

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EILEEN MARIE SMITH and PHILLIP JOSEPH SMITH

Upon the Petition of	)	
EILEEN MARIE SMITH,	)	Filed January 28, 1977
Appellee,	)	
And Concerning	)	<u>11</u>
PHILLIP JOSEPH SMITH,	)	2-57829
Appellant.	)	

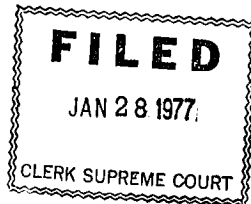
Appeal from Buchanan District Court - Karl Kenline, Judge

Appeal from economic provisions of marriage dissolution
decree. Modified, affirmed, and remanded.

Robert L. Rausch, of Waterloo, for appellant.

Kenneth W. Martinson, of Independence, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.



ALLBEE, C.J.

Philip and Eileen Smith were married in Independence, Iowa on August 29, 1964 and ten years later, on September 18, 1974, were granted a dissolution of their marriage. From this decree... Philip appeals trial court's division of their marital assets and the award of \$50 per week child support.

The Parties

At the time of the decree, Philip was a 33 year old laborer at the John Deere Waterloo Tractor Works. Philip had a drinking problem which apparently became the root of the parties' marital strife. In the past Philip also had psychiatric problems, which in 1973 necessitated his hospitalization for eight weeks. Two weeks prior to the dissolution hearing, he was hospitalized three days for stomach trouble. Eileen, 35 years old, owned and operated a beauty salon in Independence. A child, Michelle, was adopted by the couple in 1969. Eileen was given custody of Michelle, then age four, by agreement of Philip. Both Eileen and Michelle enjoyed normal health.

Assets of the Parties

The couple's major assets were their two-bedroom home, household effects, a 1972 Chevrolet automobile, and a 1965 Rambler stationwagon. The home was purchased by contract in 1967 for a price of \$11,500. There remained to be paid a contract balance in excess of \$7000. At the dissolution hearing one expert witness stated the appraised value of the home to be \$12,500 and another fixed it at \$16,000. There was evidence that the house was in need of repainting and roof repairs, that the furnace soon would need to be replaced, and that water leaked into the basement. An appraiser valued the household effects at \$1750, the automobile at \$2600, and the stationwagon at \$100.

About \$1400 remained to be paid on the automobile.

Philip's Financial Situation

The record discloses that at the time of the decree Philip's hourly wage was \$5.42, which yielded him gross weekly earnings of almost \$220. But, according to Philip, after withholdings for federal and state income and social security taxes, John Deere Credit Union deductions, and union dues, he was left with a weekly net of \$119. Of the credit union deduction, \$22 was applied to a note which had a balance of \$2000, and \$20 was credited to savings. He testified, however, that the credit union savings account balance was only \$25. Philip's monthly living expenses, not including payroll deductions and without allowance for clothing, averaged nearly \$450. His estimates of monthly expenses were: \$170 rent; \$40 utilities; \$91.56 payment on the 1972 Chevrolet automobile; \$80 food; \$20-22 automobile insurance; \$40 automobile expense. He owed \$150 to a marriage counselor. In addition, at the time of hearing Philip was \$2400 in arrears for unpaid \$75 weekly temporary support payments and also for \$100 temporary fees for Eileen's attorney, both awarded by order of January 31, 1974. A \$2000 savings certificate acquired by the parties with proceeds of an inheritance from Philip's father was spent by Philip for living expenses during their separation. Philip had possession of the automobile. John Deere provided him health insurance coverage and some life insurance protection.

Eileen's Financial Situation

Eileen's beauty salon produced taxable income of \$5279 in 1973 and she expected her 1974 net income to be over \$6000. At the time of the decree she and Michelle occupied the home and had the stationwagon. House payments, which she made, were \$95

a month. Annual taxes on the home were \$304 and homeowner's insurance cost approximately \$200 per year. Eileen's monthly living expenses, in addition to house payments, included: \$40 utilities; \$8 telephone; \$100 food; \$25-30 automobile gas. Clothing expense varied, but she estimated it averaged \$50 a month for her and Michelle. Income and social security taxes were reported as \$64 a month in her financial statement. Baby-sitting expense was around \$800 a year. She had used up a \$500 savings account for living expenses. Eileen's prior medical insurance coverage by John Deere needed to be replaced; she testified the yearly cost of medical insurance would be \$200 to \$300. The expenses of Eileen and Michelle averaged in excess of \$500 per month. Of their expenses, Eileen attributed \$200 to \$250 a month to the support of Michelle.

Trial Court's Decree

The decree from which this appeal is taken ordered Philip to pay \$50 per week for Michelle's support and to maintain health and accident coverage for her as long as available through his employer. The decree also ordered Philip to pay the monthly contract installments on the home, the property taxes, and maintain the insurance. It awarded Eileen the right to occupy the home until Michelle is age 18, or becomes emancipated, at which time the property is to be sold and the net proceeds divided equally between the parties. Eileen was given the household goods and the stationwagon; Philip the automobile. Philip also was ordered to pay all liabilities incurred by the parties during their marriage, court costs, and an additional \$150 towards Eileen's attorney fees.

Discussion

Our review is de novo; the principles of law to be applied

are well established.

Both Philip and Eileen have a duty to support Michelle, not necessarily in equal shares, but rather, according to their ability to provide. McDonald v. McDonald, 183 N.W.2d 186, 189 (Iowa 1971). Fairly apportioning the share each shall bear is difficult. Precedents are of limited value as no two cases are alike. Factors that may be considered are succinctly set forth in In re Marriage of Zoellner, 219 N.W.2d 517 at 525 (Iowa 1974); nevertheless, the child support liability to be borne by each party in this case depends solely upon the peculiar facts disclosed by the record before us.

Eileen estimated her average monthly cost for the support of Michelle to be between \$200 and \$250. Thus the decree which ordered Philip to pay \$50 per week child support imposed upon him nearly the entire cost of Michelle's support, a burden we conclude to be excessive.

We also find trial court's property division inequitable. Although the record is not entirely clear, it appears the assets of the parties were accumulated as the result of their joint efforts. Criteria for determining alimony and property division are set out in the now familiar Schantz v. Schantz, 163 N.W.2d 389, 405 (Iowa 1969), modified by In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

To award Eileen the right to occupy the home until Michelle is 18 and require Philip to make the house payments, pay the property taxes, and maintain insurance on the home, in addition to payment of substantial child support, is inequitable, particularly on considering the parties' respective earning capacities and Philip's past health problems, both physical and emotional. Not only does the financial burden mandated by the decree exceed Philip's ability to pay, it may well serve to destroy his in-

centive to attempt to meet any of the obligations imposed:
Yansky v. Yansky, 172 N.W.2d 114, 117-118 (Iowa 1969).

Based on our evaluation of the record, we conclude Philip's child support liability should be reduced to \$40 per week. We find Eileen should be awarded title to the home and the equity equally divided between the parties. We further find Eileen should be awarded alimony in the sum of \$20 per week until she remarries or dies. Giving credence to both expert witnesses who testified as to the value of the home, and taking into account the approximate contract balance, we find an equity in the home of \$6500 at the time of the decree. Philip's equity of \$3250 should be applied to set off liability he may have for unpaid temporary support, child support or alimony.

Philip in his brief also complains of the award of \$75 per week temporary support made by order of January 31, 1974. He failed to make any of the payments required by the order and at the time of the decree he was \$2400 in arrears. Philip only asserts the temporary support allowance was excessive and unreasonable. However, no appeal was taken from the order of January 31, 1974, and having failed to do so, he has waived his right to appellate review on the grounds now urged. In re Marriage of Prybil, 230 N.W.2d 487 (Iowa 1975).¹

1 The order of January 31, 1974 was founded upon an application of Eileen for temporary support and attorney fees filed January 24, 1974. The record, however, does not disclose to us that five days' notice of hearing on the application, with opportunity to be heard, was given as required by §598.11, The Code. But Philip has neither moved to vacate the judgment order nor, as before stated, has he appealed from it and, consequently, we are without jurisdiction to review the propriety of the order. Philip's notice of appeal, filed October 18, 1974, was from the final judgment and decree entered September 19, 1974.

Modifications of Decree

It is now ordered that Philip Joseph Smith shall pay as support for Michelle, the minor child of the parties, the sum of \$40 per week until she reaches the age of 18, marries, or becomes emancipated, and he shall pay as alimony to Eileen the sum of \$20 per week until she remarries or dies.

It is further ordered that title to the parties' home, legally described as:

The north half of Lots 1 and 2, Block 8,
Fargos Second Addition to Independence,
Buchanan County, Iowa;

shall be vested in Eileen Marie Smith and Philip shall have no liability for payment of monthly installments on the real estate contract for the home, or for property taxes, or for maintenance of insurance on the home, and Eileen shall save Philip harmless from such liability. Philip shall execute instruments necessary to convey sole ownership to Eileen.

It is further ordered that the equity of \$6500 in the home hereby is equally divided between the parties, and Philip's equity of \$3250 applied to set off liability he may have for unpaid temporary support, unpaid child support or unpaid alimony.

Except as modified herein the decree entered by trial court is affirmed.

Eileen requests an allowance of fees for her attorney's services related to this appeal.² Attorney fees are not allowed as a matter of right and any such award must depend upon the financial circumstances and earnings of both parties. In re

² Additional brief filed December 27, 1976 by Eileen's attorney is not responsive to and does not conform with our notice of December 10, 1976 permitting supplemental citation of case authority decided since filing of briefs, without additional written argument.

Marriage of Peterson, 227 N.W.2d 139, 142* (Iowa 1975)

We find Philip should pay an additional \$250 toward Eileen's attorney fees and that he shall do so through the Buchanan County Clerk's office within three months after issuance of procedendo. By this finding we do not fix the amount to be charged by Eileen's attorney, we only have decided what portion should be paid by Philip. In re Marriage of Peterson, supra at 143.

This case hereby is remanded for entry of decree in accord herewith.

Costs on appeal are taxed equally to the parties.