FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BARBARA J. JENNINGS AND WAYNE M. JENNINGS

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Upon the Petition of)
BARBARA J. JENNINGS,)
Petitioner-Appellee,)
And Concerning)
WAYNE M. JENNINGS,)
Respondent-Appellant.)

Filed March 20, 1984
3-370
2-69279

Appeal from the Iowa District Court for Jasper County - M. C. Herrick, Judge.

Husband appeals from the decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

Bruce J. Nuzum, Matthias, Tyler, Nuzum & Feuerhelm, Newton, Iowa, for the petitioner-appellee.

James W. Carney, Carney, Hudson, Williams & Green, Des Moines, Iowa, for the respondent-appellant.

Heard by Schlegel, P.J., Hayden and Sackett, JJ.

Respondent, Wayne Jennings, appeals from the decree dissolving the parties' marriage, challenging the child support award and the property division. Petitioner, Barbara Jennings, seeks attorney fees on appeal. We affirm as modified.

Our review of this equitable action is de novo. Iowa R. App. P. 4. Although the findings of the trial court are not binding upon us, we do give them weight, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

Barbara and Wayne were married in 1970. Barbara had a daughter, Marsha, from a prior marriage. Marsha, now a teen-ager, lived with the parties during their marriage. Barbara and Wayne had one child, a son, born in 1975. He is currently in Barbara's custody.

I. Child Support

Wayne was ordered to pay child support of $200 per month. Barbara was earning in excess of $22,000 at time of trial. Wayne was earning approximately $21,000. Wayne argues that he is not in a position to pay the support ordered. We reject his arguments, finding that the trial court's child support award is equitable.

Both parents are liable for support of their children, not necessarily in equal shares, however, but proportionately according to their ability to pay. In re Marriage of Novak, 220 N.W. 2d 592, 598 (Iowa 1974). A child support award cannot be evaluated in a vacuum. The applicable criteria must be applied to the entire record. See In re Marriage of Campbell, 204 N.W. 2d 638, 639 (Iowa 1973). Considering the record as a whole and the circumstances outlined in In re Marriage of Zoellner, 219 N.W. 2d 517, 525 (Iowa 1974), we determine the child support award to be fair and therefore affirm the award.

II. Property Division

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The parties appear to agree that the property award made by the trial court resulted in a nearly equal division of the marital property. Wayne contends, however, that the trial court, in making its determination, failed: (1) to consider a child support judgment held by Barbara; (2) to consider a gift or loan during the marriage from Wayne's parents; and (3) to give Wayne credit for property brought into the marriage.

A. Child support judgment.

Barbara held a judgment for child support against Marsha's father. The judgment accrued at the rate of $60 per month. The support payments had not been collected prior to trial. There was evidence at trial that such accrued support payments amounted to approximately $9,300.00. We note that Marsha lived with Wayne and Barbara during the marriage and that Wayne and Barbara jointly contributed to her support. The trial court found that a substantial judgment for back child support existed, but found further that there was no evidence from which the collectibility of the judgment could be determined.

There are currently two motions pending which involve the issue of valuation of the support judgment. The clerk of the supreme court entered an order allowing Wayne to enlarge the appendix with respect to valuation of the support judgment. A motion to reconsider the clerk's order was subsequently filed by Barbara. The amended appendix was filed and contains a certification by the Appanoose County clerk. The certification contains facts with reference to the judgment held by Barbara against her first husband.

In Schmidke v. Schmidke, ____N.W. 2d____(Iowa 1984)(filed January 30, 1984), the Supreme Court received a document requesting dismissal of a portion of an appeal. The request was accompanied by an attempted factual showing. The court in Schmidke said:

> It is improper for us to consider matters not of record and is highly irregular for us to be asked to do so. See Iowa R. App. P. 10(c). We give the request no consideration.

As an appellate court we must ordinarily limit our consideration to the record made at trial or in supplementary proceedings upon limited remand. In re Marriage of Callenius, 309 N.W. 2d 510, 513 (Iowa 1981); In re Marriage of Moffatt, 279 N.W. 2d 15, 19 (Iowa 1979).

The amended appendix is an effort to enlarge the record made at trial. We therefore have not considered the matters in the amended appendix. The motion to reconsider the clerk's order is sustained, and the clerk's order allowing Wayne to enlarge the record is stricken.

Wayne next filed an application for limited remand asking that this cause be remanded to the district court for the purpose of submitting evidence on the collectibility of the child support judgment in favor of Barbara. Said application has been vigorously resisted by Barbara.

The general rule is that where an equity case is not in a condition for a final decree, none will be made by this court, but the case will be remanded. Locke v. Locke, 246 N.W. 2d 246, 253 (Iowa 1976). See also In re Marriage of Morgan, 218 N.W. 2d 552, 561 (Iowa 1974).

In Locke v. Locke, 246 N.W. 2d at 253, it was said:

> * * * Where the evidence is insufficient for the fair de novo determination of an important issue, we can and should return the case for more evidence on the subject.* * *

Id. (citing Daugherty v. Daugherty, 260 Iowa 878, 882, 151 N.W. 2d 569, 572 (1967)).

In In re Marriage of Stom, 226 N.W. 2d 797, 799 (Iowa 1975), the supreme court found that "the record [was] wholly inadequate to properly review the trial court's property division," but went on to affirm the property division made by the trial court.

We decline to order the requested remand. There is evidence in the record of the existence and amount of the child support judgment at issue. We need not arrive at an exact value. The purpose of determining the value is to assist the court in making equitable property awards and allowances. In re Marriage of Moffatt, 279 N.W. 2d 15, 19 (Iowa 1979).

On our de novo review we determine that Barbara's child support judgment has value. Unlike the trial court we do not find the judgment to be non-collectible, nor do we accept Barbara's argument that Wayne has the burden to prove that the judgment is collectible. Barbara made no reference to the existence of the judgment in her financial statement. In filing the statement she verified under oath that she was filing a true and complete statement of her assets and liabilities. Barbara's testimony indicates that she was aware of the existence of the judgment.

Iowa Code section 598.13 provides:

> Both parties shall disclose their financial status. . . . A statement of net worth set forth by affidavit on a form prescribed by the supreme court . . . shall be filed by each party prior to the dissolution hearing, unless waived by both parties.
>
> Failure to comply with the requirements of this section constitutes failure to make discovery as provided in rule of civil procedure 134.

Section 598.13 places a responsibility on Barbara to make the existence of the judgment known in her financial affidavit and requires that she attempt to place a fair value thereon. While we do not find that the existence of the judgment was hidden, it is incumbent upon the parties to make honest and full disclosures. There is evidence of collectibility in the record, which Barbara does not refute. Wayne was asked:

> Q. You are aware there is a judgment for back support that your wife can collect on. A. Yes.

Barbara offered no testimony as to the existence of non-collectibility of the judgment. She had an obligation to make the facts with reference to the judgment known to the court. The record before us indicates that there is a judgment in her favor of more than $9,000 and that it is collectible, at least in part.

We must next determine whether or not the existence of the judgment requires a change in the trial court's assessing the property division. We hold that it does. The record is clear that Wayne contributed to Marsha's care financially. Wayne helped assume that duty and as a result Barbara was not forced to collect support from Marsha's father.

A child support award is property of the mother as against claims of the children. Slack v. Mullenix, 245 Iowa 1180, 1186, 66 N.W. 2d 99, 102 (1954). While never being called upon to address the issue of treatment of a child support judgment in a dissolution action, it is clear that all relevant factors should be considered which bear upon an equitable solution to financial issues. See In re Marriage of Jones, 309 N.W. 2d 457, 460 (Iowa 1981)(non-divisible military retirement of husband considered in property division); Locke v. Locke 263 N.W. 2d 694, 696 (Iowa 1978)(spouse's loss of social security from dissolution considered in framing financial clauses); Heilman v. Heilman, 291 N.W. 2d 183, 184 (Mich. Ct. App. 1980)(wife allowed interest in husband's future recovery in personal injury action); Smith v. Smith, 317 N.W. 2d 324, 325 (Mich. Ct. App. 1982)(potential workmen's compensation award of wife included as part of marital assets).

The equities in this case dictate that Barbara's child support judgment be considered by the court in determining the economic rights of the parties. We do, therefore, take such judgment into consideration, along with other relevant factors, in our review of the trial court's property division.

B. Gifts from parents. 65

Wayne next claims that the trial court failed to give him credit for approximately $17,000 which the parties received from his parents during the marriage as a gift or a loan. The money is not readily traceable to hard assets, but there is evidence that some of the money was used for a down-payment on the couple's house and shop and was used to remodel the house.

While we recognize that loans from parents may ultimately become gifts, we need not make such a distinction here. Wayne received $17,000 from his parents during the marriage. If the money was a loan, he has an obligation to repay and we should consider that obligation in reviewing the property division. If the money was a gift to Wayne, we must consider it under the dictates of section 589.21(2) which provides:

> Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

The requirement to set aside to a party the property which has thus been inherited or received as a gift is not absolute; division may nevertheless occur to avoid injustice. In re Marriage of Thomas, 319 N.W. 2d 209, 211 (Iowa 1982). We take into consideration in our review of the trial court's property division all evidence with respect to gifted property.

C. Property brought into marriage.

Wayne finally contends that the trial court failed to give him credit for property brought into the marriage. We find no support in the record for this claim.

The ultimate question is whether the distribution of property was equitable. We have rejected any rule based on a percentage division of the assets, and recognize that we must determine what is equitable under the specific facts of

this case. In re Marriage of Lattig, 318 N.W. 2d 811, 814 (Iowa Ct. App. 1982); In re Marriage of Callenius, 309 N.W. 2d 511, 514 (Iowa 1981).

Considering all factors relevant to the economic provisions of the decree, we hereby modify the trial court's order to increase Wayne's lien against the family home from $4,000 to $10,000. In all other respects the decree is affirmed.

III. Attorney Fees

Barbara requests attorney fees on appeal. In a dissolution action, attorney fees are not awarded as a matter of right. In re Marriage of Willcoxson, 250 N.W. 2d 425, 427 (Iowa 1977). After considering all of the provisions of the dissolution decree and the financial positions of both parties, we deny Barbara's petition for attorney fees connected with this appeal. The costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

HAYDEN, J. (dissenting in part)

I dissent in part, in that Wayne is entitled to an increased lien against the family home from $4,000 to $16,000 rather than $10,000.