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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF MADELYN DUNCKLEE AND JERRY DUNCKLEE

Upon the Petition of)
MADELYN DUNCKLEE,)
Petitioner-Appellant,)
And Concerning,)
JERRY DUNCKLEE,)
Respondent-Appellee.)

Filed March 24, 1981

0-392
2-64166

Appeal from Fayette District Court - Frank D. Elwood, Judge.

Petitioner appeals and respondent cross-appeals property division provisions of dissolution decree. Petitioner appeals trial court's nunc pro tunc order. - AFFIRMED IN PART. SET ASIDE IN PART.

Harlan M. Hockett, Des Moines, for petitioner-appellant.

Patrick M. Roby, of Shuttleworth & Ingersoll, Cedar Rapids, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

Carter, J., took no part.

PER CURIAM

Petitioner-wife, Madelyn Duncklee, appeals and respondent-husband, Jerry Duncklee, cross-appeals the property division provisions of their dissolution of marriage decree. Madelyn appeals a portion of a nunc pro tunc order filed by the trial court and seeks attorney fees on appeal. We affirm the property division provisions and set aside as void the nunc pro tunc order.

Madelyn and Jerry were married on February 14, 1958, when both were 24 years old and after both had graduated from Vinton high school. The marriage produced four children ——Brian, Jolene, Brad, and Blaine——who were, respectively, ages 20, 18, 17 and 13 as of the time of trial. The trial court awarded Jerry custody of the two minor children. Madelyn worked for Northwestern Bell for 22 years, first in Vinton and then in Cedar Rapids. After Jerry worked for Davis Implement in Vinton, he worked for a lumber company in Fayette, which he and another man purchased in March of 1973. Jerry has since acquired full ownership of the lumber company, which is now the sole source of support for himself and the minor children. When they were married the parties' first residence was a house in Vinton, which they sold in the summer of 1975 to move to Fayette, where Jerry purchased a house for the family. When the rest of the family moved to Fayette, Madelyn moved to Cedar Rapids, where she has lived ever since. Throughout their 21 year marriage Madelyn's income was comparable to Jerry's, except for the last two or three years, when Jerry was receiving both a salary and a corporate income from the lumber business.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of fact, but we give weight to them, especially regarding the credibility of witnesses. Iowa R. App. R. 14(f)(7).

I. Each party contends that the trial court's division of property unfairly favored the other party. Neither party contends that the trial court unfairly allocated the couple's personalty. The following provisions are in dispute. The trial court ordered Jerry to pay Madelyn a $7,000 property settlement and awarded Madelyn one-half of the equity interest in the Fayette residence, which amounts to $10,210. These awards made to Madelyn total $17,210, and were made subject to debts of $5,726, leaving Madelyn with a net award of $11,484. The trial court awarded Jerry the lumber business, which has a net value of $45,424 and one-half of the equity in the Fayette residence, which amounts to $10,210. These awards made to Jerry total $55,634. Madelyn asserts that

the disparity between the value of her $11,484 net award and the value of Jerry's $55,634 net award is unjust. Jerry argues that it was unfair for Madelyn to be awarded any of the $17,210 gross award made to her.

Although frequently a dissolution decree provides for an equal division of assets, there is no requirement that this be done. In re Marriage of Schissel, 292 N.W2d 421, 423 (Iowa 1980); In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979). The test for an acceptable division of assets is to ask what would constitute an equitable and just award under the circumstances. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976). In reviewing the property division provisions of a dissolution decree, we consider the factors articulated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault. In re Marriage of Williams, 199 N.W.2d 330, 345 (Iowa 1972).

While living in Vinton, for the first seventeen years of the couple's marriage, Madelyn was primarily responsible for rearing the children and maintaining the household, including cooking, sewing, and cleaning. During this time period Madelyn used her salary to pay for the family's groceries, her and the children's clothes, and miscellaneous expenses, and Jerry used his salary to pay all other expenses, such as house payments, car payments, and utility bills. When the couple sold their residence in Vinton in 1975, they split the net proceeds of the sale. Jerry used his one-half of the proceeds toward the purchase of the lumber company. Madelyn testified that she could not specifically recall how she spent her $5,500 share of the proceeds, and Jerry testified that he did not know how Madelyn spent it.

Although Madelyn was a full partner in the couple's marriage for its first seventeen years, over the final 3 1/2 to 4 years of the marriage she has substantially dissociated herself from the family. From the time Jerry moved the family to Fayette in the summer of 1975, Madelyn discontinued living with it on a full-time basis. She stayed at a Cedar Rapids Howard Johnson in a room rented on a weekly basis prior to renting an apartment in late 1975. Madelyn usually drove to Fayette on week-ends and stayed with the family one or two days. Madelyn also spent some of her days off work going on trips with a friend instead of being with her family. Madelyn says that she chose to work and live in Cedar Rapids because the family needed the money. We doubt Madelyn's expressed motivation for several reasons. As a result of her living and working in Cedar Rapids the difference between Madelyn's yearly personal expenses

and yearly net salary is only $1,200. Jerry wanted Madelyn to live in Fayette even if she were unemployed so that she could live at home with the family. Although Madelyn told Jerry she intended to transfer to the Northwestern Bell operation in Oelwein, which would enable her to live in Fayette, she turned down at least one opportunity to do so. Madelyn made a strong effort to conceal from the family what her living circumstances were in Cedar Rapids. Madelyn falsely told the family that she was living with a female co-worker. Madelyn gave the family the telephone number of the friend to call in case it wanted to contact Madelyn outside of her working hours. Madelyn never told the family where she lived. The family discovered where she lived only when Jerry followed her to work one day 2 1/2 years after she had obtained her apartment in Cedar Rapids. At that time Jerry discovered that Madelyn had her own apartment and her own telephone. Madelyn's telephone number was listed in the name of Jim Bascomb.

Since Madelyn discontinued living with the family Jerry has had the primary responsibility of caring for the children and home. While Madelyn has made financial contributions to the family during this time period, they have been minor, whereas Jerry's have been very substantial.

Madelyn and Jerry are disputing over how the Fayette home and lumber business should be divided between them. Jerry bought the Fayette home in 1976, well after Madelyn started living in Cedar Rapids. Jerry managed the purchase by taking loans totalling $22,000. Only Jerry has made payments on these loans; Madelyn has contributed nothing toward the purchase of the Fayette home. In 1973, two years before Madelyn moved to Cedar Rapids, Jerry and Ronald Ash bought the lumber business. Of the total cost of the business Jerry and Ash contributed $10,000 in cash apiece, and they borrowed $10,000 on the business inventory and $15,000 on the business realty. Jerry obtained the $10,000 in cash from $6,000 of an $8,000 mortgage on the family's Vinton home and a $4,000 contribution from his parents. Since that time Ash died, and Jerry is now in the process of purchasing Ash's interest in the business from Ash's widow. Only Jerry has made payments on the obligations incurred on the lumberyard; Madelyn has never made any, not even over the years that her income was similar to Jerry's. Madelyn argues that Jerry would not have been able to purchase the lumber business in 1973 but for her financial contributions to household expenses. Jerry concedes that Madelyn's interest in the Vinton home on which Jerry obtained an $8,000 mortgage

represents an economic contribution to the lumber business.

While the fact that Madelyn has never made a direct financial contribution to the purchase of either the Fayette home or the lumber business, and the fact that for approximately the final 3 1/2-4 years of marriage Madelyn has substantially severed herself from the family unit justify the decision to award Madelyn less than one-half of the value of the Fayette home and lumber business, they do not justify the decision to award her none of the value of these assets. Madelyn was a full partner in the marriage and an integral member of the family for seventeen years. During the final 3 1/2-4 years of the marriage she did make minor financial contributions to the family and maintained ties with it through her visits and through giving living accomodations to two of the children for several months in her Cedar Rapids apartment. After considering the circumstances of the case at bar in light the criteria enumerated in Schantz, we conclude that the trial court fairly allocated the value of the Fayette home and lumber business between the parties. We therefore affirm the property division provisions of the dissoulution decree.

II. The trial court entered its findings of fact and conclusions of law on August 31, 1979. On September 17, 1979, the trial court filed a nunc pro tunc judgment and decree, which preserved Jerry's right to bring an action for alienation of Madelyn's affections against Vernon Bascom. The trial court filed the nunc pro tunc order without giving Madelyn notice or an opportunity to be heard, therefore prejudicing Madelyn's rights. We therefore set aside as void the trial court's nunc pro tunc order to the extent that it preserved Jerry's right to bring an action for alienation of Madelyn's affections. Cf. McVay v. Montz Implement Co, 287 N.W.2d 149, 150 (Iowa 1980) (nunc pro tunc order without hearing or notice set aside as void because prejudical to defendant's rights).

Madelyn has applied for attorney fees incurred by this appeal. In evaluating a request for attorney fees incurred on appeal we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Erickson, 228 N.W.2d 797, 800 (Iowa 1975). Applying these factors to the case at bar, we hereby order Jerry to pay $500 of Madelyn's attorney fees on appeal.

Costs are assessed against Jerry.

Affirmed in Part; Set Aside in Part.