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FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ESTHER HELEN UELNER WESTERFIELD and MARTIN CORNELIUS WESTERFIELD

UPON THE PETITION OF

ESTHER HELEN UELNER WESTERFIELD,

Appellant - Cross Appellee,

And Concerning

MARTIN CORNELIUS WESTERFIELD,

Appellee - Cross Appellant.

Filed April 15, 1977

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2-58789

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Petitioner and respondent appeal economic provisions of marriage dissolution decree. Modified, affirmed and remanded.

William C. Fuerste of Fuerste, Carew & Coyle, of Dubuque, and Gamble, Riepe, Burt, Webster & Fletcher, of Des Moines, for appellant - cross appellee.

Thomas W. McKay of Reynolds, Kenline, Breitbach, McCarthy, Clemens & McKay, of Dubuque, for appellee - cross appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Petitioner appeals two issues, whether trial court effected (1) an equitable division of the marital assets, and, (2) an adequate award for her maintenance. Respondent cross-appeals asserting want of authority for trial court's order of retroactive payment of temporary support and pre-dissolution capital advances to petitioner.

To resolve the issues as trier de novo on appeal we examine the whole record and, while we give weight to the findings of trial court, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). Criteria for determining equitable division of marital assets and alimony are set out in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), modified by In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

The parties, familiarly referred to by counsel as Sam and Marty, were married December 28, 1962, following a three week courtship. During the marriage they prospered financially and accumulated significant wealth as a result of the efforts of both. From the record we discern that Marty guided their business ventures, from an Indiana hamburger stand to the present corporate operations headquartered in Dubuque. However, throughout the years Sam worked long hours assisting in the business enterprises as well as serving as housewife and mother. As their affluence increased the parties assumed a high standard of living, acquired an expensive home, and enjoyed many luxuries.

Their marriage ended by decree of dissolution entered October 6, 1975. At the date of decree Sam was age 41 and Marty, 43. Sam's mental health had become quite fragile because of serious emotional conditions complicated by alcohol dependency, requiring five separate hospitalizations beginning in April, 1974. This hindered her ability to provide for herself.

Sam's condition apparently has worsened during pendency of this appeal as William C. Fuerste on February 17, 1976, was appointed her guardian ad litem pursuant to rule 17, Rules of Civil Procedure.

We have examined with care this sizable appeal record, noting with particularity the conflicting evidence of values placed by the parties and their witnesses upon the numerous marital assets. The major dispute over value centers upon Pride Service, Inc., successor of Martin Oil Co., Red-X Corporation, and Marty's limited partnership interests in Universal Resources Corporation. Our study of the financial data contained in this record leads us to conclude that the actual values of these interests is greater than that placed upon each by trial court and, consequently, we are convinced the amounts awarded Sam by trial court in property and for maintenance should be substantially increased.

I. Property division.

The parties have presented numerous methods for valuation of their assets, but we have found none to be conclusive because of Martin's control over the closed corporations, the nature of the ongoing business activities with their potential for fluctuating profits and, in addition, the variances in valuation figures possible depending upon the choice of valuation method. We are unable to make a precise dollar valuation of the disputed assets, nor do we feel compelled to do so in this particular case. Rider v. Rider, 251 Iowa 1388, 1393, 105 N.W.2d 508 (1960). It is plain from the size of these assets and their proven income potential that they are sufficient to meet the obligations we hereafter impose and yet insure Martin's financial security.

We find an additional lump sum property award of $250,000

should be made to petitioner. This lump sum award may be paid in ten equal annual installments, without interest, commencing July 1, 1977. In the event respondent dies before the full sum is paid, the balance owed shall be a charge on his estate. *See* In re Marriage of Beeh, 214 N.W.2d 170, 175 (Iowa 1974).

This property division will leave Marty full ownership of the business enterprises as decreed by trial court. We believe this inures to the benefit of both parties as it gives Marty a free hand to utilize his demonstrated business acumen, and should ensure his ability to meet his obligations to Sam. It also serves to avoid potential management or minority shareholder problems inherent in restoring to Sam ownership of 49% of the corporate stock. We believe this division fits the circumstances peculiar to this case. *See* In re Marriage of Briggs, 225 N.W.2d 911, 912 (Iowa 1975); *see also* In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976).

II. Alimony.

Applying *Schantz* criteria to the facts disclosed by this record, we are satisfied Sam requires and is entitled to increased permanent maintenance rather than the "support" of $10,000 per year for 11 years decreed by trial court. Taking into account petitioner's age, standard of living, mental health, alcohol dependency, and her inevitable employment problem, as well as respondent's earning capacity and substantial income, we hereby grant petitioner an award of $2000 per month alimony. Such alimony payments shall be paid by respondent commencing May 15, 1977, and on the 15th day of each succeeding month and shall terminate on petitioner's death or remarriage. Alimony payments shall not terminate on respondent's death but in that event shall be a charge against his estate.

III. Respondent's cross-appeal.

Respondent cross-appeals from trial court's order of May 22, 1975, wherein Sam was granted a temporary support allowance retroactive to February, 1975. Additionally, Marty was ordered to pay advances of marital capital for Sam's purchase of an automobile and $50,000 for her other needs arising prior to final hearing. However, no appeal was taken by Marty from the order of May 22, 1975, and having failed to do so, he has waived his right to appellate review on the grounds now urged. In re Marriage of Prybil, 230 N.W.2d 487 (Iowa 1975).

Except as modified herein the decree entered by trial court is affirmed. This case hereby is remanded for entry of decree in accord herewith.

Costs on appeal are taxed to respondent.

SNELL, OXBERGER and CARTER, JJ., concur; DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

I dissent. The trial court found the parties' assets to be $603,570. The court awarded $163,000 to the wife with an additional $110,000 to be paid in eleven annual installments for a total of $273,000. The husband-appellee was awarded property in the amount of $430,000.

This court awards the wife an additional $250,000, increasing her award to approximately $413,000 with a $2000 per month alimony and makes no finding of total assets. Rider v. Rider, 251 Iowa 1388, 1393, 105 N.W.2d 508 (1960). The appellant's counsel submits the assets in terms of millions, while the appellee's counsel submits that the assets are in the range of one-half million dollars.

As an example of the disputed value of one of the assets, Pride Service, Inc., the trial court found it to be $190,000. The wife said it was valued at $400,000 to $500,000. The wife's CPA valued it at $250,000 plus. The husband's CPA could give no value, and the husband made a value of $215,000 to $250,000. I would agree that substantial alimony and an adequate property settlement is justified. However, I consider that there is a failure of proof concerning the value of these total assets which does not enable the majority to justifiably warrant the additional $250,000 to the property settlement.

Further, I am not satisfied that under the premarital and post marital criteria laid down in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968) that that case requires such an enormous increase for this thirteen year marriage. There is indeed no mandate that the property settlement be an equal allocation of assets nor under the *Schantz* criteria would it appear to be justified in this instance. In re Marriage of Tucker, 213 N.W.2d 498, 501 (Iowa 1973).