

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARGARET JEAN ACHESON
AND DOUGLAS KEITH ACHESON

FILED

MAY 23 1989

CLERK SUPREME COURT

Upon the Petition of)

MARGARET JEAN ACHESON,)

Petitioner-Appellee,)

And Concerning)

DOUGLAS KEITH ACHESON,)

Respondent-Appellant.)

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8-618
88-135

Appeal from the Iowa District Court for Polk County
(No. CD 54-31927), Rodney R. Ryan, Judge.

Respondent husband appeals from a dissolution decree,
challenging economic provisions and child visitation
provisions. **AFFIRMED AS MODIFIED.**

Robert B. Scism of Scalise, Scism, Sandre & Uhl, Des
Moines, for respondent-appellant.

Thomas P. Hyland of Hyland, Laden & Pearson, Des
Moines, for petitioner-appellee.

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

HABHAB, J.

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Douglas Keith Acheson (who throughout the proceedings has been referred to as Keith Acheson) appeals the decision of the district court dissolving his marriage of twenty-six years. He challenges the court's economic distributions and visitation provisions. We affirm the decision of the district court as herein modified.

Jean and Keith Acheson were married on December 30, 1961. They have four children: Shannon (born February 27, 1966), Travis (born July 4, 1968), Shay (born June 27, 1974), and Brady (born February 22, 1976). Keith works as a flight engineer for T.W.A. and is a Lieutenant Colonel in the Iowa Air National Guard. Jean has worked in the home for the majority of their married life. Recently, Jean has worked on a part-time temporary basis at a golf course owned by her in-laws.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

I. Economic Distributions. The appellant argues the distribution of marital assets is unequal and is weighted in favor of Jean. Each partner in the marriage is "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). We apply a standard of equity in determining economic distribution in dissolution cases. Iowa Code § 598.21(1) (1987) and Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976) (court quoting Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968)).

The district court divided a part of the parties' assets in the following manner:

1. Keith is to receive his pension benefits from the Iowa Air National Guard and the retirement benefits due him at retirement from T.W.A. He presently expects to receive approximately \$908 monthly.

2. In order to provide Jean with a similar retirement package, the court ordered the couple to liquidate their I.D.S. Individual Retirement Accounts totaling \$24,424.39 and purchase an annuity for Jean. The court heard evidence that the purchase price for such a contract would range somewhere between \$23,125 and \$23,345. Keith was awarded the balance of \$1,089.39. We believe there will be an income tax impact when the I.R.A.s are surrendered. An adjustment in this respect will be made in our modification order.

3. The court further awarded Keith his Life Investors' IRA and annuities, as well as his Pilot's Trust, all totaling \$32,304.62. As explained later in this opinion, the respondent's interest in the Pilots' Trust was valued by the trial court at \$6,479.11. When we review the appropriate exhibit, we determine it has a value

of but \$3,587, thus the \$32,304.62 figure is reduced to \$29,412.51.

4. Jean was awarded \$32,304.62 from the sale of the family home and acreage. Any profit remaining is to be split evenly between the parties. The \$32,304.62 Jean is to be awarded from the sale of the home before dividing the property will likewise be reduced by the difference between the value the trial court fixed and the amount we gave to the Pilots' Trust Fund along with the income tax consequences incurred by the surrender of the I.R.A.s.

5. Keith was awarded the 1971 Ford valued at \$750; Jean was awarded the 1979 Chevrolet, the 1982 Honda, and the 1979 Honda, respectively valued at \$2,000, \$1,800, and \$200.

6. Finally, Keith was awarded his and Jean's Life Investors Insurance Policies valued at \$3,849.35 and \$660.10, respectively.

Keith argues the court made an erroneous assumption regarding the cash available upon surrender of I.D.S. Individual Retirement Accounts. He asserts the surrender value of these accounts as of May of 1987 is somewhat less than that value attached to them by the court. Exhibit No. 7 supports his assertion.

When valuing the I.D.S. Individual Retirement Accounts, the trial court used their account value as of May 15, 1987. However, the accounts were ordered liquidated so as to fund the annuity for petitioner. There is an exit charge¹ on the "flexible payment annuities," thus the surrender value should be used. When we compute the

1. The exit charge is equivalent to a commission since none was charged at the time the accounts were opened. The commission is based upon the period of time the funds are held in the account before withdrawal.

surrender values, we arrive at the figure of \$22,694.17 as compared to the \$24,424.39 reached by the trial court. The amount to be spent for the annuity for Jean is \$23,125. Thus, there is a deficit from these accounts of \$430.83.

He also argues the court erroneously assigned \$6,479 as the value of his "Pilot's Trust" account. We find some merit in this contention, although we confess the record before us in this regard is not entirely clear. The value of \$6,479.11 was reached by combining the company's contribution of \$5,992.20 with respondent's contribution of \$486.91. Regrettably, the record is silent as to whether this represents trial day value.

Exhibit 4, relied on by both parties, seems to contradict a valuation of \$6,479.11. This exhibit demonstrates that the respondent is 100% vested in the benefit of the fund which is to be paid on retirement. Ownership in the fund is determined by units. Exhibit 4 reveals that the number of units registered to respondent is 97.870 and the unit value was \$36.656, for a value as of the date of Exhibit 4 of \$3,587.52. We determine this to be the value of this account and note that the petitioner does not challenge this in her brief.

Finally, Keith argues the district court failed to take into consideration the tax consequences of the court-ordered liquidation of the I.R.A. accounts with IDS.

We agree and will account for this in our modification order.

MODIFICATION ORDER

We, therefore, affirm the trial court when it ordered the taking of \$23,125 from the I.D.S. accounts to purchase an annuity for the petitioner that will pay \$900 per month at age sixty-two. There should be sufficient present day funds to meet that obligation. If not, respondent is to make up the difference from his separate funds. If, by chance, there is a balance in those three I.D.S. accounts, such balance shall pass to the respondent. The respondent is awarded the Iowa National Guard Pension and T.W.A. retirement benefit with the current value of \$908 a month.

As directed by the trial court, the respondent is awarded his Pilots' Trust Account, which we valued at \$3,587, his Life Investors I.R.A. valued at \$8,322, and his two Life Investors Annuities of \$11,285 and \$6,217. These four items have a value totaling \$29,411. We modify the decree by awarding Jean her Life Investors Insurance having a cash value of \$660, and award to respondent his Life Investors Insurance having a cash value of \$3,189.25.

We turn to the question of income tax liability incurred because of the order to liquidate the I.D.S. accounts. I.R.A. investments are tax-sheltered and when liquidated, they are subject to income tax. The annuity of \$3,361.22 is subject to partial exclusion from income tax. See 26 U.S.C. § 72(a)(b)(1) and (b)(2) (exclusion limited to investment).

We note that of the three I.D.S. accounts, two carry Keith's name and one is in Jean's name. We modify the decree further by providing that when the accounts are liquidated, Jean is to include as income on her tax return and is to pay the income tax on her surrender value account of \$2,962.10, and Keith is to include as income on his tax return and is to pay the income tax on his surrender value account of \$3,161.22. The tax result insofar as these two accounts are concerned will closely offset each other.

Keith will have income tax exposure on ⁷the remaining account that has a surrender value of \$16,570.85. Based on his projected income, we believe he should receive credit of \$4,600 as the income tax consequence of this court-ordered liquidation.

The final result insofar as these items are concerned is as follows: Jean is awarded the vehicles assigned to her by the court having a value of \$4,750, her life insurance policy of \$660, household personal property of \$11,265.00, and an annuity of \$23,125, for a total of \$39,800.

Keith is awarded the vehicle assigned to him valued at \$750, his Life Investors I.R.A. account of \$25,825.59, his Life Investors Insurance of \$3,189.25, household personal property of \$4,215, his T.W.A. Pilots' Trust account of \$3,587, and his Iowa National Guard Pension and T.W.A. Retirement Benefit having a value of \$22,024.50. His total equals \$59,591.34 less the income tax exposure over and above that to Jean of \$4,600, for a net of \$54,991.34. Respondent receives marital assets in excess of that awarded petitioner in the amount of \$15,191.34.

We note that the respondent in his brief refers to Keith's T.W.A. projected payment of \$174.91 as a social security benefit. He argues that this amount should not be considered. But when we refer to Exhibit 4, the \$174.91 is designated as a lifetime monthly benefit and the footnote to this entry illustrates the method used in arriving at that amount and the fact that it will be paid at normal retirement as a retirement fund.

We note also that when the respondent computes his figures he attributes a value to the petitioner's annuity but fails to give a corresponding value to his T.W.A. and National Guard benefits. We think this is one reason for the disparity in the figures urged before us.

We conclude this part of our opinion by modifying the decree in the further respect that when the marital home is sold Jean is to receive \$7,595.67 (and not the \$32,304.62 previously ordered) from the sale price before the net proceeds are divided as ordered by the trial court.

II. Automobile. Keith argues the court erred in awarding Jean the 1979 Chevrolet Caprice. He asserts it was the car he regularly drove and, therefore, he is entitled to ownership after the dissolution. The record reflects the Achesons owned several automobiles: a 1971 Ford truck, a 1979 Chevrolet, a 1982 Honda, and a 1979 Honda. In addition, Keith was given a 1950 Chevrolet pickup truck, formerly owned by his father and gifted to him, and presently being restored. The court awarded Keith the 1950 antique truck and the 1971 Ford pickup. In his argument, he implies the court misunderstood that the 1979 Chevrolet was driven by the children. While it is true the record reflects the fact that Keith drove the Caprice, there is also evidence the 1979 Honda is not in good working order. We find no error in the court's award, especially in view of the fact that the children are very active in extra-curricular activities.

III. Alimony. Keith argues the alimony award is excessive and should be made temporary. He states that if Jean properly invests the money she receives from the sale of the family home and acreage, combined with child support, she will have a yearly income of approximately \$22,500.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The

discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). We find no error in the court's award in this regard as based upon the following analysis of those factors.

The Achesons have been married for twenty-six years. At the time of the dissolution, Keith was forty-seven and Jean was forty-five. Both are in good health except Jean is presently under doctor's care for an ulcer she recently developed. The distribution of property was discussed previously. Jean has two years' college education in general studies. Evidence of Keith's educational background was not introduced at trial. During the course of the marriage, Jean had sporadically worked in clerical or restaurant businesses. Jean has been absent from the job market almost continuously since her marriage to Keith. Both parties agreed that it would be in the family's best interests that Jean remain in the home while the children grew. Jean was awarded primary physical care of all four children. At the time of the dissolution, two children were in college. Jean has expressed a desire to return to college and finish her degree. However, she has no plans to do so until the last child is in college.

It is unlikely that Jean will be able to earn enough money to be able to be self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Keith has not claimed the award of alimony will

place an unreasonable financial burden on him. We, therefore, find no error in the court's award.

IV. Visitation Provisions. Keith objects to the visitation provisions as set forth by the district court. Specifically, he argues 1) in effect, the court has reduced him to suppliant in that Jean may deny visitation for "good cause"; 2) twenty days' notice of intent to visit is unreasonable; and 3) the decree is silent as to holidays and summertime.

The record reflects the fact that the parties have difficulties communicating regarding visitation. Keith does not notify Jean of his flight schedule and takes a proprietary interest in visiting his children without regard for the schedule of the household. The district court, therefore, ordered the following:

The Respondent shall give 20 days notice of his intent to visit to the Petitioner, and receive the equivalent of 2 weekends per month, and 2 weekdays of Wednesday after school to Friday morning before school per month. The Respondent shall make sure that the boys go to their scheduled activities if said activities fall during the visitation period. The Petitioner, Margaret Jean Acheson, shall make the children available for visitation and may only deny visitation with good cause shown.

We find no error in the trial court's imposition of the "good cause." However, we remind the petitioner that liberal visitation rights are in the best interests of the children. Iowa Code § 598.1(c); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as

joint custodians, are charged with maintaining those interests. Unless visitation with the noncustodial parent will in some way injure the child, they are not to be prohibited. Fitch v. Fitch, 207 Iowa 1193, 1197, 224 N.W. 503 (1929).

Keith asserts the twenty-day notice requirement is too restrictive. He testified at the dissolution hearing that he is unable to establish a regular visitation schedule because his work schedule demands flexibility. Certainly, the best interests of the children would be served most fully if both parents would be able to jointly plan visitation. However, the reality of the situation is that this cannot be accomplished. First we believe the twenty-day notice requirement is overly burdensome and reduce it to seven days; we further amend the district court's visitation order by adding the following:

a. Beginning in 1989 and each odd-numbered year thereafter, Keith is to have the children Christmas Day and the day after Christmas. Beginning in 1990 and each even-numbered year thereafter, Keith is to have the children the day before Christmas beginning at 9:00 A.M. and concluding no later than 10:00 P.M.

b. Beginning in 1990 and each even-numbered year thereafter, Keith is to have the children on Thanksgiving Day. In addition, he is to have the children the Friday and Saturday following Thanksgiving Day in those years he does not have the children on Christmas Day.

c. The parents shall cooperate so that the children may spend a part of Christmas and Thanksgiving days (no less than two hours) with the parent who does not have the benefit of their presence under the decree.

d. Keith shall have the children four weeks each summer. In addition, he shall have the children on Father's Day and for at least three hours on their birthdays.

V. College Expenses. Keith argues it is unreasonable to now require him to pay the total college expenses of the two youngest children, Shay and Brady. Presently, he pays approximately \$4,000 a year, or \$333 per month, for the two oldest children's higher education expenses. He testified that he would be able to continue to pay the oldest children's college expenses without the necessity of a court order. We affirm that part of the decree which orders him to pay the college expenses of Shannon and Travis (paragraph 7 of the decretal part of the decree) except we modify the statement in that paragraph which requires him to make payments "as long as the minors are full-time students and have not attained age 23" by deleting "age 23" and inserting "age 22."

By statute, divorced parents have an obligation to support their children while attending college. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984). This obligation depends largely on the circumstances of each case. In re Marriage of Urban, 293 N.W.2d 198, 203 (Iowa 1980). We conclude because the age of the two younger children (fourteen and twelve years respectively) that it is premature, under the circumstances here, to allocate the payment of their college education.

In re Marriage of Rohlfesen, 398 N.W.2d 197 (Iowa App. 1986). We modify that part of the decree that requires respondent to pay the college expenses for Shay and Brady, and we reserve to the district court jurisdiction to determine the parties' contribution, if any, to the college education of their two younger sons should either or both qualify under section 598.1(2) of the Code.

VI. Attorney Fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Summary

The final result of our ruling is that we affirm the trial court except in the following respects:

1. Jean is awarded her Life Investors' insurance and Keith is awarded his.
2. Jean is to account for the surrender value on her \$2,962.16 I.D.S. account on her income tax return, and Keith is to account for the surrender value of the remaining accounts on his income tax return.
3. When the marital home is sold as provided by the decree, Jean is to receive \$7,595.67 from the proceeds before the net proceeds are divided.
4. As to the college expenses of Shay and Brady, the decree is modified in accordance with Division V of this opinion.

5. Keith's visitation privileges are increased as provided under Division IV of this opinion.

The parties are to pay their own attorney fees on appeal, and the costs are assessed one-half to each.

AFFIRMED AS MODIFIED.

Schlegel, P.J., concurs; Sackett, J., specially concurs without opinion.