FILED
NOV 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROSE JOHNSON,

Petitioner-Appellee,

vs.

LEON JOHNSON,

Respondent-Appellant.

Filed November 26, 1980

0-293
2-64261

Appeal from Cerro Gordo District Court - M. L. Mason, Judge.

Respondent-husband appeals from economic provisions of the parties' dissolution decree asserting that the alimony award was excessive and the property award was inequitable. AFFIRMED.

R. Michael Sweesy, Mason City, Iowa, for respondent-appellant.

Edward R. Boyle of Boyle, Schuler, Stanton & Grabinski, Clear Lake, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent-husband, Leon Johnson, appeals from economic provisions of the parties' dissolution decree. He asserts that the alimony award was excessive and the property award was inequitable. We affirm all provisions of the dissolution decree, but modify the alimony award to include termination upon petitioner's remarriage as well as upon the death of either party.

The parties' thirty-six year marriage was terminated on September 24, 1979. At the time of hearing, the parties' two children, both girls, were of majority age. Petitioner, Rose Johnson, age 62, had a ninth grade education, various medical problems, including diabetes and high blood pressure, and limited work experience outside the home during the marriage. She received social security in the amount of $107.20 per month and estimated her monthly expenses to be $561.76. Respondent, age 57, had a high school education, was in good health, and operated a filling station. His financial statement indicated his net monthly earnings were $451.11 and his monthly expenses $637.65, although he testified that his income averaged between $8,000 and $9,000 per year. The parties acquired no real property during their marriage.

Trial court awarded petitioner the following property, totalling $14,007.60: the household goods, valued at $2,500; jewelry, valued at $5,000; and $6,507.60 cash from the parties' joint savings account. The court also awarded her $400 per month alimony during the life of both parties. Respondent received total property of approximately $9,000: the 1973 Chevrolet automobile, valued at $1,400; his business checking account of $1,200; business equipment, valued at $750; two insurance policies; a coin collection, valued between $2,681 and $2,500; and $1,500 from the parties' joint savings account. In addition, respondent received his business inventory and accounts receivable, for which there is no assigned value in the record.

I. Scope of Review. Our review of dissolution proceedings is **de novo.** Iowa R. App. P. 4. We review the facts as well as the law and from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978). While we give weight to trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Support Award. Respondent contends trial court erred in awarding $400 per month alimony to petitioner. He argues that the award was not based upon the evidence and was neither just nor fair since it represents ninety percent (90%) of the total available spendable income of the parties. Applying the criteria of 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), we disagree. Alimony is not an absolute right, but instead, is dependent on the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). We weigh the needs of the wife here against the husband's resources and ability to pay. In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975). At the time of the decree, petitioner, age 62, had a ninth grade education. She had no income except social security of $107.20 per month. During the marriage she acquired no marketable skills; she worked at menial labor type jobs, such as cleaning the gas station restrooms, and doing cooking and kitchen work. Her health problems included diabetes, high blood pressure and a foot problem; she could not be on her feet very long and she wore corrective shoes. As a result, she did not attempt to secure any meaningful employment. On the other hand, respondent, age 57, remained in good health. He operated a filling station during the parties' marriage. His earnings have been steady for a number of years, averaging between $8,000 and $9,000 during the two years previous to the decree.

In view of these facts, we find the alimony award to petitioner should continue at $400 per month until the death of either party. Trial court's decree, however, is modified to include termination of alimony also upon petitioner's remarriage.

III. Property Division. Respondent alleges trial court erred in awarding petitioner approximately sixty percent of the parties' assets in the property division because petitioner did not make any significant direct financial contributions to the marriage or to the accumulation of property of the marriage. Respondent contends that an equal division of the parties' assets should have been made and that the portion of the savings account used by the petitioner during the pendency of the dissolution proceedings should have been included as part of the equal property division. After reviewing the record, we conclude the property division set forth in the decree is equitable and should be affirmed.

The court, in dissolution proceedings, may make such property divisions as are justified. § 598.2, The Code 1979. Justified property divisions are those considered equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). The supreme court has rejected a mechanical rule that each spouse must receive one-half of the marital assets but has recognized that an equal division is often equitable. In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980). We are guided by

the factors enumerated in Schantz in reaching an equitable determination of the parties' property division. Schantz, 163 N.W.2d at 405; see In re Marriage of Williams, 199 N.W.2d at 345.

At the time petitioner filed her petition for dissolution, the parties' joint savings account was $13,338.07; on the decree date, $8,007.60 remained. Trial court found that petitioner used a portion of the joint savings account for rent, medical bills, heating and fuel bills, correctional shoes, and attorney's fees during the period respondent failed to make temporary support payments. She also paid the parties' medical insurance premiums and respondent's life insurance premiums.

It appears that, primarily through petitioner's frugal management of the family budget of $100 per week, the parties were able to accumulate the $13,338.07 savings account by setting aside proceeds of the inside pop machine at the filling station which the respondent then weekly gave to petitioner for deposit in their savings account. In addition, petitioner loaned, without repayment by respondent, $1,557.58 from her mother's estate to respondent to enable him to purchase his brother's interest in the filling station. We note that trial court placed no value on respondent's business, including inventory and accounts receivable. The total award to respondent, therefore, is not ascertainable by reviewing the record. Thus, the sixty percent award to petitioner, as contended by respondent, may not be an accurate description of the property division.

Even if the award to petitioner is sixty percent of the marital assets, however, we believe the award is justified here. It is undisputed that petitioner deposited all of the pop machine monies entrusted to her by respondent into the parties' joint savings account; none of the monies were used for family expenses. Petitioner also performed a number of tasks at the respondent's filling station; she cleaned restrooms and office areas, swept floors, counted pop machine money, and wrote up credit card sales, all with no compensation from respondent. Except for a few short term jobs and helping at the filling station, petitioner was primarily a homemaker and mother. While she did not contribute significant income to the marriage, she made contributions through her services as wife and mother, as well as through her efforts to ensure that the parties regularly saved money. She has no specialized training, a limited education and a limited ability to seek gainful employment due to health problems. We find petitioner's efforts and contributions to the family were substantial. Due to respondent's good

health and ownership of his own business, he will have a greater opportunity to acquire future assets. Balancing all factors, we conclude trial court's property division was justified and achieves reasonable results.

IV. Attorney Fees on Appeal. Petitioner seeks an award of attorney fees on appeal. Such an award is not allowed as a matter of right but depends instead upon the financial circumstances and earnings of both parties. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). We conclude, without determining the amount that petitioner's attorney may charge, that respondent shall pay $750 toward petitioner's fees for this appeal. See In re Marriage of Peterson, 227 N.W.2d 139, 143 (Iowa 1975).

AFFIRMED AS MODIFIED.