

FILED
JUN 30 1981
CLERK SUPREME COURT
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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CAROL E. HEWITT AND DONALD J. HEWITT

Upon the Petition of		Filed June 30, 1981
CAROL E. HEWITT,	)	
Petitioner-Appellee,	)	<u>1-124</u> 2-65517
	)	
And Concerning	)	
	)	
DONALD J. HEWITT,	)	
Respondent-Appellant.	)	

Appeal from Polk District Court. Rodney J. Ryan, Judge.

Respondent-husband appeals from the economic provisions of a dissolution of marriage decree. **MODIFIED AND AFFIRMED.**

Verne J. Lawyer, and Rick Doyle, Des Moines, Ia., for petitioner-appellee.

Patrick H. Payton, Des Moines, Ia., for respondent-appellant.

Submitted to Snell, J., Carter and Johnson, JJ.
Oxberger, C. J., and Donielson, J. takes no part.

PER CURIAM

Respondent-husband appeals from the economic provisions of a dissolution of marriage decree. We modify and affirm.

Donald and Carol Hewitt were married on June 12, 1955, when they were both attending the University of Nebraska. Donald received a B.A. in business and Carol completed two years at Nebraska. Donald has also received post-graduate education in business administration. Donald is currently president of Stoner McCray System and Stoner Development Company, and has been employed by the Stoner Companies for 17 years. In 1978 Donald's gross income was \$54,978, including a \$10,000 bonus, and in 1979 his gross income was \$48,469. Carol's annual income is approximately \$1,096, earned as a yoga teacher in adult education classes. The parties have three children—Eric, Amy, and Gretchen—who were ages 21, 16, and 14 respectively as of the time of trial. Custody of Amy and Gretchen was awarded to Carol. The trial court dissolved the parties' 25-year-old marriage on August 5, 1980.

The trial court awarded Carol alimony of \$1,000 per month for ten years and child support of \$500 per month until Gretchen becomes 18 years of age. The trial court provided that the alimony and child support payments shall rise at a rate of 10% each year that the United States Department of Labor Consumer Price Index rises at least 10%, as long as Donald's income increases by at least 5% per year. Carol was awarded the family residence located at 701-55th Street in Des Moines, Iowa, subject to a \$20,000 lien in favor of Donald. She was also awarded one-half of any expenses she incurs for attending a school of higher learning between August 1, 1980 and August 1, 1984. Donald is required to maintain life insurance in the amount of \$50,000 and make his children beneficiaries for as long as his child support obligation lasts; he is required to maintain medical and dental insurance for the minor children and pay all reasonable medical and dental expenses for them for the duration of the child support obligation; he is liable for all the parties' debts incurred as of the date of the dissolution decree except for the encumbrance on the family residence. The trial court also ordered that certain stock owned by Donald should be held in trust by him for the benefit of Carol pending future assessment of the stock's value, so that Carol's interest in it can be determined by a subsequent court proceeding.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's

findings of fact, but we give weight to them, especially regarding the credibility of witnesses. Iowa R. App. P. 14(f)(7). In reviewing each individual economic provision of the dissolution decree, we consider all the provisions together as an integrated whole. See In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976).

In reviewing the property and alimony provisions of a dissolution decree, we consider the factors articulated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

L. Donald contends that the trial court unfairly divided the parties' property by awarding Carol the family residence subject to a \$20,000 lien in favor of Donald. Although not required in every case, it is often desirable to make an equal division of marital assets. In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979); In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976). The test for an acceptable division of assets is to ask what would constitute an equitable and just award under the circumstances. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976).

We see no reason in the instant case not to strive for an even division of assets and believe the trial court sought that result. Although the value of the home was disputed, the assessed value was \$62,210 and encumbrance \$20,000. Giving Donald a \$20,000 interest appears to be an equal division of the equity.

But with a disputed market value and no finding by the court of the home's value, we conclude that a more clearly equal division will be obtained from an actual sale. Accordingly we modify the trial court's decree so that Carol may occupy the family home, until none of the children lives there with her but not beyond Gretchen's nineteenth birthday, and provided that Carol remains unmarried and does not cohabit there with an adult male. At that time the home shall be sold, the encumbrance removed and costs of sale paid, after which the net proceeds shall be divided equally. Any delinquent mortgage payments, taxes, or insurance premiums shall be charged against Carol's interest before she takes any of the proceeds. See In re Marriage of Burham, 283 N.W.2d 269, 277 (Iowa 1979).

II. The Stoner Development Company is a closely held corporation in which Donald owns 5% and Tom Stoner owns 95% of the stock. Donald is entitled to another 5% of the stock upon his death or termination of employment. The only market for the stock is the Stoner Development Company itself. The trial court declined to value the

stock and ordered Donald to hold it in trust for Carol's benefit pending future assessment of its value so that it could be evenly divided. Donald asks that we value the stock now and distribute all of it to him.

It is unnecessary that we determine the value of Donald's stock interest, because whatever its value, Carol is entitled to one-half of it. Therefore, we vacate the trial court's order that Donald hold the stock in trust for Carol's benefit, and award Carol a one-half interest in the stock now owned by Donald. However, we see no need to divide the stock to which Donald is entitled upon his death or termination and accordingly award the stock to him.

III. Donald contends that the trial court unfairly ordered him to pay Carol monthly alimony of \$1,000 for ten years. Donald's earning capacity is large; Carol's is meager. Since the birth of Eric in 1957, when Carol quit a full time job, she has been occupied as a homemaker and a mother, thereby foregoing the opportunity to develop her earning potential. It appears from the record that in happier days Donald willingly indulged his family in good living. Since that is the way he accustomed them to live and since he is financially able to maintain that standard, he cannot now insist on a more austere life because of this unfortunate separation. Tallarico v. Tallarico, 164 N.W.2d 805, 809 (Iowa 1969). Considering the circumstances of this case in light of the criteria enumerated in Schantz, we conclude that the trial court's alimony award is reasonable and therefore affirm it.

IV. Donald contends that the child support award of \$250 per month per child made by the court is unfairly high. In reviewing the child support provisions of a dissolution decree, we consider factors articulated in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). Donald objects to the award because he thinks that in making it the trial court is forcing him to be solely responsible for support of his daughters. Parents are under a legal duty to support their children. Yansky v. Yansky, 172 N.W.2d 114, 117 (Iowa 1969). There is nothing, however, in the dissolution decree to suggest that the trial court did not contemplate that Carol would contribute her fair share to the support of the parties' daughters. We affirm the child support award as reasonable, subject to subdivision V below.

V. The trial court's decree provides that Carol will be paid \$500 monthly child support until Gretchen, the younger of the parties' two daughters, turns 18. Donald finds this arrangement objectionable, because while it provides Carol with child support of

\$250 per child per month before Amy reaches her majority, it provides Carol with child support of \$500 for Gretchen's support after Amy reaches her majority. The result is that Donald would be paying \$500 per month over a period of 27 months for only one child's support. We think that a \$500 obligation to support one child only is excessive, see In re Marriage of Murray, 213 N.W.3d 657, 661 (Iowa 1973), and we therefore order that Donald's child support obligation be reduced to \$300 per month as of the time that Amy attains her majority.

VL Donald contends that the trial court erred in allowing automatic increases in alimony and child support based on changes in the United States Department of Labor Consumer Price Index and in Donald's income. In In re Marriage of Stamp, 300 N.W.2d 275, 277-80 (Iowa 1980), the Iowa Supreme Court affirmed a trial court's order prescribing adjustments in the amount of child support based on changes in the United States Department of Labor Consumer Price Index. Since in the instant case the trial court's linking increases in child support and alimony to the Consumer Price Index promotes much the same policies as are promoted in Stamp, 200 N.W.2d at 279, we affirm the trial court's provisions for increases in Donald's child support and alimony obligations.

VII In its decree the trial court provided that Donald may claim the minor children for federal and state income tax exemptions as long as he keeps current in child support payments. Donald contends that the trial court's provision impermissibly modifies 26 U.S.C.A. § 152(e)(2), which specifies conditions under which a noncustodial parent may claim children as dependants. We are not convinced that Donald would be prohibited from claiming exemptions even if not current in child support payments since he might qualify under subsection B(i), 26 U.S.C.A. § 152(e)(2). Nevertheless, we find the provision of questionable value and therefore vacate from the decree regarding tax exemptions the provision that child support payments be current.

VIII. Donald contends that the trial court unfairly ordered him to pay one-half of Carol's expenses incurred by her for attending a school of higher learning between August 1, 1980 and August 1, 1984. Carol's role in the marriage as homemaker and child raiser has stunted her earning potential. Carol's economic independence can be restored by taking advantage of the opportunity afforded her by the trial court. In re Marriage of Seidenfeld, 241 N.W.2d 831, 884 (Iowa 1976) contemplates that a trial court may require a husband to financially assist with his wife's higher education in order to permit

her to undertake a self-supporting career. We affirm as reasonable Donald's obligation to pay one-half of Carol's educational expenses.

IX. The trial court reserved jurisdiction over the parties in the event that the children desired to pursue a course of higher education and the parties cannot agree on the financial amount each shall contribute thereto. Donald objects to the trial court's reservation of jurisdiction on the ground that it is unfair that a divorced parent can be compelled to provide financial aid for his children's higher education whereas a married parent cannot be so compelled. Donald's contention is the same as that which was considered and rejected in In re Marriage of Vrbau, 293 N.W.2d 198, 202 (Iowa 1980), wherein the Iowa Supreme Court upheld the constitutionality of section 598.1(2), The Code 1979, which permits a court to compel a divorced, noncustodial parent to contribute to his children's college expenses. Following the recently promulgated dictates of Vrbau, we reject Donald's contention.

X. In the dissolution decree the trial court ordered Donald to secure and maintain life insurance in the amount of \$50,000 for the duration of his child support obligation with his children as beneficiaries. Donald objects to this provision as excessive, since the insurance secures only a \$12,250 child support obligation. However, the insurance also secures the potential obligation of providing for the children's future education, as well as medical and dental expenses not covered by other insurance. In his argument Donald does not consider that his child support obligation may increase as a function of increases in the Consumer Price Index and in his own income. Prior to the dissolution decree Donald carried life insurance of \$40,000 for his wife and children. We affirm as reasonable the trial court's order that Donald carry life insurance of \$50,000 for the children.

XI. Donald contends that the trial court unfairly ordered him to maintain dental insurance for the minor children for the duration of his child support obligation. Donald claims in his brief that he is unable to obtain dental insurance, but he gives no reason for his inability and no evidence points to such an inability. A parent has a duty to provide for the health care needs of his children, of which dental care is one type. We affirm as reasonable the trial court's order that Donald maintain dental insurance for the minor children.

XII. Carol has applied for attorney fees incurred by this appeal. In evaluating a request for attorney fees incurred on appeal we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Erickson, 228 N.W.2d 57, 59 (Iowa 1975); In re Marriage of Strom, 226 N.W.2d 797, 800 (Iowa 1975). Applying these factors to the case at bar, we hereby order Donald to pay \$1,500 of Carol's attorney fees on appeal.

Costs are assessed to Donald.

AFFIRMED AND MODIFIED.