FILED
AUG 29 1985
CLERK SUPREME COURT

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**IN THE COURT OF APPEALS OF IOWA**

**IN RE THE MARRIAGE OF LINDA D. SCHWINDT AND DOUGLAS P. SCHWINDT**

**UPON THE PETITION OF LINDA D. SCHWINDT,**

Petitioner-Appellee,

**AND CONCERNING DOUGLAS P. SCHWINDT,**

Respondent-Appellant.

**Filed August 29, 1985**

5-224
84-1234

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Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

Respondent-husband appeals from the decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

James L. Tappa of Spector, Tappa, Kopp & Nathan, Bettendorf, for respondent-appellant.

Seymore M. Raben, Davenport, for petitioner-appellee.

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

**OXBERGER, C.J.**

The respondent-husband has appealed from the child support, property, and attorney's fee award provisions of the couple's divorce decree. We affirm as modified.

The parties stipulated to a number of facts prior to trial regarding custody and the division and value of certain items of property. The respondent, Douglas Schwindt, was given custody of one of the couple's children, Jennifer, who was fourteen years old at the time of trial. Petitioner, Linda, was given custody of nine-year-old Angela under the agreement. The value of most of the properties was agreed upon, except for certain furniture and the amount of money in a credit union account. Linda also says Douglas had more property than indicated in his financial affidavit. Disposition of the homestead and payment of child support and attorneys fees were also in dispute.

The trial court did not set a value on the furniture of the parties but accepted that each party had in their possession what they needed. They were awarded the items in their possession and Douglas was given the use of the marital home until Jennifer finished high school. He was to pay all interest, taxes, and the mortgage until then, when the house would be sold and the proceeds divided between the parties. In its decree the court stated petitioner had to spend $706 to replace items left with respondent, and awarded Linda $2500 for "start up" expenses. Douglas was also ordered to pay $400 of Linda's attorney's fees.

Our review is de novo. Iowa R. App. P. 4. Both child support and alimony or property provisions of the court decree are affected by the earning capacities of the parties and the equities of the property division. Iowa Code § 598.21(1), .21(4)(1985). The parties dispute items in both these categories, and we initially resolve these factors since they will affect the issues appealed by Douglas.

Linda is a licensed practical nurse who has worked as Admissions Coordinator at Americana Nursing Home for eleven years. She earned $17,000 in the year prior to trial and has received yearly cost-of-living raises since 1981 of $1000 per year. She is thirty-five years old and is in good health. Douglas is thirty-four years old and works as a journeyman millwright. His wages vary considerably because of the unpredictable nature of his type of work. His wages decreased by $10,000 from 1981 to 1983. In 1983 he was laid off for five months. Douglas says this is in part due to hard economic times in the construction business. In 1983 he earned $22,000 in regular wages and $3300 in unemployment compensation. Douglas worked two days in 1984 before being injured and returned to work only two weeks before trial. This job was due to end August 31, 1984, and employment after then was uncertain.

Douglas points out that the court should base its figures for income for the couple on what each is actually expected to earn, and not include income entirely speculative. In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa Ct. App. 1981). He notes that while he earns slightly more than Linda, his income is volatile. On the other hand, Linda has steady work and receives cost-of-living raises each year.

When Linda separated from Douglas, she took $4400 from their checking account. She says she used this money to pay for first month's rent in an apartment, for a damage deposit, to pay various bills, and purchase $700 worth of furniture. She also paid moving expenses with the money. After paying all her debts, she was left with $900 still in her possession. She also says Douglas owns a John Deere tractor, tools, and guns not listed in his affidavit. She claims the tractor may be worth $3000 although it was purchased two years ago for

$1000. She also says Douglas borrowed $1540 on his life insurance and that should be included in his assets.

We accept the figures on the parties' properties given by Linda except that we find the $2300 used by Linda not reflected in her assets should be included. She says this is needed for start-up money, but it was nevertheless the joint money of the parties which she used. We also hold the tractor is worth, at most, the amount paid for it of $1000. Linda says the credit union account is $400, although she had originally said it was $300 and admitted it was just a guess. Douglas says there is $180 in the account. The evidence does not make it clear which figure is accurate, and we accept Douglas's figure of $180. We include in Douglas's assets the money borrowed on his life insurance to pay expenses while he was out of work, since the money was taken out of the cash value of the policy. We accept Linda's figures presented in her brief regarding the worth of the furniture.

We find the award of property to be as follows:

| Linda | | Douglas | |
|---|---|---|---|
| Ford Mustang | $3750 | Ford truck | $2000 |
| Checking account | 400 | Checking account | 800 |
| Furniture | 1475 | Silver bar | 950 |
| New furniture | 743 | Credit union | 180 |
| Cash | 900 | Tools | 2000 |
| Used from | | Guns | 1100 |
| joint account | 2350 | Tractor | 1000 |
| | $9618 | Appliances | 1600 |
| | | Furniture | 1055 |
| | | Policy | 1540 |
| | | | $12,225 |

It was not clear in the court's decision whether the $2500 given to Linda was a part of the property division or alimony.

The property division, most of which the parties stipulated to, was nearly equal. Linda admitted at trial that if the $4400 she took was fully included, the division is nearly equal. Our figures show a $2607 advantage given to Douglas. Property divisions do not have to reach exact equality, and the circumstances of each case will be considered. In re Marriage of Conley, 284, N.W.2d 220, (Iowa 1979). The result here is not unreasonable, considering the fact the lot upon which the marital home was built was given to Douglas and valued at $1200.

We disagree with Douglas that the court's award is not justified as startup expenses. He says the amount Linda withdrew from the joint accounts was used for such expenses. However, most of the money went to pay bills, medical and dental expense and moving costs. We find it is equitable to award her one-half of this amount. We uphold the award to her for start-up expenses as alimony but modify it from $2500 to $2200.

Another justification made by the court for both the award to Linda and for the child support award is the fact that Douglas is allowed to live in the parties' marital home for four years. Linda argues on appeal that Douglas has the advantage of using her $19,500 in equity for four years, and that the award replaces interest she could earn on the money. However, for four years Douglas will pay nearly $1900 in mortgage and other expenses for the house. During this time, Linda will be gaining equity but will not have to put any money into the house. We find it would be more equitable to give Linda interest of ten percent during the next four years until the house is sold and provide that she shall not share in the increased equity from Douglas's mortgage payments over those four years.

In such a situation where the parties are in a nearly equal position in regard to income, property,and where each has one child to support, the factors set

out at section 598.21(4) would reveal that no child support should be paid by either party. The court found Douglas should pay $35 per week in child support since "it does not seem fair that one child should have the benefit of remaining in the marital home and the other child have to live in an apartment."

There was no testimony at trial that Jennifer's needs were different from Angela's. Douglas must pay the mortgage, interest, taxes, and insurance on the home. In addition, Linda did not want to live in the house, and instead wanted it sold. This would indicate she did not see a significant disadvantage to Angela in living in an apartment. We agree with Douglas that the trial court's reasoning appears more as a penalty to Douglas for wanting to keep the marital home. Considering the various factors set out in the Code, we find child support is not appropriate while Jennifer lives with Douglas.

When Jennifer leaves the home, however, Douglas will be in a better position financially. At that time, we find he should pay to Linda $50 per week in child support until Angela reaches majority, or is emancipated.

In determining whether it is appropriate for the trial court to award attorney's fees, we consider the resources of the spouse and their ability to pay. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). Where the party requesting payment of attorneys fees has the ability to pay those fees, the application for additional fees should be denied. In re Marriage of Hitchcock, 309 N.W.2d 432, 438 (Iowa 1981). We hold Linda should pay all of her trial court attorneys fees.

The criteria for deciding an award of appellate attorneys fees include the needs of the requesting party, the party's ability to pay, and the results on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). Douglas shall pay $500 towards her appellate attorneys fees and all costs.

**AFFIRMED AS MODIFIED.**