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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FRANCES M. JONES,

Petitioner-Appellee,

vs.

PAUL C. JONES,

Respondent-Appellant.

Filed March 24, 1981

0-350
2-64060

Appeal from Des Moines District Court - David B. Hendrickson, Judge.

Respondent-husband appeals and petitioner-wife cross-appeals from the parties' dissolution decree. Respondent alleges that trial court improperly considered evidence of fault and that trial court's award of alimony and attorney fees is excessive. On cross-appeal, petitioner asserts that all evidence of fault should have been admissible to show respondent's failure to live up to his marital vows and that respondent's conduct constituted a failure of consideration for an antenuptial agreement of the parties. AFFIRMED WITH MODIFICATION ON APPEAL; CROSS-APPEAL DISMISSED.

Alan N. Waples of Wittkamp & Waples, Burlington, Iowa, for respondent-appellant.

Carl A. Saunders of Fort Madison, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent-husband, Paul C. Jones, appeals and petitioner-wife, Frances M. Jones, cross-appeals from the parties' dissolution decree. Respondent contends that trial court improperly considered evidence of "fault" and that trial court's award of alimony and attorney fees is excessive. Petitioner asserts on cross-appeal that all testimony relating to "fault" should have been admitted to show failure of respondent's consideration for the parties' antenuptial agreement, thereby voiding the agreement. She also seeks additional attorney fees on appeal. We affirm trial court's decree with modification on respondent's appeal; petitioner's cross-appeal is dismissed.

The parties were married January 18, 1975. Their four-year marriage was dissolved by decree filed July 2, 1979. No children were born to or adopted by the parties, although respondent had two sons from a prior marriage who lived with respondent's former spouse. At the time of the dissolution, petitioner was 40 years old and unemployed. Prior to the marriage she had been employed as the financial secretary for her church for approximately sixteen and one-half years, earning about $5,000 per year. Petitioner brought assets of approximately $1,700 to the marriage. Just prior to the marriage, the parties executed an antenuptial agreement relinquishing any interest in each other's property. Respondent, age 52, had a college degree in general engineering. During the parties' marriage, he inherited from his mother's estate assets valued at $3,185,821.76 at the time of trial, upon which approximately $400,000 estate tax was owed. One-half of the assets were directly received by respondent; the other one-half was held in trust for respondent's sons, with respondent receiving the income for life after payment of up to one-half the income for the sons' expenses. Respondent's annual earnings averaged $30,600. The parties lived in the home of respondent's mother (valued at trial at $39,000); most of the furnishings had belonged to respondent's parents. Respondent raced automobiles, both as a hobby and for a business. Until 1978, the parties managed the properties respondent inherited from his mother; following respondent's hospitalization for psychiatric care in 1978, a conservator was named to manage the properties.

Trial court, in finding that the antenuptial agreement did not prohibit an award of alimony, awarded petitioner lump sum alimony of $200,000. She also was awarded a 1966 Corvette; her personal affects; all wedding gifts, kitchen utensils, dishes, games and puzzles in her possession; a hall tree; her hat collection; and her engagement ring. Respondent received all other items of real and personal property, including furniture and his mother's jewelry. Respondent was ordered to pay $5,500 toward petitioner's attorney fees. The parties' separate appeals followed.

I. Scope of Review. Our review of dissolution proceedings is **de novo**. Iowa R. App. P. 4. We review the facts as well as the law and from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. "Fault" Testimony. Respondent claims trial court erred in considering for any purpose testimony relating to "fault." Petitioner argues that the evidence was offered to show that respondent had violated his marital vows, thereby resulting in a failure of consideration for the antenuptial agreement.

Initially, we recite the principle that fault is no longer a factor to be weighed in dissolution proceedings. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). Although trial court did admit evidence relating to fault, it made no orders in the decree based upon this testimony. Further, in our **de novo** review, we do not consider fault testimony for any purpose. See, Id. We conclude no error occurred on this issue.

III. Alimony Award. Respondent contends that the award of $200,000 lump sum alimony was excessive. Applying the criteria of Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault, Williams, 199 N.W.2d at 345, we agree.

The right to receive alimony is not absolute but depends instead on the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). We weigh the needs of petitioner, in this case, against the respondent's resources and ability to pay. In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975). At the time of the decree, petitioner, age 40, was unemployed; she had one year of college-level business education and had worked many years as a financial secretary for her church. She had no income except for $1,000 per month from the conservatorship. During the marriage, petitioner, upon respondent's demand, did not work outside the home. She testified to doing the bookkeeping for all of the inherited properties, to mowing the lawns of the city properties, and to making sure that respondent fulfilled his responsibilities as executor of his mother's estate. Respondent, on the other hand, appears to have experienced emotional problems necessitating hospitalization at various times throughout the parties' marriage. While his earnings from the farming operation on the inherited properties and from his racing varied, due to his emotional problems, respondent was apparently unable to directly assume responsibility for his earnings during a considerable period of the parties' marriage. Petitioner did carry much responsibility for keeping the assets intact. However, these assets were all respondent's

by inheritance. Further, the four-year marriage was of relatively short duration. In view of these facts, we find the alimony award to petitioner is excessive. We conclude as a more appropriate award that respondent shall pay to petitioner the sum of $20,000 payable within ninety days of issuance of procedendo and $600 per month alimony for one year. We modify the decree accordingly.

IV. Attorney Fees.

A. At Trial. Respondent next contends that the $5,500 award of attorney fees was excessive. We disagree.

Attorney fees are not recoverable as a matter of right, but depend on one party's financial needs and the other party's ability to pay. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979); Locke v. Locke, 263 N.W.2d 694, 695-96 (Iowa 1978). Trial court has considerable discretion in awarding attorney fees. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Respondent testified that her attorney fees would be between $5,000 and $6,000 and that her attorney's hourly rate was $50. Numerous difficulties due to respondent's uncooperativeness were experienced throughout the dissolution proceedings. Based on the record, trial court reasonably could find that petitioner did not have adequate resources to pay her own attorney. We therefore find no abuse of trial court's discretion in requiring respondent to pay $5,500 toward petitioner's attorney fees.

B. On Appeal. Petitioner requests an award of attorney fees for this appeal. Such an award is not allowed as a matter of right; any award must depend upon the financial circumstances and earnings of both parties. Burham, 283 N.W.2d at 278. After reviewing the entire financial situation of both parties, however, we find an award of attorney fees on appeal is warranted for petitioner. We conclude, without setting the amount petitioner's attorney may charge, that respondent shall pay $1,200 toward these fees for this appeal.

V. The Cross-Appeal. We do not consider the issues raised in petitioner's cross-appeal. Her notice of cross-appeal was filed more than thirty days after judgment entry and more than five days after the filing of respondent's notice of appeal. The cross-appeal is dismissed as untimely.

All other provisions of trial court's decree not modified by this opinion are affirmed. Costs of this appeal are assessed against respondent.

AFFIRMED AS MODIFIED ON RESPONDENT'S APPEAL; PETITIONER'S CROSS-APPEAL IS DISMISSED.