

FILED

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IN THE COURT OF APPEALS OF THE STATE OF IOWA SUPREME COURT

UPON THE PETITION OF)

DORIS L. MC CLAIN,)

Petitioner-Appellant,)

Filed February 5, 1980

AND CONCERNING)

MACKIE E. MC CLAIN,)

Respondent-Appellee)
Cross Appellant.

329
2-63037

Appeal from Dallas District Court - Van Wifvat, Judge.

Petitioner-wife appeals and respondent-husband cross-appeals from economic provisions of dissolution decree. - Affirmed as Modified.

Carl V. Nielsen, Altoona, for petitioner-appellant.

Dwight W. James & Laura L. Rodenburg, of Dickinson, Throckmorton, Parker, Mannheimier & Raife, Des Moines, for respondent-appellee cross appellant.

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

PER CURIAM

Petitioner-wife Doris McClain appeals and respondent-husband Mackie McClain cross-appeals from economic provisions of dissolution decree. Doris asserts that the property division was inequitable in that Mackie's business was undervalued, and, therefore, she should have been awarded total ownership in the marital home, rather than required to buy out Mackie's one-half interest in the home within thirty days of the filing of the decree. Doris also contends that the alimony award was insufficient and that the decree improperly provided for the termination of alimony when Doris either dies, remarries, or reaches age 62, whichever occurs first. Doris further contends that Mackie should have been required to verify his business income and expense statements in light of allegations that he had been under-reporting his income and making improper expense deductions. On cross-appeal, Mackie asserts that the alimony award was too high and that he should not have been required to pay all of Doris' attorney fees incurred at trial and all of the trial costs.

Doris and Mackie were married on August 2, 1957, in Fort Smith, Arkansas. Both had been previously married. Doris brought an income-producing house into the marriage and Mackie brought an automobile and a deep freeze. In 1958, they moved to Des Moines, financing the move with a loan against Doris' house. Approximately four years later, Mackie went into business for himself as a manufacturer's agent, financed by another loan against Doris' house. Mackie's business has become relatively successful, earning approximately \$165,000 in gross commissions in 1978, out of which Mackie drew \$39,000 for his salary and \$7000 as a stock dividend. Doris worked for approximately eleven years as a legal secretary until 1976 when her doctor advised her to leave her employment because of a heart condition.

Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we will not abdicate our function as trier de novo on appeal. Iowa R. App. P. 14(f)(7).

I. In its property division, the trial court awarded each party a one-half interest in the marital home. Doris was awarded possession of the home, however, she was given thirty days from the filing of the decree within which to buy out Mackie's one-half interest. Doris asserts that if the trial court had properly valued Mackie's business

which was awarded to him, she would be entitled to all of the marital home.

In assessing the propriety of a dissolution decree's property division, we apply the criteria announced 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 valuing a closely-held corporation for purposes of arriving at an equitable property division, an exact value need not be ascertained. In re Marriage of Moffatt, 279 N.W.2d 15, 19 (Iowa 1979). We will not disturb a trial court's finding of valuation if it was within the permissible range of evidence. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973).

The trial court used a book value approach by valuing the business at the value of its capital stock and capital surplus, or \$13,250. Doris contends that the value of the gross commissions of the previous year, or \$165,000 is a more appropriate value, basing that contention on the deposition testimony of a Mr. Linn, who stated that he had observed sales of similar businesses in the past. However, as pointed out in Mackie's counsel's objections to Mr. Linn's testimony, Mr. Linn was not established as an expert in valuing businesses of this type, and there was an inadequate foundation laid to establish the similarity between the businesses about which Mr. Linn testified regarding sale price and Mackie's business. Furthermore, Mackie produced a witness who testified that Mackie's business was quite different from the businesses Mr. Linn testified about, and that businesses such as Mackie's did not lend themselves to be valued at a market price since the success of the business depended significantly on the personal qualities and abilities of one or two individuals.

The trial court adopted the conclusion that a market value for Mackie's business could not be readily ascertained, and therefore used a net asset approach. We note that while net asset value is an acceptable means of determining a business' intrinsic value when market value cannot be reasonably ascertained, Moffatt, 279 N.W.2d at 19, there has been a growing recognition of the capitalization of earnings approach as a more accurate guide to value. D. Herwitz, Business Planning 26 (1966). However, we conclude that the capitalization of earnings approach cannot be appropriately applied in this case. A review of the balance sheets of recent years reveals that substantial amounts of earnings were deducted for salaries and travel expenses. There was no evidence regarding the reasonableness of the salaries and travel expenses. Since those amounts are especially significant in applying the capitalization of earnings method to

this case because of the low multiplier attached to a small service corporation of this nature, see D. Herwitz, supra at 18 (quoting 1 Dewing, Financial Policy of Corporations (5th ed. 1953)), we conclude that the evidence is inadequate to appropriately value Mackie's business under the capitalization of earnings approach. Similarly, the evidence is insufficient for valuing Mackie's business under alternative valuation methods using reproduction or liquidation value. Consequently, the trial court's book value approach to valuing Mackie's business was appropriate and the value arrived at was within the range of permissible evidence. We decline to disturb that finding on appeal.

II. Doris contends that even if the trial court divided the property equitably, it was inequitable to allow her only thirty days within which to buy out Mackie's one-half interest in the home. The trial court apparently determined that to reach the goal of an approximately equal division of the assets, the home had to be sold. However, because of Doris' desire to retain the home, it gave her the thirty-day opportunity to buy out Mackie's one-half interest. Under the circumstances, we do not think it was inequitable to require that the home be sold. See In re Marriage of Tierney, 263 N.W.2d 533, 534 (Iowa 1978); In re Marriage of Dowie, 215 N.W.2d 276, 277-78 (Iowa 1974). There are no minor children for whom occupancy of the home would be advantageous. It is a large home on 16.8 acres of land and will require substantial maintenance which will involve costs above and beyond mortgage, tax, and insurance payments. It is the highest valued asset of the marriage, and the trial court apparently determined that awarding possession to Doris without requiring her to compensate Mackie forthwith would constitute an inequitable distribution of property. While it is desirable to allow the parties to continue in a lifestyle enjoyed during the marriage, we are not unmindful of the notion that dissolution presents new realities of economics and equity to which a prior lifestyle must succumb. See In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975). Under the circumstances, we cannot conclude that the trial court's order with regard to the sale of the house was inequitable.

III. The trial court awarded alimony to Doris in the amount of \$1200 per month for three months and \$700 per month thereafter until Doris either dies, remarries, or attains age sixty-two, whichever occurs first. On appeal, Doris contends the \$700 monthly amount is inadequate, and on cross-appeal, Mackie contends that it is

excessive. When reviewing the alimony provisions of a dissolution decree, we are mindful of the considerations expressed 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). With special emphasis on Doris' contributions to the marriage, her extraordinary efforts to preserve the marriage, and the relative earning capacities of the parties, we conclude that the alimony award should be increased to \$1000 per month.

IV. Doris further contends that the trial court erred in ordering that alimony payments terminate once Doris reaches age sixty-two provided she does not die or remarry prior to that time. At the time of trial, Doris was fifty-two. The trial court did not explain the order of termination of alimony payments when Doris reaches the age of sixty-two, however, it is reasonable to assume that the trial court was attempting to account for Doris' eligibility for social security benefits upon reaching age sixty-two. While the presence or absence of social security benefits is an appropriate factor to be considered, In re Locke, 246 N.W.2d 246, 254 (Iowa 1976), we do not think it appropriate to determine that social security benefits will serve as a complete substitute for alimony when there is no evidence of the amount of social security benefits that will be received. We think the approach employed in Craft v. Craft, 226 N.W.2d 6, 8-9 (Iowa 1975) is a more appropriate resolution of this issue. Therefore, we order that the alimony payments shall continue until Doris either dies, remarries, or until Mackie files proof with the trial court that Doris is receiving social security benefits. Upon filing of such proof, the amount of social security benefits shall be credited against future alimony payments.

V. Doris alleges that the trial court erred in denying her application to verify Mackie's business income and expense statements. Since the only relevancy of this issue to the decree is with regard to the alimony provision which we have already modified to Doris' benefit, the need to address this issue has substantially diminished. However, we take this opportunity to reaffirm the principle that the trial court is vested with considerable discretion in deciding whether discovery under the rules of civil procedure should be ordered. Pollock v. Deere & Co., 282 N.W.2d 735, 738 (Iowa 1979); Jones v. Iowa State Highway Commission, 261 Iowa 1064, 1067, 157 N.W.2d 86, 87 (1968). We conclude that the trial court did not abuse its discretion in denying Doris' application to

verify Mackie's business income and expense statements.

VI. Mackie contends that the trial court erred in ordering him to pay all of Doris' attorney fees incurred at trial and all of the costs. Attorney fees are not recoverable as a matter of right in a dissolution proceeding. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978); In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). The elements to be considered in determining reasonable attorney fees are set out in In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972) and In re Marriage of Jayne, 200 N.W.2d 532, 534 (Iowa 1972). The determinative factors are need and ability to pay. Locke, 263 N.W.2d at 696; In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The trial court has considerable discretion in the allowance of attorney fees. Locke, 263 N.W.2d at 696; In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Applying these considerations to the record in the case at bar, we cannot conclude that the trial court abused its discretion in ordering Mackie to pay all of Doris' attorney fees incurred at trial and all of the costs.

VII. Doris has applied for attorney fees incurred by this appeal. 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 Stom, 226 N.W.2d 797, 800 (Iowa 1975). Applying those factors to this factual situation, and without attempting to fix the value of Doris' attorney's services, we conclude that Mackie should pay \$1000 toward Doris' attorney fees incurred by this appeal. Costs are taxed to Mackie.

AFFIRMED AS MODIFIED.