FILED
APR - 8 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SANDRA SUE LEWIS AND STEVEN WAYNE LEWIS

UPON THE PETITION OF **SANDRA SUE LEWIS,**	)	Filed April 8, 1983
Petitioner-Appellee,	)	
AND CONCERNING **STEVEN WAYNE LEWIS,**	)	2-522 / 2-68378
Respondent-Appellant.	)	

Appeal from Polk District Court, Luther T. Glanton, Jr., Judge.

Respondent-husband appeals from economic provisions of the parties' dissolution decree. AFFIRMED AND MODIFIED.

Rex Darrah and Douglas B. Howard, Des Moines, for respondent-appellant.

Gary S. Gill, Des Moines, for petitioner-appellee.

Considered by Oxberger, C.J., and Snell and Johnson, JJ.

OXBERGER, C.J.

Respondent-husband appeals from economic provisions of the parties' dissolution decree, asserting: (1) that the child support award was inequitable; (2) that the property division was inequitable; (3) that he should be awarded attorney fees for both the trial and this appeal; and (4) that an award of child support for the time that the action was pending was inequitable and in any event should not have been made when the wife did not request temporary support during the pendency of the action. We affirm and modify.

The parties were married in 1973. During the marriage the husband worked for a railroad which has now terminated its business and at the time of trial was employed part-time as a truck driver with a gross salary of approximately $190 per week. The wife is a nurse with a 1981 gross income of $21,985.49. She neither requested nor received temporary child support during the pendency of this action.

The wife was awarded custody of the children, now aged five and three, and child support of $35 per week per child. The husband was awarded a 1966 Mustang, a railroad retirement fund which he regarded as valueless, and a rollaway couch valued at approximately $160. The wife was awarded all remaining property including a 1977 Honda Civic, household furnishings, and the parties' home in which they had an equity of $20,000. The husband was awarded a lien against the real estate in the amount of $10,000 less $1,960, an amount representing child support for the period that this action was pending. The lien was to draw ten percent annual interest and was made due and payable sixty days after the husband's child support obligation terminates. Half of a $5,000 debt owed to the husband's parents was also to be paid from the lien awarded to him. He was ordered to pay the remainder of the debt to his parents and another debt of $250 while the wife was ordered to pay debts of $350, assume the mortgage on the home, and a street paving assessment. Neither party was awarded alimony or attorney fees.

I. Scope of Review

Since this is an action in equity, our review is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7); In re Marriage of Bevers, 326 N.W.2d 896, 897 (Iowa 1982).

II. Child Support

Our review regarding child support is governed by the principles codified at Iowa Code section 598.21(4)(1983). Parents are equally obligated to support their children. Gerk v. Gerk, 259 Iowa 293, 296-99, 144 N.W.2d 104, 107-08 (1966). Disparity in the amount each parent is required to contribute toward child support results from differences in the ability of the parents to contribute.

Sandra is a trained registered nurse with a full-time job at Iowa Methodist Hospital in Des Moines, Iowa. Her annual income, based on full-time employment and excluding overtime pay is $24,377.60. In addition, she has been earning substantial sums of money for overtime work. At the time of trial, she had a few minor debts. The trial court's award of the parties' home to Sandra imposed upon her the obligation to make mortgage payments on the home amounting to $468.17 per month, which included payments on the mortgage, insurance, taxes, and payment toward a $2,302.44 street paving assessment.

By contrast, Steven had a high school education, and was employed as a part-time driver for Purolator Courier in Des Moines, where his gross weekly income was approximately $190. In addition, the trial court's decree left him with a $5000 debt to his parents, an obligation to pay $1,960 for back child support to Sandra, a debt of $206 to a service station, and $70 per week child support. The trial court awarded him none of the household goods of the parties except a rollaway couch and an automobile.

It is evident, then, that Steven was left with no assets, no place to live, a number of debts, minimal earning potential, a limited income, and —for him—a

crushing child support obligation. He was required to remit $70 of his weekly paycheck of about $150 to Sandra for the support of their children.

Taking into account all of the circumstances, we conclude that this division of the responsibility of supporting the children of this marriage is inequitable. We must consider the financial resources of both parents, since both parents are obliged to share in the responsibility of supporting their children. "Although both parties to a marriage are under the same legal duty to support their children, . . . the obligation to support is not necessarily to be borne equally; it should be apportioned according to the reasonable ability of each parent to contribute." In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976); In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1972).

In view of the greater ability of Sandra to contribute to her children's support, her more comfortable circumstances, and the grave financial difficulties which face Steven as well as his limited income, we modify the decree and order Steven to pay child support in the amount of $20 per week per child. This obligation will increase to $35 per week per child six months after this opinion is filed, unless Steven can demonstrate to the court that he has made a good faith effort to secure full-time employment and has been unsuccessful.

III. Property Division

There is no mechanical rule that each spouse must receive one-half of the marital assets. In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980). Each marital partner is entitled to a just and equitable share of the property accumulated as the result of their joint efforts. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981); Knipfer v.Knipfer, 259 Iowa 347, 353, 144 N.W.2d 140, 143 (1966).

The trial court found that Steven was entitled to half the parties' interest in their marital home and determined that this amounted to $10,000. In order to give

effect to this determination, the court gave Steven a lien in the amount of $10,000 on the homestead of the parties. However, the court reduced this lien by $2,500 as Steven's share of a $5000 debt the parties owed to Steven's parents. Sandra and Steven borrowed this money from Steven's parents in order to make a down payment on their first home, not the home at issue in these proceedings.

Steven argues that the court had no jurisdiction to order a personal debt to a third party to be paid from his equity in the home. Without deciding this issue, we modify the decree as follows: Steven's share of the marital assets is increased $2500 by increasing the $10,000 lien on the homestead to $12,500. Steven shall hold Sandra harmless for any liability to Steven's parents for this debt. Sandra shall have the option of paying her share of the debt directly to Steven's parents; if she does this, the additional lien of $2,500 shall be void.

Steven's lien shall draw 10 percent annually interest and is due and payble sixty days after his child support obligation terminates. We do not decide the legal liability of Steven to his parents.

We find that the court's approach to resolving this debt was inequitable. Until Steven lost his employment as a result of the bankruptcy of the railroad for which he worked, he contributed all or nearly all of his earnings to the support of his family and made appropriate payments on their homestead. The debt to Steven's parents was incurred as a mutual obligation of both parties.

IV. Retrospective Child Support

The court awarded Sandra $70 per week in retroactive child support from the date of the separation, and deducted the accumulated total of $1960 from Steven's lien on the parties' homestead, thus reducing still further his equity in their home.

We cannot agree with Steven's contention that the court may not retroactively order a noncustodial parent to pay child support. "[A] n action for contribution for past child support may be maintained, subject to traditional

defenses such as the statute of limitations, waiver, laches, and estoppel." Brown v. Brown, 269 N.W.2d 819, 822 (Iowa 1978).

However, in light of the discussion above, we conclude that the retroactive child support obligation imposed upon Steven was inequitable, and therefore order him to remit to Sandra past child support in the amount of $960 payable over a period of ten months beginning one month after the filing of this decision.

V. Attorney Fees

Attorneys fees are not recoverable as a matter of right. See In Re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977).

Although Sandra's income far exceeds Steven's, we find that in view of her heavy obligations, she enjoys no greater ability to pay than he does. Consequently, each party is ordered to pay his or her own attorney's fees.

VI. Summary

The decree is modified as follows: (1) Steven's obligation to pay child support is reduced to $20 per child per week; (2) six months after this opinion is filed, Steven's child support obligation will increase to $35 per child per week unless he can establish that good faith efforts to find full-time employment have been unsuccessful; (3) Steven's lien of $10,000 on the house is increased to $12,500 and he shall hold Sandra harmless for payment of the $5,000 loan from his parents; (4) Steven shall pay Sandra $960.00 for pre-decree child support, said payment to be payable over a period of 10 months beginning one month after the filing of this decree. Steven's request for attorney fees is denied. Costs are taxed equally to both parties.

The decree is affirmed in all other respects.

AFFIRMED AS MODIFIED.