

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN RE THE MARRIAGE OF SHERRY M. BUSH AND LOREN C. BUSH**

Upon the Petition of	)	
SHERRY M. BUSH,	)	Filed January 26, 1983
Petitioner-Appellee,	)	
And Concerning	)	<u>2-391</u>
LOREN C. BUSH,	)	<u>2-68013</u>
Respondent-Appellant	)	

Appeal from Washington District Court - Richard J Vogel, Judge.

Respondent husband appeals from economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED**

Margaret T Lanson of Meardon, Sueppel, Downer & Hayes, Iowa City, for respondent-appellant

D. Bradley Kieseey, Washington, for petitioner-appellee.

Heard en banc

DONIELSON, J.

Respondent husband appeals from economic provisions of the parties' dissolution decree. On appeal he asserts that the property division was inequitable and that the award of 10% interest on the unpaid balance of the lump sum property settlement was excessive. We affirm in part and modify in part.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give them weight especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I.

The parties, Sherry Bush and Loren Bush, were married for twenty-seven years, from 1954 to 1981. They had five sons. At the time of the marriage Loren was working for his father on a farm. He brought \$3,000 and some equipment into the marriage and Sherry brought a cedar chest. In the early years of the marriage, Loren rented land for farming. Sherry performed household and farming chores until she became employed as a sales clerk in 1976 after which her work around the farm decreased substantially.

In 1965, the parties purchased a 254-acre farm. Over the subsequent ten years they continued to purchase land for farming, all of which was adjacent to the original farm purchased or to the after-acquired property. They purchased a total of 470 additional acres. The last 70 acres were purchased with the parties' children holding a five-sixth ownership interest, and the parties holding a one-sixth interest. At the time of trial, the value of the land had increased substantially.

Four of the parties' five children live on the land in houses owned by the parties. One son purchased the homestead area of a part of the land upon which he was building his own home. The other two elder sons were married, with children and lived on the land rent free. They all took part in the farming operations, although in varying degrees of participation. The two high school age boys lived with Sherry in what had been the marital home. Each of the children paid their one-sixth share of the contract payment for the purchase of the last 70 acres from proceeds from the sale of the crops grown on their respective share of this land. Both parties expressed the desire that the sons be allowed to continue to farm the family land.

In its property division, the court awarded Loren the pool table, gun case, two deer heads, walnut bookcase and coffee table. The car and all other personal property and furnishings were awarded to Sherry. Loren was awarded all farm real estate, equipment, machinery and grain, subject to all indebtedness on those items. Sherry was awarded a lump sum of \$496,284.50 payable in eleven installments with interest of 10% on the unpaid balance. The lump sum award represents one-half of the equity in the real property. Loren instituted this appeal to challenge only the property division of the decree.

II.

Loren contends that the property division, as a whole, is inequitable. We agree and modify the award in accordance with the following principles. Our analysis is governed by § 598.21 which codified many aspects of our prior case law. See Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) (modified to exclude fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972)). Among the factors we consider in dividing marital property under section 598.21 are the length of the marriage and the contribution of each party to the marriage, including homemaking and child care services. Our ultimate question is, as it has

always been, whether the distribution of property was equitable. We reject any rule based on a percentage division of the total assets and must determine what is equitable under the specific facts of this case. In re Marriage of Callenius, 309 N.W.2d 511, 514 (Iowa 1981). When asked to review an individual economic provision of a dissolution decree, we consider all the provisions together as an integrated whole. In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976).

It is apparent from the record that the parties' adjusted gross income for the years immediately preceding the dissolution was relatively low and in 1979 was a minus \$15,000. The reason for these low figures appears to be due to capital expenditures, depreciation and operating loss carryovers associated with the property. The parties' wealth is not in their production income, but in the increased value of the land they purchased throughout the marriage. We have noted that "an equitable property division of the appreciated value of the property should be a function of the tangible contributions of each party and not the mere existence of the marital relationship." In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). We recognize Sherry's contributions in the instant case and believe that she should be awarded a substantial amount of the property, taking into account its appreciated value. However, we have also recognized that the fact that the land is being used for one's livelihood may require special consideration. See Callenius, 309 N.W.2d at 315. In the instant case the farmland provides the livelihood for at least four people, Loren and his three sons. There is a suggestion that the other sons may want to become involved in farming operations on the land as well. Both Sherry and Loren have expressed a desire to allow their children to continue farming the land. We believe the trial court's division frustrates this desire and the above principles.

We believe it would be more equitable to divide the property between the parties rather than to award Sherry a lump sum settlement. We find that Sherry

should be awarded the area known as the Porter farm consisting of 150 acres and buildings with a value of \$208,725. The debts on this parcel, which amounted to \$23,625 at the time of trial, are to be the responsibility of Loren. In addition, since there is evidence suggesting that the quality of this land for farming purposes is poorer than the remaining portions of the farm, Sherry shall also be awarded 50 acres of farmland adjacent to the Porter farm area. The adjacent 50 acres awarded shall not include buildings and the separation of these 50 acres from the rest of the farmland shall be made in such a manner so as to avoid the inclusion of any buildings, unless the parties agree otherwise. Loren shall be responsible for any debts associated with this property as well. According to this division of the property, Sherry will be awarded 200 acres with an approximate value of \$298,725. Loren is awarded the remainder of the real estate but must pay the debts associated with all of the property.

We realize that Sherry's award is reduced, but believe this is equitable under the circumstances. While she did contribute to the marriage, Loren brought more into the marriage and developed and expanded the farm with his skill and knowhow. The award will insure that his farming operations as well as those carried on by his sons will not be jeopardized. For this reason, we need not address the issue of interest to be paid on the award.

III.

Sherry contends that, in the event her property award is reduced, she should be awarded alimony and greater child support. We disagree. While we note that the court can properly consider how the property has been divided in assessing the needs and resources of the parties in fixing alimony, we do not believe it is appropriate in this case. See In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). Sherry received a substantial amount of the property, debt-free. She has minimal living expenses and a full time job as a sales clerk. We do not believe she should be awarded alimony.

Having reviewed the criteria governing child support awards set forth in section 598.21(4), we also find the child support award to be equitable and justified. The obligation to provide support depends upon the particular circumstances and is awarded in accordance with the parent's ability to pay. In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). As a general rule, however, parents are equally obligated to support their children. Id. It appears to us that both parties are able to discharge their obligation of support toward the two sons who are still attending high school. The modification of the property division will have little, if any, effect on their ability to provide such support.

IV.

Sherry also seeks attorney's fees in connection with the trial and the appeal. Attorney's fees are not recoverable as a matter of right, but depend upon 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). The trial court has considerable discretion in awarding such fees at trial. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Likewise on appeal, our primary consideration in making an award of attorney's fees is the parties' resources. We believe the trial court considered the parties' financial needs and abilities in determining that each should pay his or her own attorney's fees and pay half of the court costs. The parties shall pay their own attorney's fees on appeal but Loren shall pay the court costs.

Having considered all of the parties' contentions, we affirm the decree as modified.

AFFIRMED IN PART AND MODIFIED IN PART.