FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BENJAMIN A. LEVINE AND MAXINE C. LEVINE

Upon the Petition of)
BENJAMIN A. LEVINE,)
Petitioner-Appellant,)
And Concerning)
MAXINE C. LEVINE,)
Respondent-Appellee.)

Filed March 24, 1981

0-343
2-63683

Appeal from Black Hawk District Court - Forest E. Eastman, Judge.

Petitioner-husband appeals from economic provisions of the parties' dissolution decree asserting 1) that trial court erred in its finding of facts thereby denying him a fair and reasonable basis for an equitable distribution of the assets of the marriage, 2) that trial court erred in rejecting the parties' antenuptial agreement as to the intent of the parties for distribution of the parties' marital assets, 3) that trial court erred in distribution of the accumulated assets of the parties, and 4) that trial court erred in awarding excessive attorney fees to respondent. Respondent seeks attorney fees and costs on appeal. AFFIRMED.

Samuel T. Beatty of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, Iowa, for petitioner-appellant.

Robert J. Dieter of Redfern, McKinley, Olsen & Mason, Cedar Falls, Iowa, for respondent-appellee.

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

PER CURIAM

Petitioner-husband, Benjamin A. Levine, appeals from economic provisions of the parties' dissolution decree. He asserts 1) that trial court erred in its finding of facts thereby denying him a fair and reasonable basis for an equitable distribution of the assets of the marriage, 2) that trial court erred in rejecting the parties' antenuptial agreement as to the intent of the parties for distribution of the parties' marital assets, 3) that trial court erred in distribution of the accumulated assets of the parties, and 4) that trial court erred in awarding excessive attorney fees to respondent. Respondent, Maxine C. Levine, seeks attorney fees and costs on appeal. We affirm.

The parties were married in 1974. Their marriage was dissolved by decree filed March 5, 1979. At the time of the dissolution, petitioner was 59. Petitioner had two prior marriages, the first of which produced two sons; the second marriage was of short duration. Petitioner, while having only an eighth-grade education, has been a successful retail merchant and has operated Richfields Clothing Store for twenty-seven years. He brought substantial assets to his marriage with respondent. Petitioner was hospitalized for back surgery during the parties' marriage and continues to experience some related health problems.

Respondent was 62 at the time of trial. She was married to Stanley R. Cohn until his death in 1972. She has two daughters and a son from this marriage. Stanley Cohn was an equal stockholder with his brother in Cohn Brothers, Inc. The company was placed in receivership five days after Stanley's death. Respondent is eligible for social security benefits of $250 per month. She has two years of college education and has worked briefly in a retail clothing store. Respondent's assets at the time of the parties' marriage consisted of $30,000 life insurance proceeds from Stanley Cohn's death and an interest in his business.

Prior to their marriage, the parties entered into an antenuptial agreement in which each waived any right to disclosure of the other's assets and each acknowledged the other retained control of his or her separate assets.

In dividing the parties' assets, trial court noted that "[t]he financial machinations of the petitioner, the apparent manipulation by both parties of the values placed upon assets listed in their financial statements, and the parties tendency to co-mingle family, corporate and personal assets in their minds made it very difficult for the court to determine the exact assets possessed by the parties at the time of their marriage and upon their separation." The court limited its consideration to assets under the parties'

legal ownership, finding that the ownership of Cohn Brothers rested solely in respondent's son, Marc. The court's intent in dividing the properties was ". . . to completely separate the parties and their business interests from future reliance upon each other . . ." due to the vindictiveness of the parties towards each other. The court awarded to respondent:

> (a) all funds attributable to the Stanley Cohn inheritance . . . and presently held by respondent ($30,000);
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> (b) National Bank claim in the Stanley Cohn Estate, valued at $5,000 to $17,000;
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> (c) two commercial lots, originally titled in Cohn Brothers, Inc., but held jointly by the parties at the time of trial; valued at $25,000.
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> (d) Cohn Brothers notes, valued at $50,000 to $120,000 by the parties.
>
> (e) $6,018.75 to be paid by petitioner toward respondent's attorney fees.

Petitioner was awarded all other assets listed by the parties on their financial statements, including a diamond ring valued at $12,000, the insurance value of respondent's wrecked automobile, $1,500 in bonds, relief from delinquent temporary support obligations, and relief from any future alimony payments.

I. Scope of Review. Our review of dissolution proceedings is **de novo.** Iowa R. App. P. 4. We review the facts as well as the law and from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Trial Court's Findings of Facts. Petitioner claims that trial court erred in its findings of fact and deprived him of a fair and reasonable basis for the equitable distribution of assets of the marriage. He claims that the record fails to show the Stanley R. Cohn Estate is bankrupt, that the corporation was purchased by and owned by respondent's son, Marc, that the commercial lots and note values are as set by the court, that Marc purchased the commercial lots, or that he should be penalized on his failure to sustain a previous settlement agreement. We find no merit in any of petitioner's contentions.

From our review of the record, which includes tax returns, financial statements, and a CPA's evaluation of values, we find that trial court fairly determined the extent of the marital assets, given the failure of petitioner to clearly disclose the nature and

amount of his estate. We agree that sufficient evidence existed from which to find the Stanley R. Cohn Estate was bankrupt, the commercial lots had been deeded to petitioner and respondent, 55 shares of the corporation had been transferred to Marc, another 25 shares had been retired into the corporation, and 30 shares remained in the corporation. Only the National Bank claim, valued at $5,000, remained in the estate. The values on the lot and notes are within the permissible range of the evidence and we are not inclined to disturb them. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). See In re Marriage of Conley, 284 N.W.2d 220, 222 (Iowa 1979).

Further, we find no evidence that trial court, in its award, penalized petitioner for failure to sustain a settlement agreement. We conclude no error occurred on this issue.

III. The Antenuptial Agreement. Petitioner also contends that trial court erred in rejecting the parties' antenuptial agreement as to the intent of the parties for the distribution of the marital assets. He claims that trial court's refusal to consider the parties' intent, resulted in a property distribution which seriously impairs his net worth and financial security. We find no merit in petitioner's assignment of error.

Trial court, in distributing the parties' marital assets, could have referred to the antenuptial agreement for an indication of the parties' intent. Norris v. Norris, 174 N.W.2d 368, 369 (Iowa 1970). But, ". . . any provision which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage [is] contrary to public policy and void." Id. at 370. Trial court here, under objection, allowed testimony relating to the parties' antenuptial agreement, but made no reference to the agreement in its findings or conclusions of law.

The antenuptial agreement provided that the parties were to retain control over their own estates, including all increases or additions, but each could "encumber, sell, dispose, give or devise and bequeath" his or her own estate as each so chose. In the property division, trial court's stated objective was ". . . to divide the property in a manner intended to completely separate the parties and their business interests from future reliance upon each other." Even though trial court made no reference to any reliance on the antenuptial agreement in its property distribution, we see no conflict. Trial court returned to each party essentially those assets with which each had entered the marriage. While respondent's assets were enhanced during the marriage by petitioner's generosity, the ability of each party to "give" of his or her own estate was clearly intended by the parties in the antenuptial agreement. In addition, although petitioner does not disclose with certainty his assets, from the record it appears that his

assets have also increased in value during the parties' marriage. Merely because respondent was unable to "give" of her assets to enhance petitioner's furnishes no basis from which to say the antenuptial agreement now requires taking from respondent those assets of hers that increased in value due to petitioner's "giving." Further, we see no provisions in the antenuptial agreement forbidding the parties to "give" of their assets to each other during the marriage and even if such a provision would have been included in the agreement, it would not have been binding. See, Id. "Public policy has declared that certain obligations attached to a marriage contract, including the duty of a husband to support his wife. It is against public interest to permit the parties to enter into an antenuptial agreement relieving him of his duty." Id. We conclude no error occurred on this issue.

IV. Distribution of Assets. Petitioner next contends that trial court erred in its distribution of the accumulated assets of the parties. He asserts that all property acquired prior to the marriage should be assigned to its original owner and property acquired during the marriage should be divided in just proportions. He argues that trial court, in its effort to completely separate the parties in their business interests, determined the rights of the parties without a thorough examination of the postmarital criteria of Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). We see no merit in petitioner's argument.

Trial court in dissolution proceedings may make such property divisions as are justified. Section 598.21, The Code 1979. Justified property divisions are those considered equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). We are guided by Schantz, 163 N.W.2d at 405, and Williams, 199 N.W.2d at 345, in reaching an equitable determination of the parties' property division.

We have reviewed all of the evidence and considered the arguments presented by the parties and see no reason to disturb trial court's award.

V. Attorney Fees. Petitioner's last assignment of error is that trial court erred in awarding excessive attorney fees to respondent. We disagree.

Attorney fees are not recoverable as a matter of right, but depend on one party's financial needs and the other party's ability to pay. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). Trial court has considerable discretion in awarding

attorney fees. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Trial court awarded $6,018.75 toward respondent's attorney fees. An itemized statement of services on behalf of respondent totalling $12,037.50 was in the record. Trial court based this award on a disparity of annual income of the parties, the lack of liquid assets on respondent's part, the additional attorney fees respondent incurred when petitioner failed to conform to the settlement agreement, and the "extremely complicated and changing statement of assets" provided by petitioner necessitating additional time and effort in determining petitioner's financial situation. We find no abuse of discretion here.

Respondent requests an award of attorney fees and costs for this appeal. Such an award is not allowed as a matter of right; any award must depend upon the financial circumstances and earnings of both parties. Burham, 283 N.W.2d at 278. After reviewing the entire financial situation of both parties, however, we find an award of attorney fees on appeal is warranted for respondent. We conclude, without setting the amount respondent's attorney may charge, that petitioner shall pay $1200 toward these fees for this appeal. Costs of this appeal are assessed against petitioner.

All other provisions of trial court's decree not addressed by this opinion are affirmed.

AFFIRMED.