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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROSEANNE MARIE MAXWELL AND DONALD DEAN MAXWELL

UPON THE PETITION OF
ROSEANNE MARIE MAXWELL,

Petitioner/Appellee/Cross-Appellant,

AND CONCERNING
DONALD DEAN MAXWELL,

Respondent/Appellant/Cross-Appellee.)

Filed September 25, 1984

4-252
83-1246

Appeal from the Iowa District Court for Jasper County, Jack D . Levin, Judge.

Petitioner appeals from divorce decree, saying: (1) his farm was valued too high, (2) the property division was inequitable, (3) certain amounts of temporary support should be credited to property settlement payments, and (4) child support is excessive. Respondent cross-appeals, claiming: (1) 6 percent interest on the property settlement is too low, and (2) she should be awarded attorney fees on appeal. AFFIRMED AS MODIFIED.

Dennis F. Chalupa of Brierly, McCall, Girdner & Chalupa, Newton, for petitioner/appellee/cross-appellant.

Lawrence F. Scalise and Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for respondent/appellant/cross-appellee.

Considered by Oxberger, C.J., Donielson, and Schlegel, JJ.

The petitioner-husband in this appeal asks for relief from what he claims is an inequitable property division and excessive child support payment he was ordered to make pursuant to a decree dissolving the parties' marriage. He also requests that portions of temporary support he has paid be credited toward payments he owes respondent under the property division. Respondent-wife cross-appeals, saying 6 percent interest to apply to the unpaid portions of the property award is too low and that petitioner should pay her attorney fees on appeal. We affirm the property division as modified, affirm the child support payments, and hold temporary support payments will be credited toward the property division. On respondent's cross-appeal we affirm the trial court decision regarding the interest rate and determine respondent shall pay her own attorney fees. We affirm as modified.

The thirteen-year marriage of petitioner, Donald Maxwell, and respondent, Roseanne, was dissolved July 7, 1983. Both parties are in good health and have one child, who is now five years old. Roseanne brought no assets to the marriage and was employed for some time during the marriage, earning approximately $200 per week when she quit working outside the home in 1978. She is 32 years old, has a high school degree, and has skills in typing, computer, and office work. Since 1978 she has remained at home to care for the couple's child and has contributed extensively to working at the house, gardening, and with various farm tasks. She also is involved in Amway sales. Donald brought $5392 into the marriage and is a farmer. He is 34 years old, has had one year of college, and owns a 295-acre farm. The farm was purchased during the course of the marriage and required extensive renovation by both parties.

The trial court dissolved the marriage, awarded custody to Roseanne, and ordered child support payments of $344 per month. It found the following property to be in Donald's possession: household goods, valued at $1000; farm

machines worth $44,625; livestock valued at $43,739; grain totaling $57,548 in value; hay and straw at $702; a $2321 checking account; a 1982 Monte Carlo now worth $7350; a camper it determined was worth $1000; and insurance valued at $1599. Donald also had rent due to him of $16,500 and lived on the farm. Roseanne had in her possession household goods of $2,650; a checking account of $400; Amway products of $2000; and a 1981 Monte Carlo valued at $6500. The court allowed each party to keep the property in their possession. It decided the farm was worth $405,625. After subtracting amounts for farm debts, and $419 in to her debts, and for Donald's separate property, it held the net worth of the parties $389,877. Half of that amount, less the value of property already in Roseanne's possession, was $181,042. It awarded her this amount in property settlement, to be paid by Donald at $31,042.43 thirty days after the decree, and the remainder in annual installments over five years, with 6 percent interest to be paid on the unpaid balance. During pendancy of the appeal, the court ordered Donald to pay $1000 per month in temporary support, which was modified to $500 per month after receipt of financial statements.

I. Property Division

Donald attacks the court's property division, claiming: (1) the farm was valued too high, (2) there was an inequitable division of the property, and (3) the temporary support should be credited towards payments due on the property division.

Donald claims the farm is worth $1000 per acre, Roseanne says it is worth $1500 per acre, and an appraisal by Hertz Farm Management placed the value at $1375 per acre. Donald says his figure is more accurate because of the depressed farm economy, because a farm three miles away sold one month prior to trial at $820 per acre , and he also notes that Hertz was originally involved in the bidding for his farm. The price Donald paid for it in 1972 was $440 per acre. The court accepted the figure from Hertz.

In our de novo review of a dissolution proceeding, precedent is of little value and each decision turns on the facts of the case. In re Marriage of Briggs, 225 N.W.2d 911 (Iowa 1975). We give weight to the trial court findings, particularly where the credibility of witnesses has been evaluated, but are not bound by the court's findings. In re Marriage of Kehrli, 241 N.W.2d 923 (Iowa 1976). We will not disturb the trial court valuation of property when it is within a permissible range. In In re Bare's Marriage, 203 N.W.2d 551 (Iowa 1973). The court said, "The valuation found by the trial court was well within the permissible range of the evidence and we are not inclined to disturb it." The trier of fact is, of course, at liberty to accept or reject any part of opinion evidence. Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968).

Using these standards, we find the valuation of the trial court of the farm property was well within the permissible range, and the acceptance of the Hertz evaluation reaches a middle ground between the stances of Donald and Roseanne.

Donald also claims the property payments of over $30,000 per year along with the child support payments will put a tremendous strain on his average income of $17,000 per year. He says he has little hope of increasing his earning capacity and the situation forces him to face selling the farm. He also points out that with the payments, Roseanne will be living at a much higher standard of living than she did during the marriage. He asks us to lower the amount he owes her to $71,000 and spread the payments over ten years. Roseanne answers that the court must take into consideration her contributions during the marriage in making a property division. She further says the house Donald lives in is debt free, and that he should not have to sell the farm since he has over $100,000 in liquid assets, including grain, hay, and livestock.

The purpose of property division in dissolution was explained by the court at Knipfer v. Knipfer, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966). There, the court said alimony is "an allowance to the wife from the husband for her support in a divorce action, in lieu of the legal obligation of the husband to support her. . . " Id. (citations omitted). On the other hand, property division "has for its basis the wife's right to a just and equitable share of that property which has been accumulated by the parties as the result of their joint efforts during the years of marriage to serve their mutual needs." Id. at 353 (citations omitted). Equity is the goal in property settlements. In re Marriage of Wallace, 315 N.W.2d 827 (Iowa Ct. App. 1981).

The fact that Roseanne will enjoy a higher standard of living than during the marriage because of the property settlement is irrelevant, since support is not the issue, but rather it is the equal division of jointly earned property. Roseanne's contributions during the couple's marriage have been significant. The record shows she not only cared for the couple's son and was involved in maintaining the house, but also tended the garden, canned vegetables, assisted in feeding cattle, operating farm machinery, vaccination, and maintaining the family budget. Considering all the factors outlined at section 598.21(1) of the Iowa Code, we agree the court's division of the property was equitable.

As pointed out by Donald, however, the court-ordered payment schedule of over $30,000 per year is nearly twice that of his income. Donald's problem is similar to that faced by the court in In re Marriage of Novak, in which the court said:

> Although petitioner was ordered to assume all debts and obligations he also received all collateral securing these liabilities. Petitioner's problem is simply a shortage of cash to meet all the financial obligations for which he is responsible. It may be impossible for him to do so in which case various things or parts of the real estate would have to be sold. This possibility does not necessarily mean the property distribution was inequitable, however. Furthermore, if the saw mill business is as successful as

> petitioner envisions, his financial situation would be considerable [sic] eased. The record shows the value of the farm has greatly increased since its purchase; respondent made a significant financial contribution to its purchase and also worked steadily on its operation.

In re Marriage of Novak, 220 N.W.2d 592, 597-98 (Iowa 1974).

In this situation, as in Novak, simply because Donald may have to sell some of his assets does not make the property award inequitable. There are several differences between that situation and this one, however. A significant amount of the money Donald will receive from selling his liquid assets must go back into the farm if it is to be maintained. As Donald points out, the Iowa Supreme Court has frowned on property division which takes the income-producing asset out of the hands of paying party. Anderson v. Anderson, 243 N.W.2d 562 (Iowa 1976). In re Marriage of Callenius, 309 N.W.2d 510 (Iowa 1981). In Novak, unlike in this case, the property award took a large portion of the husband's income, but was still less than his expected yearly income. Here, the property award is double Donald's income. In addition, Donald has testified he faces a depressed farm economy, rather than the improving financial situation of Novak. On the other hand, Roseanne is entitled to her portion of the property as near its present value as possible.

To balance these conflicting interests, we modify the property payments so that $18,042.43 plus interest will be paid the first year, the remaining payments to be spread equally over ten years. Interest of 6 percent will be paid on the remaining unpaid balance. The trial court set the interest at 6 percent, citing the extreme financial burden placed on Donald. Roseanne says the interest should have been at the legal rate of 10 percent. We leave the interest at 6 percent in our attempt to ease the burden on Donald somewhat. He will still face payments in excess of his average income, but not at twice his income. We also consider the fact that Donald is involved in the economically risky business of farming, and will

be required to put forth considerable effort in maintaining the farm, factors which must be considered in such a situation. In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981).

Donald says that the temporary support ordered paid during the pendancy of appeal should be credited toward his property payments, arguing that Roseanne does not need the temporary support because of the money she will receive from the property award, and because she has few debts while he has many. Roseanne says these amounts are for support and should not reduce the property payments.

We note that the Iowa Supreme Court has credited temporary child support payments when that support was later eliminated. In re Marriage of Briggs, 225 N.W.2d at 914.

Orders for temporary support are made pursuant to section 598.11 of the code for the support of the spouse and children. In Knipfer, the court applied its definition of alimony to temporary as well as permanent support. Knipfer v. Knipfer, 259 Iowa at 352. Such payments are made for the support of the wife, children, or both. No alimony has been awarded in this case, and child support is set at $344. The payments made by Donald exceed this amount by $656 during the payment of $1000 in temporary support and by $156 for each month he paid $500 in temporary support. Since the purpose of any support is to provide for the needs of the spouse or child, Donald's payments exceeded the purpose by these amounts. It would be inequitable to allow Roseanne to retain this excess after the court determined the child's and her needs plus Donald's ability to pay warrant smaller support payments. We hold that in order to avoid unjust enrichment to the party receiving the excess support, and undue hardship upon the payor, that temporary support in excess of what the court later determines is actually warranted may be credited toward payments due. We are not indicating that there may not occur some situation where crediting excessive temporary payments would be

inequitable. Each dissolution proceeding turns on its peculiar facts. However, in the circumstances presented here, such a credit is warranted. The excess Donald has paid to Roseanne in support shall be credited toward his property settlement payments.

II. Child Support

Donald says that considering the payments he will have to make in the property settlement and the other factors set out at section 598.21(4) of the Code that the child support award is excessive. Roseanne urges us to keep the payments at $344 per month, pointing out Donald's income and her expenses in raising their child. We affirm the child support award.

III. Attorney Fees

Roseanne also requests that she be awarded attorney fees on appeal. In determining whether contribution should be made, we consider the needs of the requesting party, whether that party was obligated to defend the trial court's decision on appeal, and each party's ability to pay. In re Marriage of Castle, 312 N.W.2d 147 (Iowa 1981). Considering our changes in the property settlement, Roseanne's cross-appeal, that she will have a better cash flow position than Donald, along with each party's ability to pay, we hold no contribution from Donald is warranted and Roseanne will pay all her own attorney fees.

AFFIRMED AS MODIFIED.

All judges concur except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

This unemployed ex-wife and mother has had an assured income of only $500 per month for her support and the support of the minor child of these people since the order of the Supreme Court providing for support during the pendency of the appeal in this matter. Prior to that, she received $1,000 per month for her support and the support of the minor child during the pendency of the dissolution action. Now we are charging the temporary support she has received in excess of the $344 per month child support ordered by the trial court against the property distribution ordered by the court and approved by the majority. To the time of trial, respondent had paid $9,000, was behind for May 1983, the sum of $500, for June 1983, $500. Presumably, an additional payment of $1,000 was due for the months of July and August that year. Thus, it appears that support in the amount of $11,000 or $12,000 was paid during the pendency of the matter in district court. According to the majority, this was in excess of the proper child support by a total of $7,216 or $7,892. From December 1983 to the present, respondent is charged with the payment of $500 temporary support during the pendency of the appeal. Assuming another ten months, the majority would conclude that respondent has paid $1,560 in excess of the ordered child support. Presumably, then, under the majority's reasoning, the sum of $9,452 should be deducted from petitioner's award of cash in lieu of property distribution. I cannot agree with this result.

Setting off temporary support against property division is totally without precedent. In fact, such action runs contrary to the spirit of the controlling statute and existing case law. Additionally, such action is unwarranted under the facts of this case.

Iowa Code section 598.11 (1983) allows the trial court to order either party to pay money "for the separate support and maintenance of the other party and the children to enable each party to prosecute or defend the action." (Emphasis

added). Payments for the support of the "other party" in a dissolution action are alimony. See Knipfer v. Knipfer, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966). Although payment of alimony is not an absolute right and depends on the circumstances of each particular case, In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976), alimony will be awarded "to the ex-wife in lieu of the husband's legal obligation to support her." In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981) (citation omitted). Ordering payment of support to the wife or ex-wife is appropriate when the husband has valuable property and a good income at his disposal and the wife has insufficient income and property to support herself. See Nelken v. Nelken, 176 N.W.2d 195, 202-03 (Iowa 1970) (husband with assets of $99,822 and average salary of $32,600 should pay support to wife with income of only $15); Simpson v. Simpson, 91 Iowa 235, 240, 59 N.W. 22 (1894) ("A showing that she is without means, and that her husband is able to furnish them . . . will, ordinarily, be sufficient to justify an allowance for her necessary support."). See also Iowa Code § 598.14 (1983) (court shall consider pecuniary condition of the parties).

Because a temporary order for support payments ends when a dissolution decree is entered, id., in reviewing the award of temporary support we should focus on whether Roseanne had the ability to support herself during the dissolution proceedings,[1] or whether she was unable to do so and Donald was legally obligated to support her.

The property settlement, which has a purpose distinguishable and differing from the purpose of alimony, Marriage of Hitchcock, 309 N.W.2d at 437, is relevant to our review only to the extent the settlement affected Roseanne's

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[1] For the purposes of this review, I consider Donald's appeal to be part of the dissolution proceedings.

ability to support herself during these proceedings. Clearly, the property settlement has not affected her ability to support herself. Roseanne has not had any benefit from the property settlement. During the time that the appeal has been in process, Donald has had the sole use of the assets of these parties, and has made no payment of any installment awarded to Roseanne by the court. She has had the benefit of none of the money to which she is entitled, while Donald has had the use of all of her share of the assets, except the personal property worth approximately $11,000 that she had in her possession at the time of trial. Without the benefit of the property settlement, Roseanne, unemployed and lacking substantial assets, is unable to support herself. The award of temporary support was not inequitable.

The trial court's refusal to award alimony as part of the dissolution decree is simply irrelevant. That refusal is based in part--perhaps entirely--on the property settlement. See Iowa Code § 598.21(3)(c) (1983). It was not based on a determination that Roseanne was able to support herself during the dissolution proceedings. Using the absence of alimony in the dissolution decree to justify taking away temporary alimony is wrong.

It is quite simple, if there is a need to modify the court's decree, to relieve respondent from the demands of the first year's payment to petitioner. It would be equitable to award to petitioner a share of the corn and soybeans that were held in storage. Had that been done, petitioner could make the decision whether she should sell the same to obtain needed cash or to hold them for a higher price at a later date. By the same token, respondent had difficulty in making the first year payment only because he chose to make it difficult.

I would affirm the trial court in its entirety. I am not opposed to ordering the payment of the balance of the cash award plus interest over a period of ten years, but the first installment should be no less than $30,000, and interest should be charged from the date of the entry of the court's decree in this matter.