not subject to a property division "except upon a finding that refusal to divide the property is inequitable to the other party . . . ." In In re Marriage of Wood, 325 N.W.2d 774, 775 (Iowa Ct. App. 1982), we elaborated on this

statutory exception and set forth various factors to consider including contributions of the parties toward the property. In considering these factors, it is apparent that the gift should be subject to division. Over the years, Sarah has contributed toward the care, preservation, and improvement of the farmland, as well as the parties' home. It would be inequitable at this point to deprive her of all interest in the land. Accordingly, we conclude that the value of the home farm, discounted by the amount of the original gift, should be subject to division. In other words, Sarah is entitled to share in $140,000 of the $200,000 that the property is worth.

Harlan also argues that the Kratz farm should not be subject to property division. Harlan purchased the Kratz farm several years before the marriage for a total purchase price of $15,000. At the time, he made a $5,000 down payment; the remainder has been paid off during the course of the marriage. The farm has appreciated in value over the years and at the date of trial it was valued at $81,000. We believe that Harlan's $5,000 equity in the farm at the time of the marriage should not be subject to division. However, Sarah is entitled to share in the remaining $76,000. Most of the amount owed on the farm was paid off while the parties were married. We cannot say that this was entirely due to Harlan's efforts. This position would ignore the contributions and homemaking services that Sarah made during the 26-year marriage, which at least in part, enabled the parties to pay off the farm. Because of this, she should be entitled to share in the appreciated value of the land.

Thus, in arriving at the amount in determining the property subject to division, we set aside $65,000, representing Harlan's equitable interest in the Kratz farm at the time of the marriage and the value of the home farm at the time it was given to Harlan. We also set aside $3,000 representing the value of the farm machinery that Harlan brought into the marriage. The value of the remaining property which is subject to division is $441,125.

We next turn our attention to the debts of the parties. The total sum of the undisputed farm-related debts is $217,828. Harlan claims that three additional debts should be deducted from any property awarded to Sarah. We are unpersuaded by his arguments in this respect. First, he claims that Sarah owes him $108,000, an amount allegedly borrowed to invest in a yarn shop business. However, there is no evidence in the record of any agreement between Sarah and Harlan that she was under an obligation to repay this amount. Harlan also claims that he owes his father $123,301, as evidenced by a promissory note. The promissory note was not executed until after the present action for dissolution commenced and allegedly represents money loaned in previous years. We are troubled that this loan was created only after dissolution proceedings commenced and we are unwilling to consider it in the property division. We are also unwilling to consider the final disputed debt—$15,900 in educational loans for the children's education. The children are principally liable on these loans. Consequently, we see no reason to consider them a debt of the parties. We therefore conclude that the total indebtedness which should be considered for purposes of the property division is $217,828.

In subtracting the farm-related debts from the property subject to division, we arrive at an amount of $223,297. In achieving an equitable division of this amount, it is necessary to consider Sarah's contributions to the marriage and the length of the marriage. Yet we must also consider the fact that, pursuant to the original decree, Harlan is assuming responsibility for all the parties' farm-related debts. Because of this, Harlan is entitled to a larger percentage of the property than Sarah. In balancing the above considerations, we believe Sarah should receive $80,000. We affirm the trial court's award of approximately $7,600 of personal property to Sarah and subtract this from the modified award. Accordingly, we conclude that in addition to the personal property awarded by the trial court, Sarah should receive $72,400. Harlan is directed to pay $7,400 within 90

days of this decision. The remaining $65,000 shall be paid in annual installments of $5,000 commencing January 1, 1986. Interest will accrue at the rate of ten percent per annum on the unpaid balance.

While we believe this award is equitable, we are not unaware of the financial strain this may cause for Harlan. In this respect, we note that Harlan owns 285 acres of farmland. We recognize that the cost basis of selling real estate is low and have considered the tax consequences of a sale in arriving at our determination.

II.

Sarah also argues on appeal that the award of alimony should be increased. In considering the fairness of the alimony provision, we consider the factors listed in Iowa Code section 598.31(3). Sarah is currently employed and earns net monthly wages of $1,010.38. Her claimed expenses per month amount to $1,296.00. Thus, it is apparent that the $200 alimony coupled with her monthly earnings are not sufficient to meet her expenses.

The precise amount of Harlan's disposable income is unclear from the record and the trial court made no finding in this respect. His 1983 income tax returns reveal that his gross profits for farming totaled $78,684. However, after subtracting allowable deductions, his returns reflect that Harlan incurred a loss for that year of $7,626. In examining the deductions taken, it is apparent that most of them were actual farm-related expenditures. Thus, it is apparent that Harlan had no disposable income for 1983. His claimed expenses, excluding alimony, total $1125 per month.

In light of the above considerations and the property division, we do not believe an increase in alimony would be justified. We recognize that Sarah may have to limit her expenditures somewhat in order to live within her means. Yet, in examining her financial statement, we are convinced that this can be done without undue hardship. Furthermore, the amount we have awarded for the

property settlement will be of some aid in alleviating financial difficulties. We simply cannot ignore the fact that Harlan's ability to pay is limited. An award of $200 per month would seem to strike a proper balance between the competing considerations. Accordingly, we affirm the trial court decree in this respect.

III.

Sarah also claims that she should have been awarded trial attorney fees. In considering Sarah's financial needs and Harlan's ability to pay, we believe that such an award would be inappropriate. For similar reasons, we also deny Sarah's request for appellate attorney fees.

AFFIRMED AS MODIFIED.