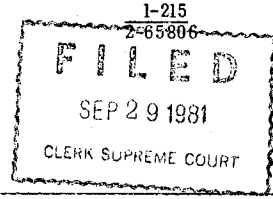
IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JOHN R. FLAHERTY AND CAROL A. FLAHERTY

Upon the Petition of)
CAROL A. FLAHERTY,)
Petitioner-Appellee,)
)
And Concerning)
JOHN R. FLAHERTY,)
Respondent-Appellant.)

Filed September 29, 1981

1-215
2-65806



Appeal from Scott District Court, Nathan Grant, Judge.

Respondent-husband appeals from the economic provisions of the parties' dissolution of marriage decree contending that the property division was inequitable, that the child support award was excessive, that he should be allowed the income tax dependency exemption for both children and the petitioner-wife should not have been awarded attorney fees. AFFIRMED IN PART AND MODIFIED IN PART.

Francis J. Coyle, Coyle, Gilman, & Stengel, Rock Island, Ill., for respondent-appellant.

Robert C. Bradfield, Davenport, Ia., for petitioner-appellee.

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

PER CURIAM

Respondent-husband appeals from the economic provisions of the parties' dissolution of marriage decree contending that the property division was inequitable, that the child support award was excessive, that he should be allowed the income tax dependency exemption for both children, and the petitioner-wife should not have been awarded attorney fees. We affirm in part and modify in part.

Petitioner, Carol A. Flaherty, and respondent, John R. Flaherty, were married August 21, 1971. The parties have two children, Shannon Marie, born March 9, 1974, and Ryan Anthony, born August 3, 1978. Carol and John have been living separately since March of 1980.

The record indicates that John is employed by the Rock Island School System teaching mentally and physically handicapped children, and after school he coaches the school's wrestling squad. From his employment by the school system, John has a take-home salary of $460.00 bi-weekly.

Carol is a trained optician currently employed by Jorgenson Opticians, Incorporated. Carol has a take-home salary of $422.00 every other week.

At trial, the custody of the two minor children was not an issue, and it was agreed that Carol is to continue to have the responsibility of care and custody of the children. John was ordered to pay $50.00 per week per child as child support payments until each child reaches the age of eighteen, marries, or sooner becomes self-supporting. In accordance with section 598.1, The Code 1979, a provision was included in the court's order to continue the support payments beyond age eighteen in the event the children are enrolled in post high school education.

The court awarded the family residence to Carol, subject to a judgment in favor of John for one-half of the equity in the home after deducting the mortgage encumbrance and a seven percent real estate commission. The judgment is not payable until the happening of one of the following events: the youngest child reaches eighteen years of age, marries or becomes self-supporting; Carol remarries; or, Carol no longer resides in the home. The trial court computed John's equity in the home to be $9813.50, and there was no provision for payment of any interest by Carol to John on his equity in the home during the period of Carol's possession. The trial court awarded each party their respective personal property, with the exception that John was awarded a table saw and

the refrigerator in the basement of the residence. Each party was awarded the automobile in their respective possession, subject to any encumbrance on the vehicle.

John was also ordered to pay $200 towards Carol's attorney fees. No alimony was or would be awarded to either party by the trial court. John is to receive the benefit of the income tax exemption for the youngest child, Ryan Anthony, and Carol is to receive the benefit of the exemption for Shannon Marie.

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 when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). In reviewing each economic provision of the dissolution decree, we consider all of the provisions together as an integrated whole. See In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976). In reviewing the property and alimony provisions of a dissolution decree, we consider the factors articulated 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).

I. John contends the trial court erred by imposing excessive financial obligations on him. John asserts that awarding Carol the family residence, subject to a judgment for his share of the equity payable only when the children reach age eighteen or become self-supporting, when Carols vacates the premises or when Carol remarries, unfairly distributes the assets of the marriage. John argues that the trial court's order was unfair because it requires his equity in the home to be tied up potentially for fifteen years and that the award does not give appropriate consideration to the nearly equal earning capacities of the parties.

In response to John's argument, we are guided by the notion that although an equal division of assets is frequent, there is no requirement that the division be precisely equal. In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980); In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979). Even if the trial court's goal is to divide the assets equally, there is no necessity that one party be awarded exactly the amount the the other party is awarded. Conley, 284 N.W.2d at 223. The test for an acceptable allocation of assets is whether the distribution constitutes an equitable and just award under the particular circumstances of the parties. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976), Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968); In re Marriage of

Williams, 199 N.W.2d 339, 345 (Iowa 1972). We are of the opinion that the trial court's award was not fair and equitable on the issue of allocation of the family home in light of the trial court's apparent scheme of distribution of the family assets.

The trial court ostensibly sought relative parity in the division of the assets between John and Carol. That goal is reflected by the computational method the trial court utilized in arriving at its division. We think, as did the trial court, that relative parity is appropriate in the instant case given the nearly equal financial inputs and service-oriented inputs made by each party. To effect what we consider a more fair and equitable division of the parties' assets, we modify the trial court's order in the following way and for the following reasons.

We believe that instead of awarding John a lump sum amount, representing his equity in the family home, payable upon the happening of the stated alternative conditions precedent, awarding John a flat percentage of the appraised value of the family home at the appropriate time effects equity between John and Carol. The trial court concluded in its findings of fact that the family residence was currently valued at $63,900 and is subject to a mortgage with a balance of $39,800. We adopt the trial court's conclusions on that issue. After substracting out a seven percent real estate commission from the current value of the home, a percentage we feel is reasonable, an equity of $19,627 is left. The trial court equally divided that amount between John and Carol, giving each an equity position in the home of $9813.50. Since John's equity balance is noninterest bearing and its realization is postponed until the children attain majority, Carol remarries or she vacates the home, the actual value of John's equity will be diminished by the effects of future inflation and is unfair for those reasons. With those concerns in mind, we award John a fifteen percent share of the fair market value of the home, which is the percentage John's equity of $9813.50 bears to the current fair market value of the home of $63,900.

A percentage of the appraised fair market value of the home is more fair given that John will not actually realize the value of his equity interest until the occurrence of one of the conditions precedent. During that time, John's equity will not be producing any income to offset the erosion of his equity caused by inflation nor is there any potential for appreciation. Carol's equity, on the other hand, could potentially be enhanced by appreciation in the value of the home. Therefore, awarding John a percentage of the value of the home more accurately and equitably effects parity

between the parties than did the trial court's award of a flat dollar amount to John or would imposing an obligation on Carol to pay John interest on his equity during the period of her possession. In essence, John's equity interest is given the same opportunity to respond to market conditions and inflation as does Carol's interest. In this case, although we are not required to do so, In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979), we are inclined to strive for as nearly an absolutely equal division in the real property as is feasible, due to the parties' equal contributions to the marriage and nearly equal financial statuses and prospects. In arriving at our conclusion, we take into account the facts that Carol has raised the children with only minimal assistance from John, that John has, through his labor, enhanced the value of the home and that John has undertaken other forms of employment in addition to his primary occupation of teaching.

The trial court's order, regarding the distribution of the real estate, is modified only to the extent that John is to be awarded fifteen percent of the fair market value of the family home, based upon an appraisal made by a mutually acceptable appraiser and payable upon the occurrence of any one of the following events: the youngest child reaches age eighteen, marries or becomes self-supporting; Carol remarries; or Carol ceases to reside in the home.

Our conclusion on this issue does not affect the trial court's order awarding child support to Carol, which is not argued as being excessive, and is affirmed.

John's second argument is that the trial court erred in ordering that Carol is to receive the income tax exemption for the oldest child when John, the noncustodial parent, is providing more than $1200 towards the support of the child. John's claim is based upon I. R. C. § 152(e)(2)(B), which provides:

> (2) Special rule.—The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if—
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> * * *
>
> (B) (i) the parent not having custody provides $1,200 or more for the support of such child (or if there is more than one such child, $1,200 or more for each children) for the calendar year, and
>
> (ii) the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.

Internal Revenue Code § 152(e)(2)(B) is designed to ensure that a noncustodial parent providing at least $1200 of support per child and over one-half of each child's support

requirements obtains the income tax exemption for each child meeting those conditions.

We affirm the trial court's order on this issue. The order is reasonable as it has the potential to avoid disputes between the parties after the dissolution and it is implicitly fair. We point out, however, the allocation of the exemptions contemplated by the trial court will not be guaranteed by its order. Treas. Reg. §§ 1-152-4(d)(3), 1-152-4(f), ex. 5. Each year the issue will be subject to a factual redetermination of support if the parties so desire. See Treas. Reg. § 152-4(e). The trial court's order determines which party is entitled to the exemption unless the issue is factually redetermined, and is affirmed.

III. John's final contention is that the district court committed error in awarding Carol $200 to be applied to her attorney fees. Carol also argues she should be reimbursed for her attorney fees on appeal in the amount of $1807.80. We recognize that recovery of attorney fees is not a matter of right. Geisinger v. Geisinger, 202 N.W.2d 44, 47 (Iowa 1972). Given that the trial court has considerable discretion in allowing attorney's fees in dissolution actions, Lochmiller v. Lochmiller, 229 N.W.2d 228, 229 (Iowa 1975), we affirm the trial court's award of $200 to Carol to offset some of her attorney fees. In light of the relative earning capacities of the parties, we also order John to pay Carol $500 to be applied against her attorney fees on this appeal.

Costs of this appeal are taxed equally against both parties.

AFFIRMED IN PART AND MODIFIED IN PART.

All judges concur except Oxberger, C.J., and Johnson, J., who dissent.

OXBERGER, C.J., (dissenting)

I find the majority's effort to award John a return on his home equity too complex. I would simply award John statutory interest on his equity.

Johnson, J., joins in this dissent.