IN THE COURT OF APPEALS OF IOWA

No 5-395 / 94-1415

FILED
FEB 28 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF HAROLD CORT VESTWEBER AND CAROL ANN VESTWEBER

Upon the Petition of
HAROLD CORT VESTWEBER,

Appellant,

And Concerning
CAROL ANN VESTWEBER,

Appellee.

Appeal from the Iowa District Court for Franklin County, Gilbert K. Bovard, Judge.

Harold Vestweber appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

David M. Nelsen of the Nelsen Law Office, Mason City, for appellant.

Kristy B. Arzberger of the Arzberger Law Office, Mason City, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Harold and Carol Vestweber were married on October 12, 1963. Carol left the family residence in February 1993. Harold filed a petition for dissolution on March 2, 1993. Harold was fifty-six years of age at the time of trial. Harold worked for the Franklin County REC until his termination in 1994. He began receiving unemployment in the amount of $211 per week, which was due to end in February 1995. Harold has been unemployed since his termination, except for short stints as a security guard. Carol was forty-nine years of age at trial. Carol works as a physical therapist at Franklin General Hospital earning in years 1988-1992 an average of $24,000 per year. Both parties are generally in good health, although Carol does suffer from some knee and lower limb problems.

Neither party brought substantial assets to the marriage. After the separation, their residence at 6 Terrace Hill was sold. Following the payment of the mortgage and selling costs, Harold and Carol received $49,273.36 which was placed in a savings account subject to the control of their respective attorneys until a decree was issued.

At trial the parties disagreed about the valuation of various marital assets. In particular, they did not agree upon the value of automobiles, jewelry, and savings bonds. The court valued jewelry at $7500 and bonds at $10,000. These were awarded to Carol. The court valued Harold's three automobiles, consisting of a 1987 Ford Bronco, Cadillac Seville, and a 1983 Yamaha, at a total of $8583. Carol's automobiles,

consisting of a 1990 Oldsmobile, 1976 Grand Prix, and a 1983 Yamaha, were valued at $9508. Each was awarded his or her individual bank account and pension accounts. The district court concluded there was not enough evidence to evaluate items of personal property and therefore ordered any items not agreed upon to be sold and the proceeds divided evenly. The court also concluded, in order to award Harold alimony, Carol should be awarded a greater share of the marital assets. Consequently, the court awarded Carol $41,773.36 from the home sale proceeds while Harold received $7500 The court ordered Carol to pay $100 per month in alimony until Harold reached the age of sixty-two, died, or remarried.

In summary, the court valued the parties' accumulated assets at $212,620.36. The court's distribution was as follows:

	Property to Harold	Property to Carol
Pensions, IRAs, 401-K	$ 36,514.00	$ 27,387.00
Cred. Union Accounts		2,007.00
Life Insurance	49,150.00	12,548.00
Bonds	150.00	10,000.00
Jewelry		7,500.00
Vehicles	8,583.00	9,508.00
House Proceeds	7,500.00	41,773.36
TOTAL:	$101,897.00	$110,723.36

Harold contends the district court erred in including the Mazda pickup in the marital property since it was a gift from his daughter. He maintains the court should have set

off a $6500 cash gift from his father and $4000 he received from his father's funeral fund as inheritance. Harold further contends the court incorrectly valued marital property including savings bonds, a car, and jewelry. Harold also argues he should be awarded rehabilitative alimony instead of the $100 per month traditional alimony awarded until he reaches sixty-two, dies, or remarries. Lastly, Harold argues the division of marital property was inequitable, especially the proceeds from the home sale.

Although Carol did not file a notice of cross-appeal, she requests the award of alimony be overturned on appeal. She additionally requests appellate attorney fees.

I. Scope of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Inclusion of Gifts and Inheritance in the Property Division.

Harold argues a Northwestern Mutual Insurance policy purchased and owned before marriage should not have been included as marital property. He argues, because a Mazda truck was a gift to him which he traded even up for the Ford Bronco, the Ford Bronco should not have been included in the property division. Additionally, he argues

$6500 dollars from his father was a gift and $4000 from his father's funeral fund was inheritance both of which should not have been included in the property division

The insurance policy owned by Harold before the marriage was correctly included in the property division. Iowa Code section 598.21(1) states, "the court shall divide *all* property, except inherited property or gifts received by one party, equitably between the parties." (Emphasis added.) This court, however, has refused to divide property owned before the marriage where one party brought substantially more assets into the marriage and the marriage was short. *See In re Marriage of Wallace*, 315 N.W.2d 827, 830-31 (Iowa App. 1981). In such circumstances, we have held a party's claim to property owned by the other prior to the marriage is minimal at best. *Id.* In this case, the marriage was very long, thirty years, and Harold did not bring substantially more assets to the marriage. Therefore, it was equitable to include the insurance policy in the property distribution.

The truck, inheritance, and gift of money were also correctly included in the marital assets. We are uncertain whether the truck was intended as a gift to Harold. At trial, a letter was introduced to establish the Vestwebers' daughter meant the truck as a gift only to Harold. She, however, was never cross-examined, and the validity of the note was questionable. Additionally, there was little evidence in the record concerning either the inheritance or the gift of money from Harold's father.

Even if Harold actually received gifts and an inheritance, we would still hold the district court correctly included them in the distribution. Although gifts and inheritance are generally not equitably divided, Iowa Code section 598.21(2) provides an exception upon finding the refusal to divide the property is inequitable to the other party. In determining whether an equitable distribution of gifts or inherited property is warranted, the length of the marriage is an important factor. *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). The intent of the donor and the circumstances of the gift or inheritance control whether the gift or inheritance is to be set off in the dissolution. *Id.* Considering the length of the marriage and the uncertainty regarding the donor's intent, it would be inequitable not to divide the gifts or inheritance.

We find Harold failed to provide sufficient evidence to support his assertion. There is a lack of evidence in the record which could persuade us a credit was necessary to reach an equitable property distribution. The district court did not err in distributing Harold's interest in the above items.

III. Valuation of Property.

At trial the parties disagreed about the value of an automobile, jewelry, and savings bonds. In particular, Carol valued a 1983 Cadillac Seville at $3750 while Harold argued the car was of no value due to its mechanical unreliability. Harold estimated the value of Carol's jewelry at $10,000. Carol, however, maintained some

of the jewelry Harold included in his estimate was given to a daughter as a gift. The most strenuous argument centered around the value of the savings bonds in Carol's possession. Harold maintained they were valued at $18,000, while Carol argued they were worth a face value of $6000.

The court valued the bonds at $10,000 and the jewelry at $7500. The total value given to Harold's three vehicles was $8583, while the value placed on Carol's three vehicles was $9508. We find the value placed on the assets by the district court to be well within the permissible range of evidence and will not disturb them on appeal. *See In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

IV. Alimony.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standard of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is an

allowance to the former spouse in lieu of a legal obligation to support the person. *See In re Marriage of Hitchcock*, 309 N W 2d 432, 437 (Iowa 1981).

The district court correctly awarded traditional alimony until Harold reached the age of sixty-two, died, or remarried instead of rehabilitative alimony Rehabilitative alimony is not appropriate in this situation At the time of trial, Harold was fifty-six years old. Employers are reluctant to hire someone his age. Although Harold desires to attend school to seek a social worker certification, by the time he could receive a BA, he would be around sixty years old. By this time, Harold would probably not be employable. Consequently, rehabilitative alimony was correctly denied.

We do, however, determine the circumstances of this case required more than the $100 traditional alimony awarded. Considering the factors listed in Iowa Code section 598.21(3) a higher award is warranted. First Harold and Carol's marriage has lasted a long time, thirty years. Additionally, Carol has been awarded a greater amount of assets in the property settlement. Lastly, Harold is in his late fifties, has virtually no earning capacity, and will probably never become self-supporting. Carol, on the other hand, has a steady income. All these factors indicate Harold is entitled to more than $100 of monthly support, and Carol is capable of supplying such support.

We order Carol to pay spousal support to Harold in the sum of $500 per month until Harold reaches age sixty-two, dies, or remarries, whichever occurs first. Spousal support shall continue until and including the month Harold reaches his sixty-second

birthday, dies, or remarries. Should Carol die before such event, the spousal support shall not constitute a lien against Carol's estate. The decree is modified accordingly.

V. Property Division.

The partners to 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). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa code section 598.21(1) (1991). *Estlund*, 344 N.W.2d at 280. Among the factors to consider are: Length of the marriage, property brought to the marriage by each party, the contribution of each party to the marriage, age, the physical and emotional health of the parties, the earning capacity of each party, the amount and duration of an order granting support payments to either party, and other economic circumstances of each party, including pension benefits. Iowa Code § 598.21(1).

The distribution award by the district court was fair and equitable under the circumstances of this case. Harold received $101,897 worth of assets while Carol received $110,723.36 worth of assets. We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987); *Griffin*, 356 N.W.2d at 608. Because we have

ordered Carol to pay $500 per month alimony to Harold. It is fair and equitable for her to receive slightly more property in the division.

VI. Attorney Fees and Costs.

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 Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to 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 district court's decision on appeal. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App 1994). Each party shall be responsible for his or her own attorney fees, and shall share equally in the costs of this action.

AFFIRMED AS MODIFIED.