

IN THE COURT OF APPEALS OF IOWA

No. 0-507 / 09-1713
Filed August 25, 2010

IN RE THE MARRIAGE OF JEFFREY F. NEFZGER AND CHARLENE J. NEFZGER

Upon the Petition of
JEFFREY F. NEFZGER,
Petitioner-Appellee,

And Concerning
CHARLENE J. NEFZGER,
Respondent-Appellant.

Appeal from the Iowa District Court for Delaware County, Lawrence H. Fautsch, Judge.

Charlene Nefzger appeals from the economic provisions of the decree dissolving her marriage to Jeffrey Nefzger. **AFFIRMED.**

David A. Lemanski, Dubuque, for appellant.

John M. Carr of Carr & Carr Attorneys, Manchester, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer and Danilson, JJ.

EISENHAUER, J.

Charlene (Jayne) Nefzger appeals from the economic provisions of the decree dissolving her marriage to Jeffrey (Jeff) Nefzger. She contends the district court erred in dividing the parties' property, in denying her an award of spousal support, and in failing to award her attorney fees.

Jayne and Jeff married in June 2003 and have one minor child together. At the time of the dissolution trial, Jayne was forty-four years of age and had worked as a CNA for approximately sixteen years with an annual income of \$20,802.00. Jeff was forty-eight years of age and working as a laborer, earning \$53,155.57 per year. Jeff enjoys good health while Jayne suffers from a number of medical problems.

In November 2008, Jeff filed a petition seeking dissolution of the marriage. Trial was held in August 2009. The parties stipulated to the value of their property prior to trial. Using these values, the court made an equal division of the marital property in its September 16, 2009 decree. The court declined to award Jayne spousal support, because her possible inability to work in five to ten years was too speculative and the duration of the marriage was too short. The court awarded Jayne \$1000.00 in attorney fees.

Jayne first contends the division of property was inequitable. Specifically, she seeks the marital home in its entirety, and an equal division of the IRA and a savings account containing their 2008 tax refund. She argues the equal division made in the decree is not warranted because Jeff dissipated marital assets between the time of filing and the date of the decree.

Partners to a marriage are entitled to a just and equitable share of the property accumulated during the marriage through their joint efforts. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). Iowa law does not require an equal division or percentage distribution, but rather merely requires us to determine what is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Our review of the property division is de novo. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001).

The decree recognized the pretrial stipulation of assets and liabilities and divided them equally after awarding Jayne \$56,000 for her interest in the home prior to the marriage. Jayne argues she should have been awarded all of the interest in the home. She also asks for the IRA and the 2008 tax refund to be divided equally. She bases her argument on a claim Jeff promised to give her the home, contributed less of his earnings to the family expenses, and dissipated marital assets by incurring debt following their separation.

Although Jeff may have told Jayne the house belonged to her, such statements are insufficient to create a valid antenuptial agreement as argued by Jayne. See Iowa Code § 596.4 (2007) (requiring such agreements to be in writing). Jeff's contributions during the marriage, both monetary and nonmonetary, make an award of half of the increase in the home's equity during the marriage equitable.

Dissipation of marital assets by a spouse prior to the dissolution of marriage may be generally considered when making a property division. *In re*

Marriage of Burgess, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997). The focus is not on whether a spouse is personally responsible for debt incurred by the other spouse, but whether the payment of the obligation “was a reasonable and expected aspect of the particular marriage.” *Id.* at 829. Some of the debt incurred by Jeff was necessary to replace household items he had when he entered the marriage and subsequently got rid of, while all of the items the parties owned during the marriage remained with Jayne. That debt does not amount to a dissipation of assets. Other debts, like one incurred in purchasing a \$4995 lawn tractor, were offset by the award of the asset and the debt to Jeff. On the whole, we find the property distribution to be equitable.

Jayne next contends she should be awarded spousal support. She cites the fact she has been diagnosed with fibromyalgia, depression, migraines, and a benign brain tumor, as well as their income disparity, as justifications for such an award. Jayne also notes Jeff was away working many hours as a laborer while she cared for their child.

Alimony is not an absolute right. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Instead, an award of alimony depends on the circumstances of each particular case. *Id.* When determining the appropriateness of alimony, the court must consider the length of marriage, the age and health of the parties, and the distribution of property. Iowa Code § 598.21A(1)(a)–(c). The court also considers “(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other.” *In re Marriage of Hettinga*, 574 N.W.2d 920, 922

(Iowa Ct. App. 1997) (citation omitted). We consider the economic provisions of the dissolution decree as a whole, taking into consideration both the property division and spousal support award in evaluating their individual sufficiency. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996).

We conclude spousal support is not warranted. Although Jayne has health concerns, she is still able to work thirty-six hours per week to earn a living. Her testimony regarding her future ability to work was speculative at best. While Jeff does earn more, a marriage of five years is not of such great duration that an award of spousal support is warranted.

Finally, Jayne contends the \$1000.00 in trial attorney fees she was awarded is inadequate where she incurred \$6806.00 in fees. She seeks an increase of \$2000.00 for a total award of \$3000.00 in her trial attorney fees.

An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Awards of attorney fees must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). Given the property division, which awards Jayne \$56,000.00 from the proceeds of the sale of the marital home, we conclude the district court did not abuse its discretion in awarding Jayne \$1000 in attorney fees.

AFFIRMED.