



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF NANCY A. GENTILE AND THOMAS F. GENTILE

Upon the Petition of	)	101
NANCY A. GENTILE,	)	
Petitioner-Appellee,	)	Filed April 20, 1988
And Concerning	)	
THOMAS F. GENTILE,	)	8-80
Respondent-Appellant.	)	87-605

Appeal from the Iowa District Court for Polk County (No. CD55-32508),
Peter A. Keller, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Ted E. Marks of Marks, Marks & Marks, Des Moines, for appellant.

Douglas F. Staskal of Brick, Seckington, Bowers, Swartz & Gentry, Des
Moines, for appellee.

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

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Petitioner, Nancy Gentile, and respondent, Thomas Gentile, were married in May of 1977. They have two children, Joseph, born in November of 1979, and John, born in October of 1982. Nancy works part-time at Northwestern Bell, earning \$12 per hour. Thomas is a real estate salesman, an aluminum siding salesman, and a professional gambler.

In its dissolution decree, the trial court set up a joint custody arrangement with Nancy having physical care of the children. Thomas was directed to pay child support of \$750 per month per child and alimony of \$600 per month until petitioner cohabited, remarried, or died.

The trial court awarded Nancy a car, the parties' house subject to the mortgage, and the household goods and furnishings in the parties' house; and awarded Thomas a car and the household goods and furnishings in the apartment he was living in. The trial court directed Thomas to pay all the parties' debts, except the mortgage on the house, and \$4,993.85 toward petitioner's attorney fees.

The respondent first contends that the property division ordered by the trial court is unfair and inequitable. The property division in an Iowa dissolution of marriage is governed by Iowa Code section 598.21(1) (1987) and the criteria set forth in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968). The ultimate test that should be applied by the trial court in considering all the circumstances is whether the division of property is fair and just. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To enable a court to make an equitable distribution of property of the parties to a divorce action, both parties are required to exercise the utmost good faith and to make full disclosure of all material facts, including their circumstances and any other facts which might affect the division. Ryder v. Ryder, 105 N.W.2d 508, 511 (Iowa 1960); Schantz

v. Schantz, 163 N.W.2d 398, 406 (Iowa 1968). In this respect, the evidence at trial showed that the respondent failed to produce the necessary financial documents and records that would allow the court to be fully apprised as to the assets of the marriage. The information that the petitioner was able to obtain showed that the respondent had transferred assets to third parties.

Specifically, respondent's father testified that he had given his son loans totalling \$24,900. In repayment of these loans, respondent and petitioner quit claim deeded a piece of real property to respondent's father. The apparent value of the property was approximately \$50,000. Petitioner testified that she signed the quit claim deed because respondent told her "that was something we needed to do. We needed to get that out of our name and put into his parents' name." Prior to trial, the petitioner was not aware of the alleged borrowing from the respondent's father nor of the claim that the property was given in satisfaction of such borrowing.

Kristen Spreaker testified that she was a friend of the respondent and that the respondent had never given her gifts or money to hold for him. On further examination, however, Spreaker testified that the respondent had given her a check for \$4,000 which she cashed and then gave to respondent.

There were other unexplained transactions. Respondent testified that he borrowed as much as \$380,000 to start and operate a restaurant for approximately four months. He pledged the parties' marital home as collateral for the \$380,000 note to Norwest Bank. By the time of trial, respondent testified he had reduced that debt to \$60,000. The only documented payments to reduce the loan were a \$20,000 insurance settlement, a \$10,000 stock broker settlement, the alleged loan of \$24,900 from respondent's father, and monies generated from the sale and refinancing of automobiles totalling \$7,000. This leaves an

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approximate \$229,000 further reduction on that note for which the respondent did not account.

The court cannot fairly ignore conduct of a party in making unauthorized dispositions of proceeds of mortgages or loans in reaching a fair and equitable property distribution. In re Marriage of Johnson, 350 N.W.2d 199, 202 (Iowa 1984). In looking at the respondent's conduct, the trial record reveals that he made no effort to obtain records which would reflect on his financial activities since moving from the marital home. The same is true with respect to stock transactions and a bank account in Arizona. The respondent testified that he earned only approximately \$1,000 to \$1,500 a month even while paying support in excess of \$2,000 per month. He allegedly borrowed money to make up the difference, but no evidence was presented to support that allegation. He admitted that his accountant may have had certain records concerning his business transactions, but he made no effort to obtain or present such records.

Against this background, the trial court concluded:

The Court finds the testimony of Respondent and Spreaker without credibility and the Court believes it is indicative of the contemptuous attitude which Respondent has displayed toward all the judicial proceedings that have taken place since this Petition was on file.

The court went on to correctly outline the standards upon which its decision was to turn:

It is the Court's opinion that Respondent's willful refusal to comply with the orders of the Court should not be cause for Petitioner receiving less than her fair share. It is for this reason that in making a division of the property and determining the level of support payments the Court has rejected the testimony of the Respondent as having no credibility.

Based on these facts and the entirety of respondent's testimony, the trial court could not fairly conclude that the respondent was "on the verge of bankruptcy." Upon our de novo review of the record, we find that the trial court's property distribution was entirely fair, equitable, and proper.

The respondent next argues that the court made an inequitable award of alimony to the petitioner and placed an excessive child support obligation upon him. The trial court's award results in the respondent paying petitioner \$1,500 per month for child support and \$600 per month for alimony. The total, \$2,100, is less than half of the family's basic expenses and makes no allowance for vacations and gifts to which the petitioner was accustomed. The remaining expenses must be paid from petitioner's \$2,000 monthly income.

It is apparent on this record that the trial court correctly applied the criteria listed in Iowa Code sections 598.21(3) and (4) in establishing child support and alimony obligations. The respondent complains that he lacks the financial resources to make the contributions required of him and asserts that Nancy should bear a greater burden. We disagree. We are of the opinion that under the circumstances here the alimony should terminate after seven years or upon the respondent's death, whichever occurs first.

As to the respondent's earning capacity, the record reveals that the respondent withheld information concerning that issue and that his testimony was otherwise lacking in credibility. From the information that was provided, we find that respondent's tax returns reveal net gambling income from 1982 through 1985 of more than \$247,000. His 1985 return showed interest income of \$14,708, the source of which respondent did not know. The respondent is a licensed real estate salesman. For a few years he was a member of the "Million Dollar Club" and earned as much as \$40,000 annually. Based on the fact that the respondent withheld financial information and in view of the figures provided in the information available to the court, the court was fully justified in determining that the burden placed on the respondent was not unrealistic and certainly not unfair.

The respondent takes exception to the trial court's award of attorney fees to the petitioner. The trial court is vested with considerable discretion

in determining an award of attorney fees to one of the parties to a dissolution action. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Each party's resources and ability to pay attorney fees will be considered in the court's determination of the award of attorney fees. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980); In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981).

The trial court properly noted that petitioner earns \$12 per hour, while the last tax return of the respondent shows his earnings in excess of \$100,000. The trial court further correctly noted that a great deal of time was spent by the petitioner's attorney in pursuing respondent's refusal to comply with discovery requests and to comply with the temporary support order. Under these circumstances, we cannot conclude that the trial court abused its discretion in awarding attorney fees to the petitioner. Accordingly, we affirm the trial court's decision to award said fees to the petitioner.

Finally, the petitioner's attorney fees on appeal in the amount of \$2,451.50, and costs on appeal are to be assessed to the respondent.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

I concur in the result only.