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MAY 30 1980

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF RUTH M. KELSEN & DAVID S. KELSEN

Upon the Petition of)

RUTH M. KELSEN,)

Filed May 30, 1980

Petitioner-Appellee,)

And Concerning)

DAVID S. KELSEN,)

0-102
2-62738

Respondent-Appellant.)

Appeal from Black Hawk District Court -- Thomas Nelson, Judge.

Respondent-husband appeals and petitioner-wife cross-appeals from provisions of dissolution decree. - AFFIRMED AS MODIFIED.

Frederick G. White, Waterloo, for respondent-appellant.

Peter W. Burk, of Burk Law Firm, Waterloo, for petitioner-appellee.

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

PER CURIAM

Respondent-husband, David Kelsen, appeals and petitioner-wife, Ruth Kelsen, cross-appeals from the provisions of the decree dissolving their marriage. David contends the trial court erred in including a provision in the decree that limited his visitation rights. David also contends that the decree's property division was inequitable, and that the award of child support to Ruth was excessive. On cross-appeal, Ruth asserts that she should have been awarded alimony. Ruth also seeks an award for attorney fees incurred by this appeal. We modify certain of the decree's provisions and affirm the decree as so modified.

David and Ruth were married on September 12, 1959. Two children were born of the marriage: Bryan, presently age 17; and Joel, presently age 13. David is an attorney, earning after-tax income of approximately \$27,000 per year. Ruth is now employed as a physical therapist, and she earns an annual after-tax income of approximately \$11,000.

The trial court awarded custody of the parties' two children to Ruth. David was awarded reasonable visitation subject to the condition that he give Ruth at least twenty-four hour notice prior to exercising his visitation rights, and that such visitation shall be exercised only "at times convenient to the personal plans of the children of the parties." The trial court ordered David to pay \$750 per month to Ruth in the form of child support. Under the property division provisions of the decree, we find that Ruth was awarded approximately \$72,000 in net assets, including the marital home. David was awarded \$21,000 in net assets. The decree did not provide for an award of alimony to Ruth.

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).

I. David contends that there was no basis for the provision that his visitation rights shall be exercised "only after not less than twenty-four hours prior to notice to [Ruth] and at times convenient to the personal plans of the children of the parties." We find the requirement of giving at least twenty-four hours notice to Ruth prior to exercising visitation rights is within the concept of "reasonable" visitation. However, we are somewhat disturbed by the inclusion of the requirement that visitation only be

exercised when convenient for the children. While we do not find that such a requirement is unreasonable, we are concerned that such a requirement has the potential to allow Ruth to exercise her discretion as the custodial parent in determining when visitation would be convenient for the children. A provision that allows the exercise of such discretion by the custodial parent over the visitation rights of the non-custodial parent is improper. Willey v. Willey, 253 Iowa 1294, 1302-03, 115 N.W.2d 833, 838-39 (Iowa 1962). We see no need for such a provision since the visitation provision already provides that visitation shall be reasonable. Since the requirement of the children's convenience, unlike the notice requirement, contains the potential for discretionary control by the custodial parent, we conclude that the language "and at times convenient to the personal plans of the children of the parties" should be deleted from the decree's visitation provision.

II. David contends that the trial court's property division is inequitable. In reviewing the property division of a dissolution decree, we consider the factors listed 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). Applying the Schantz factors to the factual situation in the case at bar, we conclude that equity would be better served by awarding the marital home to David. This was David's family home prior to the marriage, and we think he should be allowed to preserve the home as such. Ruth and the children may continue to reside in the marital home until David is no longer required to pay child support pursuant to the requirements of the decree. As an offset to the award of the marital home to David, Ruth is awarded a lump sum settlement equal to one-half of the present equity in the home, or \$22,132.50, with interest to accrue from the date of the trial court's decree at the rate of nine percent per annum payable on termination of child support payments by David. David shall also be required to pay the monthly house payments, the property taxes, and the insurance on the home.

III. David also contends that the child support award of \$750 per month to Ruth is excessive. In determining the proper child support allowance, a number of factors must be considered, including: parties' age, health, present earning capacity, future prospects, amount of resources owned by each or both parties, contributions of each to the joint accumulations, the children involved, duration of the marriage, indebtedness of

each or both, and any other relevant factors that may aid in reaching a just and equitable decision. In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). In light of these factors, with special attention placed on the needs and relative present earning capacities of the parties, as well as our order that David incur the obligation of the monthly house payments, we conclude that David's child support obligation should be reduced to \$100 per month per child. David's support obligation shall continue until each child reaches age eighteen. The provision for child support beyond age eighteen as stated in section 598.1(2), The Code 1979, is to be applied if appropriate. The trial court shall retain jurisdiction over the child support provision to provide any necessary modification should Ruth and the children move out of the marital home prior to the termination of David's child support obligations.

IV. On cross-appeal Ruth contends that she should have been awarded alimony. In determining the propriety of a trial court's provision for alimony or the absence thereof, we again consider the Schantz factors as well as the other economic provisions of the decree, including the property division and the award of child support. In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). In light of these considerations, we cannot conclude that the trial court's decision not to award alimony was unjust or inequitable.

V. Ruth also seeks an award for her attorney fees incurred by this appeal. Factors to be considered in evaluating a request for attorney fees incurred on appeal include: 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 the facts of this case, and without attempting to fix the value of Ruth's attorney's services, we conclude that David should pay \$1000 toward Ruth's attorney fees incurred by this appeal. Costs are taxed three-fourths to David and one-fourth to Ruth.

AFFIRMED AS MODIFIED.