FILED
JUL 30 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHRYN JONS ROELFSEMA AND ROBERT W. ROELFSEMA

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Upon the Petition of)

KATHRYN JONS ROELFSEMA,)

Petitioner-Appellant/ Cross-Appellee,) Filed July 30, 1987

And Concerning)

ROBERT W. ROELFSEMA,) 6-449 / 86-499

Respondent-Appellee/ Cross-Appellant.)

Appeal from the Iowa District Court for Hardin County (No. DM-4-148), Milton D. Seiser, Judge.

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED.**

Gordon D. Greta and Carol J. Greta of Greta & Greta, Eldora, for appellant.

Jack A. Hall of Wilson, Hall, Wilson & Craig, Eldora, for appellee.

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

DONIELSON, P.J.

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner wife asserts (1) that the trial court should have found her testimony more credible than respondent husband's, (2) that the trial court should not have given respondent husband a lien against the house it awarded to her, (3) that the trial court should not have made her responsible for all of the parties' debts, and (4) that the trial court should have awarded her rather than respondent husband certain items of personal property. On cross-appeal, respondent husband asserts that the trial court should have given him either a larger lien on the house petitioner wife was awarded or a cash settlement from petitioner wife. We affirm.

Petitioner Kathryn Jons Roelfsema and respondent Robert W. Roelfsema were married in 1954. They were divorced in 1956, and they remarried in 1957. They were divorced again in 1977, and they remarried again in 1978. The parties have three children, all of whom are now grown. Kathryn is a schoolteacher and supplements her income by distributing Amway products. Robert was personnel director at the Iowa State Training School for Boys until 1978, at which time he was discharged. Robert presently has established a business of tuning and repairing pianos and has twice been elected mayor of Steamboat Rock, Iowa.

In its dissolution decree, the trial court awarded Kathryn most of the parties' personal property; her $15,000 IPERS account; the parties' lots; and the marital home, subject to a $10,000 lien in favor of Robert, payable within two years at eight percent interest. In addition to the lien, the trial court awarded to Robert the parties' Couristan rugs, oak veneer table, walnut dresser, and canoe. Robert was additionally awarded bicentennial prints and framed

parchments. The trial court directed Kathryn to pay all of the parties' debts of $6,821. Both parties have appealed from the dissolution decree.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties in this case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Kathryn initially argues that the trial court erred in assessing more credibility to Robert's testimony than to hers. We find no merit in such argument.

In In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984), the Iowa Supreme Court recognized that it is important to pay close attention to the trial court's assessment of the credibility of witnesses. The court noted that "[a] trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" 359 N.W.2d at 423, citing In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974). In contrast, an appellate court must rely solely on the printed record and is denied the ability to discern the demeanor of the various witnesses who have testified at trial. Id. at 423.

Upon review of the record in the present case, we find no error in the trial court's assessment of credibility in the present case. Contrary to Kathryn's argument on appeal, the trial court's findings actually favor Kathryn in several key respects. The trial court adopted Kathryn's $45,000 valuation of the marital home when fashioning the property division, and the valuations on the personal property were mostly favorable to Kathryn. We further find no evidence that the trial court implicitly based its decision on "fault." The trial court's findings

of fact and conclusions of law were based upon the questions presented by Kathryn at trial. We find no error here.

Kathryn argues that the trial court should not have given respondent husband a lien against the marital home which was awarded to her. In support of her argument that Robert should not have been awarded a lien on the home, Kathryn relies on a two-pronged argument. Kathryn first argues that the conveyance of the house in 1978 to Robert and herself after the parties' third marriage was fraudulently induced by Robert's false promise to quit drinking and get counseling. Kathryn argues in the alternative that had it not been for Kathryn's financial efforts, the house would now be in foreclosure and that therefore Robert should be allowed no interest therein. We disagree.

Concerning Kathryn's argument regarding fraud, Kathryn has the burden of proving each element of fraud by a preponderance of clear, satisfactory, and convincing evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984). The following elements of fraud must therefore be proven pursuant to the above standard: (1) a material misrepresentation, (2) made knowingly (scienter), (3) with intent to induce the plaintiff to act or refrain from acting, (4) upon which the plaintiff justifiably relies, (5) with damages. Id. Fraud cannot be predicated upon failure to perform a promise or stated intention to do something in the future, unless the statement is made with an existing intent not to perform. Kunz v. Bock, 163 N.W.2d 442, 448 (Iowa 1968). Fraudulent intent may not be inferred merely from the fact of nonperformance. Id. In order to prove the "falsity" element of fraud, it is necessary to establish that the representation was false at the time it was relied upon. Hagarty v. Dysart-Geneseo Community School District, 282 N.W.2d 92, 95 (Iowa 1979).

We do not believe that in the present case Kathryn has met her burden of proof in showing that she was fraudulently induced to reconvey one-half

of the interest in the home to Robert. The joint tenancy deed was executed by Kathryn to Robert and herself after the parties' remarriage in 1978. Kathryn testified at trial that she agreed to execute the joint tenancy deed in order to remain eligible for Robert's veteran's exemption and also stated that she executed the deed because the parties had gotten back together.

The record additionally reveals that Robert promised Kathryn that he would quit drinking and would become more active in church activities. Robert testified that he would go for a year without drinking and then on a golf course on a Wednesday afternoon at men's league would have several beers. Robert also testified he became relatively active in Kathryn's church for three or four years and occasionally sang in the choir and played the piano.

From these facts, we find no evidence in the record that Robert intended to fraudulently misrepresent his true intentions to Kathryn. While it appears that Robert's promises played a role in Kathryn's decision to convey the joint tenancy deed, we do not believe it was the sole reason. Kathryn herself best expressed her emotions at the time of the parties' reconciliation in 1978:

> Q. How did the reconciliation come about in 1978? A. During that time Bob more or less kept in contact with me and I think I still wanted a reconciliation. I have seen people with similar problems totally turn their lives around and I know what a capable individual Bob is and I think I still held out the hope that things would be better. And I do believe in marriage. Divorce is a last resort sort of thing.

We further disagree with Kathryn's contention that Robert should not be awarded a $10,000 lien on the marital home because Kathryn has provided most of the family's income since 1978. The record reveals that from 1954 to 1971 Robert contributed approximately 60% of the family income. From 1972 to 1977, Robert contributed slightly more than 50% of the family income. From 1978 to 1985, Kathryn's calculations estimate that Robert contributed approximately 21.8% of the family income. Robert estimates his contribution

as being somewhat higher, but offered no documentation to substantiate this claim. Nonetheless, it is clear from the record that at the time the parties acquired the home in 1971, Robert was contributing between 50 and 60% of the family income and undoubtedly contributed significantly towards payment of the mortgage on the home. Robert should therefore not be deprived of an interest in the marital home, especially since Robert and Kathryn were married for approximately twenty-seven of the last thirty years.

We additionally note that even though Robert's contributions to the marital income dropped sharply after his dismissal from the Iowa State Training School for Boys, the record reveals that Robert greatly contributed towards the cleaning of the home and the grooming and maintenance of the large lots accompanying the home. Though Kathryn strongly emphasizes her financial contributions since the parties' third marriage, we note that the law does not contemplate a division of property on a price-per-hour basis as though the marriage is a business venture. Zinger v. Zinger, 243 N.W.2d 639, 641 (Iowa 1976). "Husband and wife need not, during happy days, keep a ledger to prove his or her economic value should the marriage later founder." In re Marriage of Briggs, 225 N.W.2d 911, 913 (Iowa 1975). We therefore hold that the trial court was correct in awarding Robert a $10,000 lien against the marital home, payable in two years at an interest rate of 8%.

Kathryn next contends that the trial court erred by ordering her to pay debts of $6,821. Kathryn argues that because the trial court awarded Robert a lien against the family home, she should not be held responsible for debts she alleges to have been incurred by both parties.

The trial court in the present case adopted Kathryn's $45,000 valuation of the marital home, though the most recent offer on the home was approximately $25,000. The trial court also found that a mortgage of $17,000 remained against

the home, thus leaving equity of $28,000, or $14,000 divided equally. The trial court then ordered Kathryn to pay the parties' debts listed and assume the mortgage on the home. By thus doing so, the trial court found an equity of $20,000 remaining in the home, which was to be divided equally. The trial court additionally ordered Robert to pay the balance owing to the parties' son, which was estimated at approximately $250, miscellaneous bills of $120, and $1,000 borrowed from his mother.

At the time of trial Kathryn's income was approximately $1,800 per month, while Robert's income was approximately $600. Though neither party is well off financially, Kathryn had a superior financial ability to pay the parties' debts and was therefore ordered by the trial court to do so. Dividing the parties' debts equally, the total amount which would have been assessed to each party would be approximately $3,410. It is thus apparent from the trial court's decree that Kathryn should be compensated for assuming the bulk of the parties' debt which were largely accrued by Kathryn, by reducing Robert's share of the remaining net interest in the family home. We find this to be just and equitable under the circumstances, and we therefore hold that the trial court did not err in ordering Kathryn to pay debts of $6,281.

Kathryn lastly contends the trial court erred by awarding certain items of personal property to Robert. Robert requested two items of the parties' personal property: (1) reproductions of three Russell bicentennial prints and (2) framed parchments. The trial court additionally awarded Robert the parties' Couristan rugs, an oak veneer table, a walnut dresser, and canoe. Kathryn argues that she should be awarded all these items because she requested the trial court to award them to her and specifically requests the Russell prints because they are now used in the home to cover holes in the wall.

We find no merit in such argument. Kathryn has set forth no argument favorable to her position other than the fact that she wants the items awarded to Robert. The property division in the present case was approximately equal. Kathryn was not obligated to pay Robert any money in connection with these items of personal property. We find the trial court's award of these items of personal property to Robert to be just and equitable under the circumstances, and we therefore affirm the trial court's award of the disputed personal property to Robert.

Robert, on cross-appeal, argues that the trial court erred in not awarding him a greater share of the marital residence or, in the alternative, should have awarded him a cash payment from Kathryn. We disagree. While Kathryn undoubtedly has a superior financial situation, Kathryn, under the terms of the decree, must assume the debts and mortgage on the marital home. Kathryn is also providing financial assistance to the parties' children who are currently attending college. Under the decree, Kathryn was ordered to assume $6,821 of the parties' debts, a portion of which Robert acknowledges is his. Considering Kathryn's significant financial responsibilities, we believe it would be inequitable to require Kathryn to pay Robert a cash settlement or increase Robert's interest in the marital home. Additionally, we note that while Kathryn has approximately $15,000 in her IPERS account, such funds would not be available to Kathryn until such time as she either leaves her employment as a school teacher or otherwise retires. We therefore reject Robert's argument that he should have been granted a greater interest in the family home or should have been awarded cash from Kathryn.

AFFIRMED.