IN THE COURT OF APPEALS OF IOWA

No. 0-693 / 10-0674
Filed October 6, 2010

IN RE THE MARRIAGE OF SUE ELLEN RILEY AND CHARLES HAYDEN RILEY

Upon the Petition of

SUE ELLEN RILEY,
Petitioner-Appellee/Cross-Appellant,

And Concerning

CHARLES HAYDEN RILEY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Respondent appeals and petitioner cross-appeals from the district court ruling dissolving the parties' marriage. **AFFIRMED.**

William H. Habhab, Fort Dodge, for appellant.

Veronica Kirk, Iowa Legal Aid, Des Moines, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Charles Riley appeals from the March 22, 2010, decree dissolving his marriage to Sue Riley. Charles contends he should not have been required to pay his wife of twenty-two years alimony. Sue contends that the property division was not equitable. We affirm.

I. Scope of Review. This is an equitable proceeding, our review is de novo. Iowa R. App. P. 6.907 (2009). In such proceedings, we give weight to the district court's findings of fact, especially when considering the credibility of the witnesses. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). However, we are not bound by those findings. *Id.*

II. Background. Charles and Sue were married in November of 1989. They had three children, twin girls born in March of 1990, and a son born in September of 1992. The parties were awarded joint legal custody of their son and Sue was granted primary physical care. Charles was ordered to pay child support of $370 a month and in addition cash medical support of ninety-six dollars. The court found neither party could afford health care insurance for themselves or for their son and none was available from Charles's employer. The court divided the parties' property and debt and ordered Charles to pay Sue alimony of one dollar a month so long as he was obligated to pay child support. After the child support obligation expired, the court ordered the alimony increase to $300 a month payable for a term of four years but not to extend beyond June 1, 2015.

III. Alimony. Charles contends that he should not be required to pay Sue alimony. We disagree. Spousal support is provided for under Iowa Code section 598.21A (2009). Whether spousal support is justified is dependent on the facts of each case. *See In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Entitlement to spousal support is not an absolute right. *Id.* In assessing Charles's challenge to the alimony, we look at all the factors of section 598.21A(1) and applicable case law. *See In re Marriage of Francis*, 442 N.W.2d 59, 62-63 (Iowa 1989). The economic provisions of a dissolution decree are based on a number of factors, including the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed in the marriage. Iowa Code §§ 598.21(5)(a)-(f), 598.21A(1)(a)-(f); *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Mouw*, 561 N.W.2d 100, 102 (Iowa Ct. App. 1997).

Charles is forty-eight years old and in good health. Sue is fifty-four years old and suffers from certain health problems including depression and is on oxygen in the evening. Both parties are high school graduates. Charles is employed with KLR Pork and earns a gross monthly income of about $2000 a month. His adjusted net monthly income for purposes of calculating child support was determined to be $1521.91. Charles has earned more in prior years but he lost a job. KLR Pork is thirty-five miles from the Fort Dodge Correctional Facility where Charles resided at the time of trial following a guilty plea to incest. Sue has been employed but contends that her depression and other health problems

prevent her from taking another job. She has applied for but has not received Social Security disability. The award of alimony is justified under this record and we affirm on this issue.

IV. Property Division. Sue on cross-appeal contends the property division is not equitable and she should have received a 401K which the district court allocated to Charles.

Iowa is an equitable division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.*; *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988); *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *Russell*, 473 N.W.2d at 246. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(5). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not demanded. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007).

The parties agreed to the division of certain property. In addition it was agreed that Sue receive the parties' homestead, at least temporarily. The home was appraised at $23,000 and is subject to a mortgage of $18,000. Apparently, the city of Fort Dodge holds the mortgage and it does not have to be paid unless

the property is sold. Additionally, Sue can live there without making principal and interest payments on the mortgage.

Charles had requested the home be sold or refinanced in one or two years so he could receive one-half of the equity. The district court denied the request noting the court would be forced to elevate Charles's obligation if the house were sold to maintain an equitable division.

The 401K plan Sue wants allocated to her had a value of $3477.04 as of July 12, 2009, but was encumbered with a loan of $2241.86, leaving a value of $1235.18. The court provided Charles could keep the plan but required him to pay what the court considered most of the debts of the parties in the amount of $741.

Sue contends the account was not properly valued because at the time of the parties' separation it was about $3900 and was encumbered in the amount of $2000, leaving a value of $1900. Charles testified without specifics that the loan he took after separation was to pay bills and may have included a $1000 retainer he gave his attorney. Sue contends that this debt should be charged only to Charles. She cites *In re Marriage of Fennelly*, 737 N.W.2d 97, 106 (Iowa 2007), as support for her position. In *Fennelly*, the court addressed the allocation of debt acquired by the husband after the parties separated. *Fennelly*, 737 N.W.2d at 105. The court found the amount unreasonable because the husband failed to adequately explain it. *Id.* at 106. The court went on to find it equitable to set aside a certain amount of debt to the husband which was not to be included in the distribution of the parties' assets and debts. *Id.*

The distribution here was equitable even if Charles failed to explain how the money received from the plan was spent. The balance left in the account is $1235.18 which Sue asks go to her. Charles was ordered to pay $741 in debt plus $500 towards Sue's attorney fees. Sue has received all the equity in the home. She is receiving alimony. We cannot say the district court did not do equity and we affirm the property division.

We award no appellate attorney fees. Costs on appeal are taxed to Charles.

AFFIRMED ON APPEAL AND CROSS APPEAL.