

FILED

AUG 30 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DONALD K. SCHMIDT AND DIANE D. SCHMIDT

281

Upon the Petition of)

DONALD K. SCHMIDT,)

Petitioner-Appellant/
Cross-Appellee,)

Filed August 30, 1983

And Concerning)

DIANE D. SCHMIDT,)

Respondent-Appellee/
Cross-Appellant.)

3-94
2-68787

Appeal from Linn District Court - Thomas M. Horan, Judge.

Petitioner husband appeals and respondent wife cross-appeals from various economic provisions of the parties' dissolution decree relating to property division, alimony and child support. **AFFIRMED AS MODIFIED AND REMANDED WITH INSTRUCTIONS.**

Robert M. Fassler, Cedar Rapids, for petitioner-appellant/cross-appellee.

Stephen B. Jackson, Cedar Rapids, and Michael S. Vestle, Cedar Rapids, for respondent-appellee/cross-appellant.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden,

JJ.

DONIELSON, J.

Petitioner husband appeals and respondent wife cross-appeals from various economic provisions of the parties' dissolution decree relating to property division, alimony and child support. Petitioner also claims that respondent's cross-appeal was not timely filed and should therefore be dismissed. Our review is de novo. Iowa R. App. P. 4. We affirm with modification and remand.

Donald and Diane Schmidt were married in 1963 and were, respectively, 43 and 39 at the time of trial. Since the birth of the parties' first child in 1964 Diane has been exclusively a housewife and mother doing some work for Donald's service station business. Donald purchased the business, which he had previously leased, in 1978 with a down payment of about \$52,000 and borrowed funds, subsequently repaid, of about \$26,000. In 1981 he added a \$20,000 addition to the service station. The business showed an operating loss of \$1,131 for the year 1981.

The trial court awarded Donald property which it valued at \$244,189.61 including the service station which was valued at \$95,000. Donald's appraiser testified that the station was worth \$90,000 while a witness for Diane testified that the station was worth approximately \$150,000. Its appraised value for tax purposes was \$99,738. Donald was also awarded stock valued at \$11,306 which the trial court found to be all that remained of a \$60,000 inheritance received by Donald in 1971.

Diane was awarded property which the trial court valued at \$100,373.12 and a lump sum of \$51,832.26 payable within one year drawing annual interest of fifteen percent from the date of judgment. The property awarded to her included a 1969 Volkswagen valued by the trial court at \$1,500 to which Donald testified that he had a sentimental attachment. Diane was also awarded alimony of \$400 per month terminable upon her death or remarriage, custody of the parties' youngest child, now aged fourteen, and child support of \$100 per week until the youngest

child reaches the age of eighteen or graduates from high school. Donald was awarded custody of the parties' oldest child, who has now reached her majority.

A pretrial order limited the issues to property and support. Diane subsequently filed an answer in which she made her first specific request for permanent alimony. The court overruled Donald's motion for a new trial in which he alleged that the court had committed various errors. This appeal and cross-appeal followed.

I.

We first dispose of Donald's claim that we have no jurisdiction over Diane's cross-appeal because it was not timely filed. Iowa R. App. P. 5(a) states in part: "[a] cross-appeal may be taken within the thirty days for taking an appeal or in any event within five days after the appeal is taken" (emphasis added). Rule 5(a) also provides that an appeal may be taken within thirty days after the entry of a ruling on a motion for new trial. In this case, Donald's motion for new trial was overruled on June 11, 1982. Diane filed her cross-appeal on July 7, 1982, well within the thirty-day limit imposed by the first alternative in the above-quoted portion of Rule 5(a). Since the cross-appeal was timely filed, Donald's claim that we have no jurisdiction because of Diane's failure to satisfy the alternative five-day limit of that rule is without merit.

II.

Donald next claims that Diane is not entitled to alimony since that issue was not properly before the trial court. We disagree. The court's pre-trial order in question limited the issues for determination to "property" and "support." We believe the term "support" may be fairly construed to include alimony and is not limited to only child support as Donald argues. This conclusion is supported by the fact that Iowa Code § 598.21(3), which lists the factors to be considered in arriving at an equitable alimony award, refers to " support payments to either party"

(emphasis added). The alimony issue was properly before the trial court.

III.

Both Donald and Diane complain about various specific provisions of the property division and the awards of alimony and child support. In considering the fairness of these provisions, we view them as an integrated whole. In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa Ct. App. 1981). We examine the facts of this case in light of the factors listed in Iowa Code §§ 598.21(1) (property division), 598.21(3) (alimony), and 598.21(4) (child support).

With the one exception detailed below, we believe the provisions relating to the division of property are equitable. Specifically, we reject Donald's claim that the trial court improperly awarded a portion of his inheritance from his father's estate to Diane. The record sustains the court's conclusion that, of the \$60,000 inheritance received by Donald in 1971, only \$11,306 (in stock investments) remains which is directly traceable to that inheritance. Since the remainder was used in the accumulation of the parties' marital property and is not directly traceable to any particular asset, we believe it would be inequitable to refuse to divide such remainder between the parties. See Iowa Code § 598.21(2). We also reject Diane's claim that the court undervalued the service station. The court apparently thought the appraisal made by Donald's expert witness was more credible than that given by Diane's witness and made its determination of value accordingly. We see no reason to disturb that judgment. We do believe, however, that Donald should be awarded the 1969 Volkswagen automobile. He testified that he restored it from a state of abandonment and that it therefore has a great deal of sentimental value to him. We therefore order that Donald be given the Volkswagen. See In re Marriage of Wallace, 315 N.W.2d 827, 832 (Iowa Ct. App. 1981).

With regard to alimony, we affirm the amount (\$400 per month) but we

believe it should not last any longer than four years. This will give Diane enough time to obtain more education and job skills after which she should be able to find employment and become self-supporting. We therefore modify the decree such that Diane is awarded alimony of \$400 per month for four years from the date of the trial court's decree unless she dies or remarries before the expiration of that time period at which time alimony will then cease.

Finally, we see no reason to disturb the award for child support. Its terms are sufficiently generous (\$100 per week) such that Diane's claim that it should last through the child's college years instead of only through high school as decreed by the court is without merit. If the child decides to pursue post-secondary education and if the present support award is inadequate for those needs, Diane may bring a modification action at that time.

IV.

Diane asks for attorney fees incurred in this appeal. Such award depends upon the relative financial circumstances of the parties. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). Without directing what Diane's attorneys may charge, we order Donald to pay \$1,000 toward that obligation.

Except for the award of the Volkswagen and the duration of alimony, the provisions of the decree are affirmed. The cause is remanded for entry of judgment in conformity with this opinion. Each party shall pay one-half the costs.

AFFIRMED AS MODIFIED AND REMANDED WITH INSTRUCTIONS.