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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BARBARA KATHRYN BOIES
AND DAVID LEONARD BOIES

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Upon the Petition of	)	
BARBARA KATHRYN BOIES,	)	
Petitioner-Appellee,	)	Filed November 26, 1986
And Concerning	)	
DAVID LEONARD BOIES,	)	6-264 85-1772
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Buchanan County (No. 1029-1284) - James C. Bauch, Judge.

Respondent husband appeals from economic provisions of the parties' dissolution decree, asserting that both the property division and the support awards were inequitable. **AFFIRMED AS MODIFIED.**

Susan B. Keith of David R. Nagle, P.C., Waterloo, for respondent-appellant.

Robert L. Rausch of Rausch & Ferguson, Waterloo, for petitioner-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

Petitioner Barbara Kathryn Boies and respondent David Leonard Boies were married on April 4, 1965. They have three children: Steven, born November 5, 1975; Sean, born July 3, 1977; and Scott, born October 18, 1978.

Barbara was forty-two years old at the time of the trial. She is a high school graduate, but has no college or vocational school training. She worked outside the home as a bookkeeper during the first ten years of the marriage, never receiving more than $3,800.00 in net annual salary. She has not been employed outside the home since the birth of the couple's first child in 1975. During the course of the marriage she had primary responsibility for the family's housework, gardening, and child care. She also contributed to the growth and maintenance of a hog-raising operation begun by the couple in 1970.

David has been employed by the Donaldson Company in Oelwein, Iowa, for twenty-two years and has been a supervisor there for the last twelve years. He presently earns approximately $15.20 per hour for a forty-hour work week and receives time-and-one-half for overtime. David has no control over the amount of overtime he is required to work. David claims only two dependents for payroll tax deduction purposes, which has resulted in income tax refunds of approximately $7,000.00 for both 1983 and 1984. His employment benefits include hospitalization insurance, a profit-sharing plan, a pension plan, a 401-K retirement plan, a life insurance plan, and a yearly bonus.

During the pendency of the dissolution action, Barbara and the three children received government assistance in the form of food stamps, free commodities, and free school lunches. Under the district court's decree, they will continue to qualify for this assistance.

The family house is located on approximately four acres of land in rural Hazelton, Iowa. At trial, testimony by a professional realtor placed the fair-

market value of the property at $95,000.00, $65,000.00 of which represented the value of the residence and $30,000.00 of which represented the value of the hog-raising operation.

In its dissolution decree, the district court set up a joint custody arrangement with Barbara having physical care of the children. The court ordered David to pay $300 in child support per month per child so long as he is liable for the support of three children, continuing in that amount during his legal obligation to two children and increasing to $600 per month during his legal obligation to the youngest child alone. He was also ordered to pay Barbara alimony in the amount of $250 per month for ten years. The district court also ordered David to pay other support payments in the form of one-half the monthly mortgage payments, one-half the monthly real estate taxes, and insurance payments. David was ordered to pay $1,000 toward Barbara's attorney's fees, court costs, and all debts other than the home mortgage not retired as a result of the agreed-upon sale of the hog operation and farm machinery.

The district court also divided the parties' property and gave Barbara a car, a certificate of deposit, household furniture, the couple's 1984 income tax refund, one-half of David's profit-sharing plan, yard and garden equipment, one-half of the hogs on the homestead at the time of the decree, her bank account as well as those of her children, and an antique love seat. David received the profit from the sale of hogs since the couple's separation, his bonus from his employer for 1984-85, his profit-sharing plan, his 401-K plan at his place of employment, Farm Bureau stock, snowmobiles, two boats, tools, bar furniture, a 1984 pickup truck subject to a lien, a hog topper, one-half of the hogs on the homestead at the time of the decree, his bank account, a refrigerator, a table saw, a wood planer, several antiques, and miscellaneous personal items.

On appeal, David asserts that the property division and the support awards were inequitable. Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the district court but are not bound by them. Iowa R. App. P. 14(f)(7).

In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa Ct. App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property is based upon each marital partner's right to a just and equitable share of the property accumulated as a result of their joint efforts. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa Ct. App. 1981).

David contends first of all that several items of property considered by the district court in its attempt to achieve an equitable division of property are the product of his labor following the couple's separation. As such, he argues, they should not be considered in reaching the property division. Specifically, appellant refers to the profit from the sale of hogs during 1984 and 1985, his bonus from his employer, his 401-K plan at his place of employment, and the hogs on the farm at the time of the district court's division of the property. We disagree and believe that the district court properly considered each of these items of property in reaching the property division.

In Locke v. Locke, 246 N.W.2d 246 (Iowa 1976), the court held that the date of trial is the only reasonable time at which an assessment of the parties' net worth should be undertaken. With this holding, the court rejected the argu-

ment that it should not consider property acquired by a spouse after the marital breakdown but before trial. The court also reaffirmed Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), wherein is stated:

> Under existing circumstances, to the extent reasonably determinable by the record, we are persuaded defendant's net worth, at time of trial, was at least $112,000, and probably much more. (emphasis supplied in quote).

Locke, 246 N.W.2d at 252 (quoting Schantz, 163 N.W.2d at 405).

Consideration at time of trial is justified in the present case where both parties contributed to the growth and maintenance of the hog-raising operation. The hog-raising operation was begun by the couple in 1970. The record shows that both parties contributed during the marriage to the operation, even though Barbara's contribution ended for all practical purposes in January of 1985. Iowa Code § 598.21 states that "[u]pon every judgment of . . . dissolution . . . the court shall divide the property of the parties . . ." and goes on to mandate an equitable division of "all property except inherited property or gifts received by one party." Although most of the work done after the parties separated was performed by David, the hog operation was the result of a venture pursued by both parties during the course of their marriage and the post-separation profit and hogs were properly considered by the district court in making an equitable property division. See In re Marriage of Smith, 351 N.W.2d 541, 543 (Iowa Ct. App. 1984).

Similarly, with respect to David's 1984 and 1985 bonuses from his employer, the district court was correct in taking these into consideration. Even assuming that their entire value was earned after the couple's separation, a proposition seemingly belied by the fact that the parties' separation did not occur until the latter third of 1984, the marriage was still in force and Barbara was still performing the services of mother that allowed David to work and receive the

bonuses. Under § 598.21(1)(c), district courts are to take into consideration such matters. Likewise, the district court properly considered David's profit-sharing plan and 401-K plan at his place of employment. As with David's bonuses, each of these assets was accumulated as a result of the joint efforts of the parties and were properly considered by the district court. Hitchcock, 309 N.W.2d at 437. See In re Marriage of Byall, 353 N.W.2d 103, 106 (Iowa Ct. App. 1984).

We do note an error, however, in the district court's division of David's profit-sharing plan. After valuing the plan at $6,439.00, the court gave one-half to each party. In listing the profit-sharing plan's division, however, David was listed as receiving the entire $6,439.00 while Barbara was listed as receiving a one-half share, or $3,219.00. We modify the property division of the district court so that it properly reflects the district court's decision to award Barbara $3,219.00 and David $3,220.00.

David urges us to hold that an equitable division of property would require that liquid assets be divided as evenly as possible. He directs our attention to no authority in support of this proposition, however, and we decline to adopt it as our law.

David also urges that we decree an equal allocation of debts not retired by the agreed-upon sale of farm equipment and machinery. The allocation of marital debts between the parties is as integral a part of the property division as is the apportionment of marital assets. In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980). Appellant relies upon our language in Smith, 351 N.W.2d at 542, where we said that

> [a]ny loans obtained prior to the separation of the parties are considered part of a joint effort benefiting both parties. Accordingly, we find that whatever amount was left owing at the time of separation is to be divided

> equally between the parties, and each party is to assume his or her half of the remaining indebtedness.

Id. at 542.

The facts supporting the even distribution of debt in Smith are much different, however, than those before us today. In Smith, the ex-wife was a cashier clerk earning approximately $24,000 per year who had also been trained as a licensed practical nurse. The ex-husband involved in that property division was a real estate salesman with an income comparable to that of his ex-wife's. Upon consideration of that situation, the court in Smith found that the indebtedness surrounding an automobile should be split evenly between the parties. The circumstances in the present case are obviously quite different. We reiterate that the crucial issue before us on review is whether the distribution of property was equitable under the particular circumstances. Wallace, 315 N.W.2d at 830. We find that the district court's valuation and distribution of the marital property is equitable and should not be disturbed.

We also agree with that portion of the district court's decree which grants Barbara and the parties' three children the right to reside in the family home until the last of the three children dies, attains the age of eighteen, or becomes emancipated. We are persuaded by the equities of this case to award the right to live in the family home for a reasonable time to the party having physical care of the children. This home has served as the only residence of the children, and the record supports that the neighbors are of substantial assistance to Barbara and the children. Barbara's father helped in building the home and it will enable her to maintain a garden to help reduce food costs. The savings involved in moving from the home and renting a home for Barbara and the children are speculative and, as the district court found, nominal at best. Much of the real estate taxes and utility costs involved with the homestead are associated with

the hog operation and may well be substantially reduced upon the sale of those assets. The district court's award to Barbara and the children of the right to live in the family home was equitable and should not be disturbed.

David next challenges the district court's awards of support for Barbara and the parties' three children, contending that in light of his income and expenses the award to Barbara is inequitable in both amount and duration and that the child support ordered is inequitable in amount. The district court imposed support obligations on David of $250.00 per month with respect to Barbara and $300.00 per child per month with respect to the children.

The payment of alimony is not an absolute right; it is awarded out of fairness, according to the particular facts of the case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Two of the factors to be given great weight in such a determination are the duration of the marriage and the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In addition, where a spouse has sacrificed her earning capacity in order to make a home for the family and the other spouse has profited thereby, alimony is justified. In re Marriage of Sanders, 255 N.W.2d 109, 111 (Iowa 1977). When determining the appropriateness of alimony, the trial court must consider the earning capacity of each party, present standards of living, and ability to pay balanced against the relative needs of the other. In re Marriage of Estlund, 344 N.W.2d 276 (Iowa Ct. App. 1983). The spouse with the lesser earning capacity is entitled to be supported for a reasonable time in a manner as closely resembling the standards existing during the marriage as possible to the extent that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well. In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983).

Barbara is forty-two years old with no college or vocational school training. During the first ten years of the marriage she worked outside the home as a bookkeeper, as well as doing the housework and helping with the hog operation. Since the birth of the parties' first child in 1975, she has not worked outside the home. She has continued, however, to be a homemaker and gardener, to care for the children, and to help with the hog operation up to January of 1985.

David is employed as a supervisor at the Donaldson Company in Oelwein, Iowa, where he has been employed for twenty-two years. He earns approximately $15.20 per hour for a forty-hour work week and receives time-and-one-half for overtime.

We feel that under the equitable principles outlined above, Barbara is entitled to support, reasonable in amount and duration, from David both in recognition of her contribution to the marriage and to enable her to secure whatever training or education necessary for her to reenter the employment market. We think, however, that given the circumstances of the parties, $250.00 per month is too much and ten years too long of an obligation to impose on David.

Appellant notes that his average net monthly income is approximately $2,076.00. Appellee does not challenge this figure. This figure includes an amount of overtime which varies and over which appellant has no control. We are consequently reluctant to treat this figure as a reliable minimum monthly income. See In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa Ct. App. 1981). The court below ordered appellant to pay a definite monthly amount for alimony, child support, insurance and mortgage payments as well as one-half of both the children's medical expenses and major repairs to the residence, the latter two amounts being, of course, indeterminate. We find these expenses to amount to approximately $1,550.00 per month exclusive of medical expenses and home repairs. This leaves appellant with approximately $526.00 with which

to meet his monthly expenses. We think this inadequate, particularly in light of the fact that appellant is responsible under the district court's dissolution order for all debts of the parties, other than the home mortgage, not paid as a result of the sale of the hog operation and farm machinery. We believe that the district court's award of support to Barbara should be reduced in amount to $200.00 per month and in duration to five years, a period we think sufficient in the facts of this case to enable appellee to reenter the job market. In addition, we modify the district court's order to provide that the alimony obligation will cease upon Barbara's death or remarriage.

We deal next with David's child support obligation. Iowa Code section 598.21(4) (1985) enumerates the factors to be considered in determining an award of child support. While both parents have an obligation to support their children, that obligation should be apportioned according to the fair ability of each to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa Ct. App. 1984).

Under the circumstances of this case, we find that the amount awarded by the district court for child support is not reasonable. We believe, however, that an award of $200.00 per month per child can be met by David. His obligation shall remain at $200.00 per month per child until such time as he is only liable for the support of one child at which time it shall be $300.00 per month. David's liability for child support payments shall terminate in accordance with the child support provision in the district court's dissolution decree. Costs are assessed to David.

AFFIRMED AS MODIFIED.

Oxberger, C.J., and Snell, J., concur; Sackett, J., dissents.

SACKETT, J. (dissenting)

Respondent David Boies appeals from the property, child support and alimony awards of his dissolution decree contending the awards are inequitable.

I. APPENDIX

Although the only issues raised on appeal deal with property, alimony and property division, the appendix of 224 pages contains about 50 pages which deal only with evidence of child custody and fault in the breakdown of the marriage relationship, particularly evidence of David's relationship with other women. The Iowa legislature has made it extremely clear fault is not a consideration in property division, alimony and child support. While the matters included may be admissible on the issue of visitation before the trial court, this evidence clearly is not relevant or proper in this appeal and should not have been included in the appendix. I clearly disregard it in the issues I review herein.

II. PROPERTY DIVISION

For the past ten years of the marriage David has been the wage earner and Petitioner Barbara Boies has assumed the child care and homemaking responsibilities. The parties had few assets at the inception of the marriage and there have been no major gifts or inheritances. David inherited $5,000 and Barbara's father helped the parties build their home. The assets are from the joint effort of the parties. I therefore determine a nearly equal division of assets is justified.

The trial court made the following division of assets:

David

Profits from sale of hogs 1984 - 1985	$ 9,000.00
Bonus from Donaldson 1984 - 1985	2,400.00
His profit sharing plan	6,439.00
Donaldson 401 K-Plan	550.00
Farm Bureau Stock	540.00
Snowmobiles	700.00
Boat	2,000.00

All tools	2,200.00
Bar furniture equipment	900.00
Flat bottom boat	100.00
1984 Chevy pickup subject to lien of $8,500.00	8,500.00
Hog topper	400.00
One-half hogs on acreage	1,250.00
Total	$25,778.00

Barbara

1976 Buick	$ 800.00
CD Oelwein State Bank	7,000.00
Household furniture	3,000.00
1984 tax return	7,397.00
One-half Profit Sharing Plan	3,219.00
Yard and garden equipment	700.00
One-half hogs on acreage	1,250.00
Total	$23,366.00

Additionally, $10,000 to $15,000 in farm machinery was ordered sold with the proceeds to apply to the following debts:

Debts

Jim Kauffman	$ 4,500.00
Oelwein Elevator	1,600.00
Farm Service	850.00
New concepts	160.00
Oelwein State Bank	5,000.00
First National Bank	3,114.00
Total	$15,224.00

The parties also had an acreage with a home and hog feeding operation. The acreage was valued at $95,000 ($30,000 for the hog feeding operation, $60,000 for the homestead). The entire acreage is encumbered for approximately $45,000. The court ordered the hog feeding operation sold, the proceeds applied to farm debt and the balance divided between the parties. The court divided the balance of the acreage equally, allowing Barbara and the children to reside on the acreage until the children reach majority.

David complains the trial court has considered income as assets, therefore the property division is not equitable. I agree.

The parties were first separated in about September, 1984. The dissolution was tried in the trial court in September, 1985. During the parties' separation David paid mortgage payments of $543 per month, insurance, telephone, medical expenses, life insurance premiums and $100 per week in temporary support. Barbara was not employed outside the home during that period and assumed the difficult task of raising the children. Besides David's support she used $1,600 in savings. During the separation period David drew his salary and bonus. He operated and took the money from the family hog operation, which both parties admit showed a loss in calendar year 1984.

David's complaint is that the trial court incorrectly charged to him alleged profits from the hog operation in 1984 and 1985 and a bonus he earned from his company in 1984 and 1985. This determination by the trial court was based on testimony by Barbara that the income from the hogs in 1984 and 1985 allegedly exceeded the expenses. However, the parties each filed a state of affairs. The statement shows there is no available assets to reflect the hog income and bonus. In addition, Barbara admitted the hog operation lost money in 1984. It is reasonable to conclude David's income has been spent for his support and the family's support during the separation.

Basically what the trial court has done is divide, without adjustment for the income tax consequences, a portion of income earned and spent by David during the separation period. I find no basis for such a division particularly when David has made substantial contributions to the family support during the separation period. I note Barbara also used a $1,600 savings account of the parties during the separation period. This was not charged to her.

David next complains he will be left with the debts not covered by the sale of the farm machinery. I agree that the trial court has failed to realistically consider the retirement of current debts. While it is possible the sale of farm machinery may satisfy the $15,244 in debts, it is probable it will not. The trial court assumes these debts can be retired from the sale of the hog operation. The problem is the home and hog operation together are encumbered by a $45,000 mortgage. It is doubtful the lender will release the lien on the hog operation without some retirement of the mortgage debt. The trial court did not consider this issue.

I would adjust the determination of assets made by the trial court. I do not consider either the hog profit or bonus income to be assets subject to division. I would make the following disposition of the parties' assets:

David

Profit Sharing Plan	$ 6,439.00
Donaldson 401 K-Plan	550.00
Farm Bureau Stock	540.00
Snowmobiles	700.00
Boat	2,000.00
Tools	2,200.00
Bar furniture equipment	900.00
Flat bottom boat	100.00
1984 Chevy pickup valued at $8,500.00 and subject to lien of $8,500.00	.00
Hog topper	400.00
One-half hogs on acreage	1,250.00
One-half income tax refund (less $1,000)	2,698.00
Total	$17,777.00

Barbara

1976 Buick	$ 800.00
Household furniture	3,000.00
Yard and garden equipment	700.00
One-half hogs still on acreage	1,250.00
CD Oelwein State Bank	7,000.00
One-half income tax refund (plus $1,000)	4,698.00
Total	$17,448.00

I would affirm the trial court's order that the farm machinery be sold and the $15,000 in debts be paid. I would modify the order to provide any debts not paid by the machinery sale shall be paid one-half by each party.

I agree if Barbara wishes she should have the right to live with the children on the acreage. I recognize however the hog operation is not easily sectioned off. I see many problems with the current joint ownership of the premises. Therefore, I would award the acreage to Barbara subject to a lien of $20,000 in David's favor. When the hog operation is sold, David shall release his lien on the hog operation only on one of the following conditions:

1. The payment of his lien in full;
2. A payment of $5,000 upon a showing his lien is subject to a mortgage on the house and surrounding property of no more than $35,000.

If the hog operation is not sold in two years, $5,000 of David's lien shall be paid. The balance of David's lien shall be paid at such time as the first of the following events occur:

1. The sale of the whole premises;
2. When Barbara and the children cease to occupy the premises;
3. When none of the children are students in the public elementary and high school.

III. SUPPORT

David claims the support payments ordered by the trial court are excessive. David is a supervisor at the Donaldson Corporation in Oelwein. David earned $38,000 in 1984, $31,000 in 1983. He also has substantial benefits from his employment which enhance his salary package.

The trial court ordered David to pay the following:

$300 per month per child	$ 900.00
$250 per month alimony for 120 months	250.00

Additionally, he was ordered to pay one-half of the mortgage and other expenses of the acreage. With the ownership of the acreage passing to Barbara, I would order the expenses of the acreage all be hers. In assessing David's support award I consider the fact David's equity remains in the home the children will occupy and consider his loss of interest on this money to be his further contribution to their support. Therefore, I determine the support and alimony awards made by the trial court to be equitable.