



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY ANN LINCOLN AND MAX EDWIN LINCOLN

Upon the Petition of	)	219
MARY ANN LINCOLN,	)	Filed March 31, 1987
Petitioner-Appellant/ Cross-Appellee,	)	
And Concerning	)	
MAX EDWIN LINCOLN,	)	<u>7-75</u>
Respondent-Appellee/ Cross-Appellant.	)	86-710

Appeal from the Iowa District Court for Poweshiek County (No. DM 1177)

- James D. Jenkins, Judge.

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

Roger W. Sunleaf of McNeil & Sunleaf, Montezuma; Emil Trott, Jr. of Barrett & Trott, Des Moines; and C. M. Manly of Manly Law Firm, Grinnell, for appellant.

Donald J. Charnetski of Tomasek, Vogel, Charnetski & Olson, Grinnell, for appellee.

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

PER CURIAM

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Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. Petitioner asserts that the property division is inequitable in various respects. On cross-appeal, respondent asserts that the trial court should have awarded him alimony and attorney fees and also requests attorney fees on appeal. We affirm as modified.

Petitioner Mary Ann Lincoln and respondent Max Edwin Lincoln were married in 1976. It was neither party's first marriage, and no children were born of the marriage. Mary apparently received \$20,000 in life insurance proceeds when her first husband died. Mary spent some of this money on and with Max while they were dating and also after they got married. During the marriage, the parties bought and ran a tavern business. Mary now runs the tavern. Max is working as a hotel desk clerk. Both parties are in their late 50's or early 60's. Mary is in good health. Max has some health problems.

In its dissolution decree, the trial court awarded Max a car, guns, rings, coin collection, his bank account, and a judgment of \$74,608. The trial court awarded Mary the parties' remaining property including their tavern and their house. Max was directed to pay the parties' debts of \$2,010. No alimony was awarded. Each party was directed to pay his or her own attorney fees.

Mary has appealed and Max has cross-appealed from the dissolution decree. Mary asserts that the property division is inequitable because the trial court (1) overvalued the parties' tavern, (2) failed to set off to her the insurance proceeds she received when her first husband died, and (3) failed to recognize her greater contribution to the acquisition and preservation of marital assets. Max asserts that the trial court should have awarded him alimony and attorney fees.

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).

We first address petitioner's contention that the trial court overvalued the parties' tavern. In the final decree, the trial court valued the building at \$38,000.00, the equipment at \$15,000.00, and business "blue sky," or good will, at \$50,000.00. The petitioner, however, afforded the tavern's "blue sky" little or no value, while the respondent placed a value on the "blue sky" at \$25,000.00.

Upon our own independent examination of the evidence presented at trial, we do not believe the \$50,000.00 value set by the trial court is equitable under the circumstances. A business "blue sky," or good will, is the value of a business that is attributable solely to public patronage and encouragement because of its local position or reputation. Riso v. Pottawattamie Bd. of Review, 362 N.W.2d 513, 517 (Iowa 1985). None of the witnesses or parties at trial testified that the "blue sky" or good will of the parties' tavern was valued at \$50,000.00. Ed Dieleman, a CPA who has done much of the business's accounting work, testified that under his cash flow approach the total value of the tavern was approximately \$50,000.00. Gary Lincoln, the respondent's brother, testified that he had no problem with Dieleman's valuation. Several witnesses, however, testified that the tavern was very nice, had a very good future, and that it was a popular place due to the respondent's efforts at public relations.

We also take judicial notice of the fact that the Iowa economy and property values are depressed at the present time. Evidence introduced at trial indicates that there have been very few comparable sales of taverns in the Grinnell area, making it difficult to make an accurate valuation of the parties' tavern. Taking into consideration the popularity of the parties' tavern, together with the gross receipts, we determine that the good will or "blue sky" value of the parties' tavern is \$25,000.00. We therefore modify the dissolution decree by holding that the total value of the parties' tavern is \$81,000.00. Consequently, we find

that the parties' net worth is \$127,556.00 and that respondent is to receive the sum of \$63,278.00 less \$1,670.00, for a total sum of \$61,608.00 at a rate of 10% interest per annum, payable in twenty semi-annual installments payable on the 15th of May and the 15th of November of each year.

Petitioner additionally argues that the trial court failed to set off to her the insurance proceeds she received when her first husband died and that the trial court failed to recognize her greater contribution to the acquisition and preservation of marital assets. Having considered all of the relevant evidence offered at trial and upon a review of the entire record and applicable authorities, we find no merit in petitioner's arguments and affirm the trial court's ruling as to those issues.

On cross-appeal, the respondent asserts that the trial court should have awarded him alimony. Under Iowa law, the payment of alimony is not a right, but rather must be determined in light of all the circumstances, including the property settlement. In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982). When considering the appropriateness of an award of alimony, we must consider the earning capacity of each party, each party's present standard of living, and a spouse's ability to pay balanced against the relative needs of the other. In re Marriage of Hitchcock, 309 N.W.2d 432, 436 (Iowa 1981). The record reveals that both parties were approximately in their late 50's or early 60's. No children were born of this marriage. The marriage was of relatively-short duration, lasting approximately ten years. The average annual wages paid to the parties from the tavern business were approximately \$4,211.00, and the parties' total net income was approximately \$14,549.00. Respondent earns approximately \$115.40 per week, or \$6,000.80 per year, as a motel desk clerk. We find, however, that payments made pursuant to the property settlement will afford respondent an income comparable to that which the parties enjoyed prior to their dissolution.

Furthermore, the record shows that the petitioner earns slightly more than the minimum wage in operating the tavern. We therefore hold that the trial court was correct in denying respondent's request for alimony.

Respondent additionally argues that the trial court should have awarded him attorney fees and requests attorney fees on appeal. An award of attorney fees in a dissolution action is not a matter of right but depends upon the relative needs and abilities of the parties. In re Marriage of Fish, 350 N.W.2d 226, 231 (Iowa Ct. App. 1984). Upon a consideration of the financial condition of both parties, we conclude that the trial court was correct in ordering each party to pay his or her own attorney fees. We additionally hold that the parties pay their own attorney fees on appeal.

AFFIRMED AS MODIFIED.