

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1983

CLERK SUPREME COURT

IN RE THE MARRIAGE OF GENE E. SEWELL AND JANICE K. SEWELL

Upon the Petition of)

00149

GENE E. SEWELL,)

Filed January 26, 1983

Petitioner-Appellant-)
Cross-Appellee,)

And Concerning)

JANICE K. SEWELL,)

2-379

2-67816

Respondent-Appellee-)
Cross-Appellant.)

Appeal from Polk District Court - Van Wifvat, Judge.

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

Richard J Howes of Dickinson, Throckmorton, Parker, Mannheimer & Raife,
Des Moines, Iowa, for petitioner-appellant.

Michael J Galligan of James & Galligan, Des Moines, Iowa, for respondent-
appellee.

Considered en banc.

SCHLEGEL, J.

Petitioner-husband appeals and respondent-wife cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner-husband asserts that the trial court should not have awarded respondent-wife alimony, in view of the amount of property she received; that the trial court's allocation of debts between the parties was inequitable; and that the trial court should not have imposed a lien on the house petitioner-husband received. On cross-appeal, respondent-wife asserts the trial court should not have ordered her to surrender her interest in another house to petitioner's mother. She also requests attorney fees on appeal.

Our review of this equitable proceeding is **de novo**. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give them weight especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974).

I.

Petitioner, Gene E. Sewell, and respondent, Janice K. Sewell, were married in 1955. They have four children, two of which, to wit: Stacy Chester Sewell, born September 3, 1967, and Sheryl C. Sewell, born August 20, 1969, are minors. The two older children: Daniel Sewell, born June 7, 1959, and Brian Sewell, born February 16, 1962, are also affected by this action.

While Gene does not challenge the division of property as such, he contends that the court should not have awarded alimony to Janice, in view of the disproportionate division of real property. The court properly found that the amounts brought into the marriage by both parties had been used for the benefit of the marriage and family, and that neither party was entitled to have any contributions or inheritances set off to him or her. See Iowa Code § 598.21(2).

Gene complains about the trial court's allocation of the debts of the parties. As presented by Gene, when the debts to be paid by him are set off against the property awarded to him, the court has awarded him no more than twenty-eight percent of the parties' property, while Janice was awarded seventy-two percent. Gene asserts that such a result is inequitable. We agree.

Our analysis is governed by Iowa Code § 598.21 (1979), as amended by 1980 Iowa Acts ch. 1175, which codified many aspects of our prior case law. See Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) (modified to exclude fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972)). Section 598.21 provides that, upon every dissolution of marriage:

1. . . . The court shall divide all property, except inherited property or gifts received by one party, equitably between the parties after considering the following:

- a. The length of the marriage.
- b. The property brought into the marriage by each party.
- c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- d. The age and physical and emotional health of the parties.
- e. The contribution by one party to the education, training or increased earning power of the other.
- f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- g. The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children.

h. The amount and duration of an order granting support payments to either party pursuant to subsection 2 and whether the property division should be in lieu of such payments.

i. Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

* * *

m. Other factors the court may determine to be relevant in an individual case.

Thus, the ultimate question is, as it has always been, whether the distribution of property was equitable. We reject any rule based on a percentage division of the assets and must determine what is equitable under the specific facts of this case. In re Marriage of Callenius, 309 N.W.2d 511, 514 (Iowa 1981). When asked to review an individual economic provision of a dissolution decree, we consider all the provisions together as an integrated whole. In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976). In this case, therefore, it is necessary that we consider the court's allocation of the debts of the parties as a part of the integrated whole of the distribution by the court.

The court awarded the homestead to Janice. From the record in the case, and in view of the testimony of Gene that she should have the house, the award of it to Janice was proper. The court found that the homestead had a value of \$70,000, less incumbrances in the amount of \$8,440 as the balance due on the mortgage debt; an installment home improvement loan with a balance due in the amount of \$6,072.69; and two promissory notes for home improvement loans, each in the amount of \$2,000, at 9-1/4% interest, payable semi-annually. The trial court ordered Gene to pay the monthly payments on the mortgage on the homestead, in the amount of \$200, and such further amount as was required to pay the taxes and insurance. The court also directed that Gene pay the home improvement loans, requiring the payment of a monthly installment of \$153, and the discharge of the two notes in the total amount of \$4,000, plus interest.

In addition, the court ordered Gene to pay family debts totalling \$8,921.23, while ordering Janice to pay debts incurred by her after separation, in the amount of \$370. From a net worth of approximately \$110,500, the court awarded Janice a net amount of \$74,630, while awarding to Gene a house worth \$40,000, encumbered by a lien in favor of Janice in the amount of at least \$20,000 to assure the payment of the indebtedness on the homestead, subject to other indebtedness in the amount of \$27,393. He was also awarded his two automobiles as well as his interest in a retirement plan maintained by his union. The net amount awarded to Gene subject to the lien in favor of Janice is approximately \$26,000. Such a result is manifestly inequitable.

An examination of the monthly obligations imposed upon Gene by the court demonstrates the impossibility of adherence to the court's order. Under the record in this case, Gene is required to make the monthly mortgage payment in the amount of approximately \$200, which includes an amount paid on account of real estate taxes. In addition, he is charged with the payment of the insurance on the homestead. The court ordered him to pay the monthly installment on the home improvement loan, in the amount of \$153, and to pay the two notes. Although it is not specifically spelled out in the record or the court's findings, Gene will be required to pay the interest on those notes at the current rate, as of the date of the decree, of 9-1/4%, or the sum of nearly \$31 per month. The court's decree requires Gene to pay child support for two children at the rate of \$60 per week per child. This amounts to \$520 per month. In addition, Gene is ordered to pay \$30 per week per child for the two children that are in college. This creates an obligation of \$260 per month. Additionally, the court ordered Gene to pay alimony to Janice in the amount of \$200 per month until she reaches the age of sixty-two, remarries or dies, whichever first occurs. Although Gene is awarded the rental property, we find that the amount of the rents and profits from the property will be used for the higher education of the child. The record indicates

that the net rental on the house awarded to Gene amounts to approximately \$2,400 per year, indicating that there is approximately \$200 per month for the children's education from that source.

It is without dispute in the record that Gene's net income from his employment as an electrician averages \$1,630 per month. Under the order of the court, he would have an additional \$200 per month income from the rental property. The court found that from his income, he could pay the foregoing amounts, which total at least \$1,564 per month. From an average income of \$1,830 per month, he would have a balance of \$266 with which to support himself, and to pay the various debts that he must pay. From the evidence, Gene hopes to pay approximately \$198 per month on the miscellaneous debts the court has ordered him to assume and pay, and from which he must hold Janice harmless. Gene's ability to perform in the manner directed by the court is not supported by any evidence in the record. The course the court has set out for Gene is impossible of fulfillment.

The court found that the disproportionate distribution of property was necessary to assure Janice of some security for the future both of herself and the minor children, while at the same time to compensate her somewhat for her lack of earning capacity. The court also dwelt, at some length in its findings, upon the fact that Janice was required to put up with numerous improprieties by Gene. His drunkenness, prior to his achieving sobriety, and his improper relationships with other women assumed some importance in the court's findings. It is not apparent that such activities entered into the court's provisions for Janice, but it should be made clear that such conduct, to the extent it is considered as fault, cannot be considered in the division of property or the allocation of the debts of the parties.

In re Marriage of Williams, supra.

The decree entered herein is modified in the manner set out herein:

- 1) Janice shall be awarded the homestead of the parties, which is set off to

her in the decree of the court. In addition, she shall be awarded the household furnishings and appliances that were set off to her as a part of the decree heretofore entered herein.

2) Gene shall be awarded the house located at 3215 Wright Street, which was awarded to him by the court. Such house, however, shall not be subject to the lien in favor of Janice, ordered by the court. In addition, Gene shall be awarded the personal property that was awarded to him in the court's decree, including the two automobiles. He shall also be awarded the vested interest in his pension plan.

3) Janice shall pay, and hold Gene harmless from, the mortgage indebtedness on the homestead of the parties, including the taxes and insurance thereon, and Gene shall have no responsibility for the payment of those items.

4) Gene shall pay the installment home improvement loan owed to the Central National Bank, and shall pay and discharge that loan in full; the two promissory note loans owed to the same bank, in full, and shall hold Janice harmless from said obligations. Gene shall also pay the taxes upon the house at 3215 Wright Street, and in addition, shall pay the Visa account in the approximate amount of \$1,005; Master Charge, \$767; Dr. Miller, D.D.S., \$124; Sears, \$178; Amoco, \$82; Dr. Kinser, \$2,000; Younkers, \$1,000; any sums borrowed by Gene from Electrical Workers Credit Union; and the attorney fees ordered by the court in the amount of \$1,800.

5) Janice shall pay, in addition to the mortgage indebtedness upon the homestead, the indebtedness incurred by her following the separation of the parties, including the loan from the Electrical Workers' Credit Union in the amount of \$1,000, or such further sum as is due thereon; her Sears account of approximately \$170; and her Visa account charges, in the approximate amount of \$200.

6) Gene shall pay, as child support for the minor child or children of the parties, the sum of \$60 per week per child, until such children shall have reached

the age of 18, or have finished high school, whichever last occurs, or until each child marries, dies, or becomes self supporting, should any such event occur before attaining age 18.

7) Gene shall pay child support for all children who have attained age 18, and who are regularly attending an approved school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational technical training either as a part of a regular school program or under special arrangements adapted to his or her needs; or is, in good faith, a full time student in a college, university, or area school; or has been accepted for admission to a college, university or area school and the next regular term has not yet begun, in the amount of \$30 per week per child, until such child shall reach age 22.

8) The decree entered by the court is further modified, by eliminating the requirement that Gene seek counselling to assist him in the resolution of the apparent alienation of his children from him.

9) Gene is ordered to pay alimony to Janice in the amount of \$200 per month, until the youngest of the children of the parties shall have reached age 18, or until Janice shall remarry or die, should either of those events precede the youngest child reaching age 18.

II.

We deny Janice's request for attorney fees incurred due to this appeal. The primary consideration in making the determination of an award of attorney's fees is the parties' resources. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Janice is gainfully employed and has relatively small living expenses. Gene is heavily obligated under the decree to pay support and the parties' marital debts and some of Janice's attorney fees.

The costs of this appeal should be divided equally.

AFFIRMED AS MODIFIED.