

FILED

NOV 29 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DOLORES GINDT LaPOLE AND CLARENCE E. LaPOLE

Upon the Petition of)

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DOLORES GINDT LaPOLE,)

Filed November 29, 1982

Petitioner-Appellant,)

And Concerning)

CLARENCE E. LaPOLE,)

2-353
2-67921

Respondent-Appellee.)

Appeal from Polk District Court - Luther T. Glanton, Judge.

Petitioner-wife appeals from the economic provisions of the parties' dissolution decree, asserting: (1) that the decree should have made some provision for past due support allegedly owed under a 1967 decree of separate maintenance; (2) that both the property division and support award were inequitable; and (3) that she should have been allowed to supplement the record with evidence regarding the cost of obtaining health insurance coverage. **AFFIRMED AS MODIFIED.**

Jaki K. Samuelson of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, Iowa, for petitioner-appellant.

Charles R. Turner, Des Moines, Iowa, for respondent-appellee.

Considered en banc.

Petitioner-wife, Dolores Gindt LaPole, appeals from the economic provisions of the parties' dissolution decree. She asserts: (1) that the decree should have made some provision for past due support allegedly owed under a 1967 decree of separate maintenance; (2) that both the property division and support award were inequitable; and (3) that she should have been allowed to supplement the record with evidence regarding the cost of obtaining health insurance coverage. We affirm as modified.

The parties were married in 1933. A 1967 decree of separate maintenance provided in relevant part that the husband was to pay support of \$75 per week. The parties continued to live together off and on through 1977. The husband paid no support after that time under the decree of separate maintenance. During hearings on the parties' separate petitions to modify the decree of separate maintenance the proceeding was converted by agreement of the parties to a dissolution proceeding. The trial court later denied the wife's request that she be allowed to supplement the record with evidence regarding the cost of obtaining health insurance coverage.

The husband is a retired plumber with various health problems and pension and social security income amounting to \$1,115.28 monthly. The wife is retired and has social security income of \$270 per month. Trial court awarded the wife certain personal property and alimony of \$35 per week; the decree made no mention of any past due support owing pursuant to the decree of separate maintenance. The husband was awarded certain personal property and ordered to maintain the wife on his health and welfare insurance so long as he is able to do so without cost to him. The parties' home, occupied by the wife since 1967 and valued at \$42,500, was ordered sold with the proceeds to be equally divided; the wife was granted an opportunity to purchase the husband's half-interest. From this order the wife appeals.

I. Scope of Review. Our review of dissolution proceedings is *de novo*. Iowa R. App. P. 4. We review the facts as well as the law and, from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to the trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Past Support. Petitioner-wife argues that the trial court erred in failing to order respondent to pay, or in some manner compensate her for the past due support owed to her by respondent under the 1967 separate maintenance decree. We find that the trial court did not err.

We agree with the authorities cited by petitioner that delinquent support payments under a support decree cannot be taken away by the court. See In the Matter of Evans, 267 N.W.2d 48, 51 (Iowa 1978). The matter of delinquent support on the record before us, however, is more appropriately left for another proceeding. The law has recognized various remedies for nonpayment of support including garnishment, liens, attachment and an array of other means of executing on a judgment. These alternatives are more appropriate than a resolution of the issue in the present proceeding. Likewise, we do not address the merits of respondent's defenses.

III. Distribution of Property. Petitioner argues that the trial court's distribution of property and award of support is inequitable in light of Iowa Code § 598.21 (1981). We agree and modify the decree.

An examination of the elements in section 598.21(3) convinces us there should be an increase in the amount of alimony to be paid to petitioner. The record reflects that petitioner remained at home during the greater portion of the time preceding this dissolution in order to raise the couple's seven children. Petitioner had not worked outside the home from 1933 to the time of the separate maintenance decree in 1967. Since that time she worked continuously from 1966 to

1979 as a retail clerk except for a one-and-one-half years from 1973 to 1974 when respondent again was living in the home.

Petitioner's current income is \$270.00 per month from social security. She resides in the home the couple owns but which is to be sold. Petitioner now must budget for rent and its attendant costs. Petitioner contends that her monetary monthly needs, if she is forced to rent, would approach \$632. Likewise, because of the dissolution, it appears petitioner will no longer be covered under respondent's medical insurance policy.

Respondent's income appears to be approximately \$1,115.20 per month. Additionally, respondent received a credit union account and a certificate of deposit totalling \$4,200.

This court affirms the trial court's order for the sale of the residence and realizes that the proceeds of the sale should increase the liquid assets of the parties and increase their respective income earning assets and their unearned incomes, respectively. We further are aware that the weight to be accorded alimony as a means of rehabilitation and training is decreased for a 62 year old woman and, accordingly, focus more on the support aspects of alimony. Based upon our review of the record, we are convinced that the alimony awarded to petitioner should be increased to \$300 per month. The trial court's decree is affirmed in all other respects.

IV. Supplemental Record. Petitioner argues that the trial court erred in not permitting her to make a supplemental record regarding her eligibility under respondent's insurance policy. We conclude that the opening of the record was within the discretion of the trial court and find no abuse of discretion by its ruling and no prejudice to petitioner.

V. Attorney Fees. Petitioner seeks \$2,500 in attorney fees for this appeal. In awarding attorney fees, this court does not determine what the fee should be for either party, but only whether, because of the discrepancy between

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the present earning capacity of these parties, and relative abilities to pay, petitioner is entitled to assistance in paying her fees. See In re Marriage of Seidenfeld, 241 N.W.2d 881, 884 (Iowa 1976). Based on the parties' present relative earning capacities, and available resources, each party shall pay his or her own attorney fees. Costs of this appeal are assessed against respondent.

AFFIRMED AS MODIFIED.