FILED
252
DEC 3 0 1981
SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF WILLIAM SODIE BLAKE AND PEGGY ANN BLAKE

Upon the Petition of	)	
WILLIAM SODIE BLAKE,	)	Filed December 30, 1981
Petitioner-Appellant,	)	
And Concerning	)	
PEGGY ANN BLAKE,	)	1-416 2-66374
Respondent-Cross-Appellant.	)	
	)	

Appeal from Wapello District Court - James D. Jenkins, Judge.

Petitioner-husband appeals and respondent-wife cross-appeals from economic provisions of the parties' dissolution decree. AFFIRMED AS MODIFIED.

Bailey C. Webber of Webber, Gaumer & Emanuel, Ottumwa, Iowa, for petitioner-appellant.

J. Terrence Denefe of Kiple, Kiple & Denefe, Ottumwa, Iowa, for respondent-cross-appellant.

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

Petitioner husband appeals and respondent wife cross appeals from economic provisions of the parties' dissolution decree. The husband asserts that certain property regarded by the trial court as assets of the couple was actually his by gift or inheritance and ought to have been set off to him before the division of assets was undertaken. In addition, he argues that an allowance should have been made for real estate broker's fee and expenses relating to the sale of farm property and that he should be permitted to pay any lump sum property settlement to the wife in installments. The wife agrees with the property division by the court but asks that she be awarded alimony and attorney's fees for this appeal. With certain modifications as to the method of payment of the property settlement, we affirm the trial court.

Peggy and William Blake were married in 1959 when she was 17 and he was 19. They have two children, both of whom have now attained their majority. William began his employment in his father's plumbing business, being first an apprentice and later a journeyman plumber there. Peggy quit high school to have the couple's first child and remained home until the birth of their second. Thereafter, she, too, has been employed outside the home in a variety of jobs. She has obtained her G.E.D. and has completed one year of a nurse's training program. Peggy was 38 at the time of trial and in reasonably good health; Willaim was 40 and a victim of multiple sclerosis, a progressive and degenerative disease with no known cure. He became completely disabled between 1973 and 1975, and now receives social security disability income of $610 each month. There was testimony that within two to five years he will need nursing home care.

Peggy and William began their marriage with no assets. In 1971 they began buying a farm on contract. At the time the farm was purchased the buildings were in substantial disrepair; both parties worked hard to repair the buildings, improve the farm, and manage livestock and crops. Eventually, William's physicial condition made it impossible for him to personally undertake the farm work; in 1975 they sold their livestock and rented the farm out on a crop sharing basis. The court found that the couples' net assets amounted to $198,121.14.

The plumbing business in which William worked, originally a sole proprietorship, was converted into a closely-held corporation with William, his mother, and his father as the shareholders. It was on this business account that William wrote a $10,740 check for the original downpayment for the purchase of the farm. That money was repaid to the company with a loan co-signed by William and his father. Thereafter, money for

farm operations, loan repayment, and the plumbing payments to the plumbing company for work done on the farm, and other monies between the two concerns were paid out, borrowed against, and generally co-mingled.

William's father died in 1975. A sum of money eventually came to William and his mother, an amount William argues constitues part of the gift or inheritance that ought to be set off to him. However, the trial court found, and we agree, that such amount constituted a distribution of retained but undivided earnings of the corporation at the time of its liquidation and was income to William who had, in fact, treated it as income on the parties' 1976 federal tax return. We also agree with the trial court that whether or not section 598.21 is applicable to this dissolution proceeding is immaterial to the outcome of the property division here since under either the code section or the criteria of Shantz v. Shantz, 163 N.W.2d 398 (Iowa 1969), William has failed to prove that any of the assets in question were the result of gift or inheritance. Consequently, we affirm the trial court's division of the parties' property as being fair and equitable under the circumstances of this case.

However, we do modify the terms of the property division in respect to the method by which Peggy is to receive her share. The trial court awarded Peggy a judgment for the $96,845.57 due her (one-half of the couple's assets minus the personalty in Peggy's possession) and made the judgment a specific lien against all of the property awarded to William. The court encouraged the parties to work out the details of implementing the property division with attention to be given to all of the tax consequences of any of the possible transfer methods. We believe that a more specific arrangement for payment of Peggy's share of the property division should be included in the decree. The $96,845 judgment awarded to Peggy is made a lien on the farm real estate awarded to William and shall be paid in eleven equal installments. The first of these installments shall be deemed payable as of the date of the trial court's decree and the rest on each anniversary date thereafter. Interest shall accrue on the unpaid balance of the judgment at the rate of ten percent per annum from the date of the trial court's decree.

Peggy requests that she be awarded alimony. The trial court balanced Peggy's very real need for support against the physical condition of William and his need to provide for his own increasing care and decided that an alimony award to Peggy would be unjust and inequitable under the circumstances. We agree and affirm the trial court's decision in all respects other than the modification herein made concerning payment of the property settlement.

Peggy also asks for attorney's fees for this appeal. Attorney fee awards are not automatic but are based on the need of one party balanced against the other party's ability to pay. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). We believe the property settlement equips each party to pay his or her own attorney fees on appeal. See Craft v. Craft, 226 N.W.2d 6, 9 (Iowa 1975). Other costs of this appeal are assessed equally between the parties.

AFFIRMED AS MODIFIED.

All judges concur except Donielson and Snell, JJ., who dissent.

DONIELSON, J. (dissenting)

I dissent. The majority seems to hinge its decision to affirm the trial court's property division as fair and equitable upon petitioner's failure "to prove that any of the assets in question were a result of gift or inheritance." In doing so the majority has failed to properly apply the Schantz criteria to this case and compounded the inequities created by the trial court's property division by modifying the method of payment.

Let me first emphasize that I believe the respondent in this case is entitled to a generous property settlement; however, in light of the petitioner's age, health, and future earning capacity, I believe both the trial court and the majority have been too generous. Petitioner is age 40 and totally disabled by multiple sclerosis while respondent is 38 and in good health. In two to five years petitioner will require full nursing care. This care even now costs $800.00 to $900.00 per month. His only future earning capacity will be his $610.00 per month disability income and the farm income. The farm is presently rented on a share crop basis and the income varies from year to year (e.g. $7,911.86 in 1979 and $10,017.99 in 1980). From this meager and variable income, the majority would require petitioner to pay respondent approximately $8300 per year plus 10% interest on the unpaid balance. In a bad farming year he may be required to use some of his disability income to pay respondent her property settlement, leaving an amount inadequate for his own necessary care. The only feasible way petitioner can pay respondent her share of the property division is by selling the farm. I believe that when proper consideration is given to the petitioner's age, health, and future earning capacity as required by Schantz, both the trial court's decision and the majority's decision appear unreasonable.

Snell, J., joins this dissent.