FILED
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CLERK SUPREME COURT



**IN THE COURT OF APPEALS OF IOWA**

**IN RE THE MARRIAGE OF DAVID A. SINCLAIR AND NANCY E. SINCLAIR**

Upon the Petition of )
**DAVID A. SINCLAIR,** )
Petitioner-Appellant, )
and Concerning )
**NANCY E. SINCLAIR,** )
Respondent-Appellee. )

Filed February 23, 1983

2-471
2-67577

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Appeal from Scott District Court - Max R. Werling, Judge.

Petitioner appeals from the decree dissolving the parties' marriage, asserting 1) that the property division was inequitable, and 2) that trial court gave undue weight to the testimony of respondent's experts regarding the valuation of certain properties. Respondent cross-appeals asserting 1) the child support award was inadequate; 2) trial court erred in not granting alimony; and 3) she was entitled to attorney fees at the trial level and is entitled to attorney fees on appeal. AFFIRMED AS MODIFIED.

Robert DeKock, Muscatine, Iowa, for petitioner-appellant.

Edward N. Wehr, Davenport, Iowa, for respondent-appellee.

Considered en banc.

**PER CURIAM**

Petitioner, David Sinclair, appeals and respondent, Nancy Sinclair, cross-appeals from the decree dissolving the parties' marriage. In petitioner's appeal, he asserts: 1) the property division was inequitable; and 2) trial court gave undue weight to the testimony of respondent's experts regarding the valuation of certain properties. In respondent's cross-appeal, she asserts: 1) the child support award was inadequate; 2) trial court erred in not granting alimony; and 3) she was entitled to attorney fees at the trial level and is entitled to attorney fees on appeal. We affirm with modification.

Petitioner David A. Sinclair and respondent Nancy E. Sinclair were married in 1969. Petitioner is an architect specializing in restoring and managing historic properties. In the year before trial, he had no net income and in fact had a net loss of about $3,000. Respondent is a stewardess. She earned about $18,000 in the year before trial. The parties own the house they live in as well as a rental house with an adjoining lot and a 100-year-old apartment building. Petitioner also has a partnership interest in an office building. At trial, petitioner called a real estate appraiser to testify as to the value of this real estate; respondent called two real estate brokers.

The trial court gave respondent custody of the parties' two children and directed petitioner to pay $250 per month child support. Respondent was also awarded the house the parties lived in, their household goods, about $70,000 of the net value of the apartment building, a car, a credit union account, a certificate of deposit, and some stock. Petitioner was awarded the rental house and lot, the office building, his office furniture, the remainder of the net value of the apartment building (about $22,000), two cars, a pickup truck, a checking account, and an account receivable. The trial court directed that petitioner's share of the net value of the apartment building be placed in trust as security for his support obligation because of his refusal to maintain lucrative full-time employment. No alimony was awarded, and each party was directed to pay his or her own attorney fees.

**I. Scope of Review.** Since this is an action in equity, our review is **de novo.** Iowa R. App. P. 4.

**II. Property Settlement.**

**A. Expert Witnesses.** Petitioner claims that the opinion testimony of respondent's alleged expert witnesses as to the value of several properties was incompetent, irrelevant and immaterial, as there was no proper foundation laid qualifying them as experts. Petitioner also ascribes as error any weight the trial court based upon such expert testimony.

We review only those issues which the parties have properly preserved. In re Neff, 193 N.W.2d 82, 84 (Iowa 1971). The fact that the parties are in equity does not alleviate the parties' responsibility to make a complete record including proper objections. Id. Petitioner made no objections to the testimony of respondent's witness Sally Exbom regarding the valuation of the Welch Apartment or the Medical Arts Building. Likewise, when the written appraisals were introduced by respondent, petitioner had no objection. Appendix at 210. Similarly, petitioner lodged no objection to respondent's witness Carol Payson's testimony regarding the valuation of the Fulton and Hillcrest properties and consented to the introduction of her written appraisals. Appendix at 265. Accordingly, petitioner preserved nothing for our review concerning the competency, relevancy, materiality and foundation to the testimony of these two expert witnesses for respondent.

Petitioner claims that the trial court committed reversible error in giving the testimony of Exbom and Payson too great of weight. Petitioner reasons that his expert was infinitely more qualified than respondent's expert witnesses and any discrepancies in the valuation of the property by his expert with the facts was unduly emphasized by the court.

The weight to be accorded expert testimony is generally relegated to the finder of fact. See Fleener v. Board of Supervisors of Poweshiek County, 246

N.W.2d 335, 337 (Iowa 1976). In equity cases, the court gives weight to fact findings of the trial court, especially when considering the credibility of witnesses, although we are not bound by such findings. Iowa R. App. P. 14(f)(7); In re Marriage of Bevers, 326 N.W.2d 896, 897 (Iowa 1982). Where the trial court's valuation is within the permissible range of evidence, we will not disturb it. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). We find no error in the trial court's findings regarding the valuation of the properties under consideration.

**B. Equity of Property Settlement.** Our review of the record reveals that respondent was awarded approximately $167,330.19 in assets and the petitioner approximately $63,370.17.[1] The award to petitioner included a $22,000 lien in the Welch Apartments to be held in trust until the youngest of the children becomes emancipated. While we ascribe to no precise mathematical formula, our de novo review convinces us that petitioner should receive a greater sum. We accordingly modify the property settlement by awarding petitioner a $50,000 lien in the Welch Apartments in lieu of the $22,000 lien. The proportionate reduction of petitioner's lien if the property is sold below the value established by the court ($315,325.00) remains in effect.

We have reviewed all of petitioner's additional claims regarding the equities of the property settlement and find them to be without merit, as the trial court's findings are substantiated by the record.

**III. Child Support.** On cross-appeal, respondent claims that the child support established by the court at $250 per month for both children was inadequate. The record reflects that petitioner is presently a self-employed architect with a negative income. The court found, however, that in the current labor market, petitioner has the ability to generate at least $30,000 per year for his services as an architect, not including his $10,000 income from his real estate investments.

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[1]These figures represent the assets of the parties after deducting all liabilities.

Our review regarding child support is governed by the principles codified at Iowa Code section 598.21(4) (1981). Parents are equally obligated to support their children. Gerk v. Gerk, 259 Iowa 293, 296-299, 144 N.W.2d 104, 107-108 (1966). Disparity in the amount each parent is required to contribute toward child support results from differences in the ability of the parents to contribute.

We are confronted here with the dilemma of a father who has an earning capacity, as found by the trial court, of at least $40,000 annually but currently on paper shows a negative income because he is self-employed.[2] We are forced to reconcile the petitioner's earning capacity with his alleged present ability to pay. The interest of the children, however, remains of paramount interest. "The ability to pay [support] is to be determined on the basis of his earning capacity rather than by the amount of his voluntarily reduced income." See Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978). We believe such rationale is persuasive in the present case where the status of petitioner's employment is voluntary. Petitioner's voluntary election may be subordinated to the best interests of his children.

Petitioner does not object to the award of $250 per month in child support. We, however, find that child support in the amount of $28.87 per week per child on a 4-1/3 weeks per month basis to be inadequate. Respondent is an airline stewardess whose occupation requires her to be absent from the home for extended periods of time. Respondent claims personal expenses for herself and the two children of $2,333.00 per month and a gross income of $1,816 per month. We now order petitioner to pay the sum of $400 per month for the support of his children, to be reduced to $250 per month when the eldest child reaches 18 years

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[2] A financial statement petitioner made for a financial institution and introduced by respondent shows that petitioner had an income for the year 1980 of $70,000, and a net worth of $497,029.

of age or graduates from high school, whichever occurs later. Provisions for educational support beyond 18 should be considered at a later date.

If the petitioner fails to make any monthly support payment, the amount shall become a civil judgment and be subject to execution by any statutory means.

**IV. Alimony.** Respondent also asserts as error the trial court's failure to award alimony and requests an award of alimony of at least one dollar per year to permit future modification. We find no error.

In awarding alimony, the court must examine the factors set forth at Iowa Code section 598.21(3) (1981). The record reflects that respondent was 36 years old at the time of dissolution. She is employed as a stewardess and has an earning capacity of approximately $18,000 annually. As part of the property settlement, she was additionally awarded income-producing properties. She does not appear to be subject to any physical or mental infirmities. This court is of the opinion that respondent has the ability to become self-supporting and requires no assistance in the form of alimony. The general purposes of alimony, that is, rehabilitation and support, would not be furthered by an award under these circumstances. Nor has the parties' income been such that life-style alimony is warranted. See In re Marriage of Wallace, 315 N.W.2d 827 (Iowa Ct. App. 1981).

**V. Attorney Fees.** Respondent finally asserts that the trial court erred in not awarding attorney fees at the trial level. Attorney fees are not recoverable as a matter of right. See In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). "Trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution cases." In re Marriage of Moorhead, 224 N.W.2d 242, 245 (Iowa 1974). Based upon the record presented, we cannot say that the trial court abused its discretion in not awarding attorney's fees at the trial level.

Once an appeal is taken, the trial court loses jurisdiction to make an award of attorney fees. This court may, however, award attorney fees on appeal. In re

Marriage of Seidenfeld, 241 N.W.2d 881, 884 (Iowa 1976). Based upon the parties' present relative capacities and available resources, each party can pay his or her own respective fees on appeal.

We, therefore, affirm the trial court's judgment except as modified by this opinion. Costs are assessed equally between the parties.

AFFIRMED AS MODIFIED.