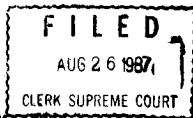


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF BARBRA S. MAXWELL AND JOHN D. MAXWELL

Upon the Petition of)

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BARBRA S. MAXWELL,)

Petitioner-Appellee,)

Filed August 26, 1987

And Concerning)

7-292
86-1653

JOHN D MAXWELL,)

Respondent-Appellant.)

Appeal from the Iowa District Court for Scott County (No. 36640), James
R Havercamp, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage **AFFIRMED.**

Thomas J. Yeggy, Davenport, for respondent-appellant.

David A. Millage, Bettendorf, for petitioner-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Respondent husband appeals from the decree dissolving the parties' marriage. He asserts (1) that the property division is inequitable, (2) that petitioner wife's alimony award is excessive, (3) that petitioner wife should not have been awarded any attorney fees, and (4) that his summer visitation with the parties' children should be increased. Petitioner wife requests attorney fees on appeal. We affirm.

Petitioner Barbra S. Maxwell and respondent John D. Maxwell were married in 1971. Barbra is 39 years old; John is 40 years old. At the time the dissolution decree was entered in October 1986, the parties had been married 15 years. The parties have two children: James, born in 1972, and Jason, born in 1976. Custody of the children is with Barbra, who testified at trial she was moving to Cleveland, Ohio the week following trial. John, who now lives in California, was ordered to pay \$110 per week per child in child support. The parties are not appealing child custody or child support.

Barbra, a high school graduate, was a clerical worker until the birth of the parties' first son in 1972, at which time both Barbra and John agreed that Barbra should stay at home. Between 1981 and 1985 Barbra worked part-time, earning \$5,377 cumulative. Barbra plans to pursue a real estate license while in Ohio.

John has a Master's Degree in Business Administration. He was in management at Towmotor Corporation, a subsidiary of Caterpillar Tractor Corporation, for 16.7 years. He terminated his employment there in January 1986. John currently works in California as a branch manager for Douglas Aircraft Company, a component of McDonnell Douglas Corporation. His base salary is \$59,800, plus overtime and benefits. At the time of trial, John had worked substantial overtime hours at a rate of approximately \$33 per hour. He testified he did

not expect to be working as many overtime hours in the future. His benefits include a retirement program after 10 years (in addition to the vested retirement program he has with Caterpillar); medical and dental coverage; life, accident and dismemberment insurance; and a savings plan.

John brought into the marriage the homestead, having paid \$20,000 down on the \$40,000 purchase price. John also brought into the marriage \$18,000 in inherited stocks, \$6,000 of which was used for family expenses and \$12,000 reinvested in other stock. John inherited \$17,000 in stocks during the marriage, which was used to purchase rental property and motor vehicles and to pay family expenses. The money from the stock had been commingled with other marital assets and funds.

Barbra is the owner of a \$100,000 life insurance policy on the life of her mother with an approximate cash value of \$8,100. This policy was transferred to Barbra as the party with the insurable interest, with the \$303 monthly premium considered by the parties to be an investment and a basis for a retirement fund.

As stated, John has a retirement plan with Caterpillar with an approximate present value between \$12,000 and \$15,000. At the time of trial there was \$38,000 cash in a bank account, representing proceeds from the sale of the marital residence. The parties owned other real estate worth approximately \$8,100. John owned 26 shares of Caterpillar stock worth \$1,096, had a balance of \$540 in the credit union and owned a 1985 Golf VW auto worth \$6,300. He had received \$6,000 for relocation expenses. Petitioner had a 1978 Chevrolet station wagon worth \$2,400.

In its dissolution decree, the trial court awarded Barbra sole custody of the children and allowed John visitation of two weeks in the summer and one week every other Christmastime. The trial court directed John to pay \$220 per week child support, \$1,000 per month alimony for 36 months, and \$4,200

toward Barbra's attorney fees. The trial court awarded Barbra the personal property in her possession, a car, a life insurance policy, and half the bank account containing the proceeds from the sale of the parties' house. Total assets awarded to Barbra were worth approximately \$29,900, plus the household goods. The trial court awarded John the personal property in his possession, a car, his pension fund, his credit union account, a real estate contract, some Caterpillar stock, the relocation expenses paid by McDonnell Douglas, and the other half of the bank account containing the proceeds from the sale of the parties' house. Total assets awarded John were approximately \$52,000. In addition, Barbra was to pay debts of \$4,348, which included debts to Mastercard, J.C. Penney, one-half of the debt to Drs. Diehl, Anderson & Foreman, and the balance of her attorney fees not ordered paid by John. John was ordered to pay debts of \$18,416, which included debts to Montgomery Wards, Mastercard, Dr. Ordone, one-half of the debt to Drs. Diehl, Anderson & Foreman, the children's attorney fee, Dr. Solis, deposition costs, a pension evaluation, credit union, portion of Barbra's attorney fees, court costs, and his own attorney fees.

John appeals from the dissolution decree, challenging the property division, the alimony award, the attorney fee distribution, and the visitation provisions. Barbra requests attorney fees on appeal.

Because a dissolution proceeding is equitable in nature, our scope of review is de novo. Iowa R. App. P. 4. While we give weight to the fact findings of the trial court, especially considering the credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

I. Property Settlement. John argues that the trial court failed to consider his premarital and inherited property in distributing the marital assets.

Iowa Code section 598.21(1) (1985) sets forth the factors to be considered in dividing the property of a marriage. We note that there are no hard and

fast rules governing economic issues in a dissolution action and, because precedent is of little value, our decision must ultimately rest on the particular facts of each case. In re Marriage of Urban, 359 N.W.2d 420, 423 (Iowa 1984). In a marriage dissolution, there need be neither an equal division nor a percentage division of property; the determinative factor is that which will constitute an equitable and just award under the circumstances. In re Marriage of Hoak, 364 N.W.2d 185, 194 (Iowa 1985). All economic aspects of the divorce decree must be viewed as an integrated whole. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa 1984). The property division and alimony provisions must therefore be considered together in evaluating their individual sufficiency. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

The requirement to set aside to a party property which has been received as a gift is not absolute; division may occur to avoid injustice. In re Marriage of Thomas, 319 N.W.2d 209, 211 (1982). That exception also applies to property brought to the marriage. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). Iowa Code section 598.21(2) (1985) states that inherited property may be the subject of a property division if a refusal to divide the property is inequitable to the other party or the children of the marriage.

The parties were married for 15 years. Both parties contributed to the marriage, although in different ways. We believe the trial court did take into consideration John's extra contributions by awarding him approximately \$52,000 worth of assets and Barbra, \$29,000 worth of assets. After deducting debts, John still received about \$34,000 worth of assets, and Barbra received about \$25,000 worth of assets. In addition, John has a greater earning capacity to justify the property division. John requests one-half of the interest in Barbra's mother's life insurance policy. Because Barbra is the party with an insurable interest and because John has one vested pension plan and will receive another

in 10 years if he stays with McDonnell Douglas, Barbra will retain ownership of the policy so that she, too, may have some sort of retirement fund.

We believe that upon an independent examination of those factors listed in Iowa Code section 598.21(1) (1985), the trial court's disposition of the parties' property was well within the range of permissible evidence in achieving an equitable division of property, and we are therefore not inclined to disturb it.

We therefore affirm the trial court's decision regarding the property division.

II. Alimony. John contends the trial court erred in awarding alimony in the amount of \$1,000 per month for 36 months.

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 Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981). In considering the fairness of the alimony provision in a dissolution decree, we look to Iowa Code section 598.21(3) (1985), which provides a list of factors that must be considered in ordering support payments. In re Marriage of Passick, 375 N.W.2d 284, 285 (Iowa App. 1985). In balancing the needs of both parties, we note that the property division and alimony must be considered together in evaluating their sufficiency; neither should be evaluated in isolation from one another. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

This court previously has stated the equitable criteria to look at in determining an award of support payments to a spouse with the lesser earning capacity:

The equitable principles that we have recognized and enforced in the past require, in dissolution cases, that 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 that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well. But once the dependent

spouse's standard of living is assured, there is no reason, in equity, for the supporting spouse to provide still more.

In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa App. 1983).

Barbra testified she was going to reenter the job market at a future date after getting her children settled. She needs time to acquire job skills and get back on her feet financially. John suggested at trial that \$900 to \$1,000 a month for 12 months would be an appropriate award of alimony. Thus, in view of the substantial assets awarded John, in view of Barbra's desire and ability to further her education to obtain employment, and in light of our finding in Hayne, id., that such support is to be for a reasonable time, we affirm the trial court's alimony award to Barbra in the amount of \$1,000 per month for 36 months.

III. Attorney Fees. John contests the amount of Barbra's attorney fees for which he is responsible, namely, \$4,200 of the total \$7,500.

The controlling factor in an award of attorney fees is the ability of the respective parties to pay, depending upon the financial circumstances and earnings of each. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). Attorney fees rest within the sound discretion of the court. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). Upon our de novo review, we have considered the income of the parties, the indebtedness of each, and the abilities and needs of each party. We believe the determination of the trial court that John is to pay \$4,200 towards Barbra's attorney's fees was proper and therefore affirm the trial court in that respect.

IV. Visitation. John requests in the conclusionary remarks of his brief that visitation with the children be extended from the two weeks awarded him in the summer to four weeks. However, no other place in his brief does he make reference to this request, nor cite any authority or basis for his request. Rule 14(a)(3) of the Iowa Rules of Appellate Procedure states in pertinent part:

"Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue." Therefore, because John did not refer the court to any reason for reversing the trial court's opinion in this regard, we deem the visitation issue waived. We affirm the trial court's opinion awarding John visitation for two weeks in the summer and one week every other Christmas.

V. Attorney Fees on Appeal. Barbra seeks allowance of additional attorney fees for this appeal. An award of attorney fees in a dissolution action is not a matter of right, but depends upon the relative needs and abilities of the parties. In re Marriage of Fish, 350 N.W.2d 226, 231 (Iowa App. 1984). In light of the financial condition of both parties, we find John has a superior ability to pay and, therefore, order that John contribute \$1,000 towards Barbra's attorney fees on appeal.

AFFIRMED.