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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF DONNA J. CALLENIUS & RONALD W. CALLENIUS

Upon the Petition of)
DONNA J. CALLENIUS,) Filed March 24, 1981
Petitioner-Appellant,)
And Concerning)
RONALD W. CALLENIUS,) 0-272
3-64389
Respondent-Appellee.)

Appeal from Sioux District Court - David J. Blair, Judge.

Petitioner-wife appeals economic provisions of dissolution of marriage decree. Respondent-husband cross-appeals economic and child custody provisions. AFFIRMED, MODIFIED, AND REMANDED.

Charles T. Patterson & John W. Gleysteen, of Heidman & Redmond, Sioux City, for petitioner-appellant.

Maurice B. Nieland, of Kindig, Beebe, Rawlings, Nieland & Killinger, Sioux City, and Mark J. Schouten, of Oostra, Bierma & Schouten, Sioux City, for respondent-appellee.

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

PER CURIAM

Petitioner-wife, Donna J. Callenius, appeals the property division, alimony, child support, and attorneys' fees provisions of a dissolution of marriage decree. Respondent-husband, Ronald W. Callenius, cross-appeals property division, alimony, child custody, child support, and attorneys' fees provisions of the decree. We modify, affirm and remand.

Ronald and Donna were married on January 26, 1964, in Brookings, South Dakota. Their three children - Ronda, Todd, and Cory - were ages 15, 12, and 7 respectively as of the time of trial. Ronald is the proprietor of a sophisticated farming and livestock operation. Ronald now has the opportunity to take a job paying $100,000 per year plus expenses. Donna has worked as a legal secretary but, based on a mutual agreement with Ronald, declined to continue working shortly after the marriage to devote her full energies to care of the home and raising a family. During the marriage, however, Donna has occasionally assisted Ronald in his farm work. Donna is currently unemployed. The trial court found that during the marriage the parties accumulated property relating to farming operations having a net value of $900,000, including real estate, growing and harvested crops, farm machinery, livestock, and other personalty. In its decree of dissolution the trial court ordered Ronald to pay Donna a lump sum of $225,000 plus interest over a period of eight years, alimony of $300 per month, child support of $100 per month per child, and $7500 of Donna's attorney fees. Custody of the three children was awarded to Donna. Ronald was awarded all real and personal property constituting the parties' farming operations subject to any debt thereon. The trial court dissolved the parties' 16 year-old marriage on November 29, 1979.

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. P. 14(f)(7). In reviewing the property and alimony provisions of a dissolution decree, we consider the factors enunciated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In reviewing a child custody determination, we apply the criteria set out in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Our primary concern is the best interests of the children. Iowa R. App. P. 14(f)(15). In reviewing the child support provisions of a dissolution decree, we consider factors enunciated in In re

Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). We initially note that in reviewing each individual economic provision of the dissolution decree, we consider all the provisions together as an integrated whole. See In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976).

I. Donna contends that the property and alimony awards made to her by the trial court were unfairly low, and Ronald contends that they were unfairly high. Although frequently an equal division of assets is made, there is no requirement that this be done. 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). After considering the circumstances of the case at bar in light of the criteria enumerated in Schantz, we conclude that the trial court's property division in awarding Donna a lump sum payment of $225,000 plus interest and in awarding Ronald all the parties' farm-related property should be modified. The net value of the parties' farm related property is $900,000. Of the $225,000 awarded to Donna $175,000 is not payable until January, 1988, which sigificantly defers Donna's enjoyment of the parties' mutually accumulated property. In order to provide for a more immediate use of property awarded to Donna and finding that a larger award to her is justified we hereby award Donna sole title to the 80 acre farm realty located in section 11 of Grant township, subject to the current mortgage indebtedness on the property. We also award Donna sole title to the 80 acre unimproved tract located in section 21 of Grant township, subject to the contract indebtness on the property. These awards, in lieu of the trial court's award, result in a division of property having an approximate value of $301,170 to Donna and $598,830 to Ronald.

The trial court in part determined its division of property by considering that a significant risk of forfeiture attended the realty award made to Ronald. While degree of risk of forfeiture is debatable, our redivision of the property shifts some of the risk to Donna, who stated that she would gladly bear the economic risks attending ownership of the realty.

II. The trial court ordered Ronald to make $300 monthly alimony payments to Donna from December, 1979 until February, 1988. Child support payments were fixed at $100 per month per child. Donna seeks an increase in alimony and child support payments, while Ronald on cross-appeal asks for a reduction in both. Ronald further

argues that Donna has waived her right to challenge these awards because she has accepted benefits under these provisions. Ronald cites In re Marriage of Abild, 243 N.W.2d 541, 542-43 (Iowa 1976), that one who accepts material and substantial benefits under a judgment or decree may not ordinarily challenge the provisions under which such provisions are awarded. Although Ronald's brief shows copies of two general executions issued against him for payment of delinquent child support and alimony, we find the record is inadequate for determination of these issues. Accordingly, we remand this case to the trial court for the purpose of allowing both parties to present evidence on these matters.

III. Ronald contends that the trial court unjustly awarded Donna custody of the parties' three minor children. The custody issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range interests of the children. In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974); In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974).

All the children have expressed their love for the parties. Both Ronda and Todd, however, have indicated a desire to live with their father. If a child is of sufficient age and maturity, his preference concerning custody must be considered, Winter, 223 N.W.2d at 167, yet the child's preference does not control the custody decision, cf. Leo v. Leo, 213 N.W.2d 495, 497 (Iowa 1973) (child's desire to be in father's custody does not prevent trial court from awarding mother custody). Ronda and Todd are both of sufficient age and maturity to have their desires weighed in the custody decision. See In re Marriage of McCreary, 276 N.W.2d 399, 402 (Iowa 1979). Our consideration of the children's desires is tempered by evidence that the parties have pressured the children so as to influence their preferences concerning custody.

Ronald spent very little time with the children before the parties separated. Ronald is also currently living with another woman. While there is evidence that either party can adequately care for the children, the evidence of Donna's abilities is far stronger than that of Ronald's. Donna in fact performed virtually all the functions connected with raising children, including keeping the home immaculately clean, painting and making repairs to the home, keeping the children clean and well dressed, helping them with their schoolwork, disciplining them, transporting them to and from school, church, and other activities, doing the laundry, the cooking, keeping the yard,

teaching Ronda domestic skills. There is no evidence that Ronald performed any of these functions. At the conclusion of the temporary custody hearing the attorney appointed to represent the minor children recommended that temporary custody be placed with Donna.

Viewed as a whole and in light of the criteria articulated in Winter, the record discloses that Donna will more effectively minister to the long range interests of the children than Ronald, and we therefore affirm the trial court's custody decision.

IV. Donna contends that the amount of attorney fees awarded her at trial is unfairly low, and Ronald contends that we should set the award aside. Attorney fees are not allowable as a matter of right. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The allowance depends on the financial conditions of the parties and their respective abilities to pay. Id. Donna had incurred over $16,000 in attorney fees as of the time trial commenced. We affirm the trial court's $7,500 award of attorney fees to Donna, because Ronald's ability to pay significantly exceeds Donna's.

Donna asks for attorney fees incurred by this appeal, and Ronald insists that she be awarded none. 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 57, 59 (Iowa 1975); In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). Applying these factors to the case at bar, we hereby order Ronald to pay $3,500 of Donna's attorney fees on appeal.

Costs are assessed against Ronald.

AFFIRMED, MODIFIED, AND REMANDED.

Donielson, J., dissents.

Johnson, J., specially concurs, joined by Oxberger, C.J.

DONIELSON, J. (dissenting)

I acknowledge that our review of this matter is de novo pursuant to Iowa R. App. P. 4. However, because of the complexity of this litigation, because I am convinced that the trial court very carefully considered all the evidence in arriving at the provisions of this decree, and because I do not believe that the remedy fashioned by the majority improves upon the disposition made by the trial court, I would affirm.

JOHNSON, J. (specially concurring)

In re Marriage of Abild, 243 N.W.2d 541 (Iowa 1976), and the cases cited therein, preclude petitioner's challenge to the alimony and child support provisions of the decree if she has accepted the benefits and respondent challenges the original award. Thus, I agree with the majority's conclusion that this case must be remanded because the record is inadequate to show whether petitioner has accepted benefits under the decree. I believe, however, that this principle of waiver through acceptance of benefits should be re-examined as it applies to alimony and child support provisions. Unlike an ordinary judgment, such awards frequently are the only source, or the most significant source, of support to the party. It seems patently unfair to preclude appellate challenge to allegedly inadequate support provisions simply because the recipient accepts the benefits and the obligor claims the awards are excessive. Of course, the party to whom support is awarded can escape this harsh result by asking the supreme court to set an amount for temporary support pending appeal. See Iowa R. App. P. 22(c). This procedure, however, adds to appellate costs and inefficiency. I believe, in the rare case where both parties challenge the support award and the appellate court concludes that trial court's award was excessive, that the preferable procedure would be to permit an off-set to the obligor.

Oxberger, C.J., joins this special concurrence.