

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF CHARLES)
L. JOHNSON AND MARILYN JOHNSON)**

Upon the Petition of)

Filed November 10, 1977

MARILYN JOHNSON,)

Appellee,)

And Concerning)

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2-59485

CHARLES L. JOHNSON,)

Appellant.)

Appeal from Lucas District Court - A. V. Hass, Judge.

Respondent husband appeals property division provisions of original dissolution decree which awarded all inheritance assets to petitioner wife. - Affirmed with modification.

Virgil E. Meyer, of Meyer & Meyer, of Chariton, for Appellee.

Richard D. Morr, of Morr & Shelton, of Chariton, for Appellant.

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

OXBERGER, J.

Respondent Charles L. Johnson appeals the property division accorded him in the original decree of dissolution of his twenty-five year marriage to petitioner Marilyn Johnson. He asserts the trial judge erred in failing to award him a substantial portion of the marital assets which came into the marriage via Marilyn's inheritance in 1963. Affirmed with modification.

During the pendency of this appeal the supreme court decided the propriety of considering an inheritance of either party in applying the third postmarital criterion of *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). *Locke v. Locke*, 246 N.W.2d 246, 253 (Iowa 1976). In reaching an equitable determination of financial or property rights:

It is our view the value of property inherited by one of the spouses and awarded to him upon dissolution of the marriage is a proper factor to be considered by the court in arriving at the net worth of each party, relative needs of the other and value of the resources of the parties. *Locke, supra*.

After her father's death in 1963, Marilyn inherited property valued by her account at \$202,700:

78 acre farm & residence	27,500
200 acre farm	25,000
40 acre farm	200
Commercial building	40,000
Stocks & bonds	<u>110,000</u>
	\$202,700

The property served as a major income-producing asset for the family. Charles farmed it and established a used car business in conjunction with the residence property. Since 1971 or 1972 the farmland has been rented with the income used to support in part the family. The forty acre farm and the commercial building were disposed of during the marriage with the proceeds used for support for the family. At the time of trial the inherited property valued at \$317,000 was awarded to Marilyn:

78 acre farm & residence	75,000
200 acre farm	140,000
Stocks and bonds	<u>102,000</u>
	\$317,000

We note Charles has challenged Marilyn's current valuation figures as excessively low. Further, he asserts the farmland is currently rented for little more than half its reasonable rental value. We are confident that the current property valuations are conservative and that the property is likely of far more value than Marilyn's computations. This is important since Marilyn received no alimony and minimal child support to maintain the family's accustomed lifestyle. She has not been gainfully employed since the earliest years of the marriage. Her chief source of income is the annual dividend and interest income from the stocks and bonds of \$5000 and the rental income from the farmland of \$7000.

Charles is hereby awarded, in addition to the \$5000 lump sum and all other assets awarded him by the trial court, a lump sum of \$30,000. The total cash award of \$35,000 shall be payable in ten annual installments of \$3500 with the first payment due May 1, 1978. Any installments not paid when due shall draw interest at the rate of seven percent per annum from the date each such payment becomes due and owing. Section 535.3, The Code 1975. *Arnold v. Arnold*, 258 Iowa 850, 855, 140 N.W.2d 874, 876 (1966). Upon remand for entry of a decree in accord with this modification, the trial court shall impose a lien upon the realty awarded Marilyn in favor of Charles in the amount of \$35,000. In all other respects the trial court is affirmed.

Affirmed with modification.

All judges concur, except Carter, J., who concurs in part and dissents in part, and Danielson, J., who dissents.

CARTER, J. (concurring in part and dissenting in part)

I agree with the majority that Charles should be awarded an additional cash settlement. I believe, however, this should be an additional \$15,000 for a total cash settlement of \$20,000.

DONIELSON, J. (dissenting)

I dissent. I do not believe that the record before us in the instant case justifies the type of modification ordered by the majority. When the parties were married in 1951, petitioner was a seventeen-year-old high school senior and respondent was a twenty-one-year-old soldier who had completed one and one-half years of high school. At that time, their combined net worth was at most \$500 and both parties were working. Following respondent's release from the armed services in 1953, he worked in various capacities for weekly wages, and helped supplement the family income by farming.

The trial court found that after petitioner inherited the property from her father in 1963, respondent farmed the 200 acres and those at the homeplace until 1971 or 1972, at which time all of the productive acres were rented out to other parties.

The parties have four children, two of whom remain at home. At the time of trial in February, 1976, respondent was not employed but indicated that he would resume work soon. Although he did not complete high school and has no special skills, he has farmed, done construction work, driven a truck, sold used automobiles, and worked as a water hauler in the past.

The record reflects that petitioner provided the bulk of the family income through farm and building rental income, dividends, interest income, and by supplying respondent with a rent-free, encumbrance-free farm which would enable him to provide the family farm income. The record also indicates that one of the buildings inherited by petitioner was sold and the proceeds used to meet current family living expenses and pay other debts. Against this factual background, the trial court issued its Conclusions of Law, which dealt with custody, child support and property settlement. No provisions were made for alimony, however.

On appeal, we give weight to the findings of fact of the trial court, but are not bound by them. Rule 14(f)(7), Rules of Appellate Procedure. The modification ordered by the majority effectively mandates an equal division of the property. I see no basis in this record for making any modification of the trial court's order.

In *re* Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975), the court stated:

"Counsel in argument refer to prior decisions of this court where the award approved for the wife in a certain factual situation amounted to 40 percent of the marital property. In others, they assert the award to her was

close to an equal division. In still other cases they analyze the opinion as providing for a 25 to 75 percent division. In some factual situations a just award may amount to a one-third share while in others a just award may call for what amounts to an equal division. Although some of our cases may be subject to the analysis as made by counsel here we point out neither section 598.17 nor 598.21 sanctions a division of the assets of the parties in a dissolution proceedings based on either a one-third share to the wife or an equal division as might be the case in descent and distribution situations. The question is always what is an equitable and just award in a given set of circumstances."

Accord Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976).

In Conaway v. Conaway, 217 N.W.2d 625 (Iowa 1974), the court was faced with a factual situation remarkably similar to the instant one. There, the court stated, supra at 627:

"Briefly stated, (1) petitioner, in addition to performing services as a wife and mother, inherited property valued at approximately \$50,000 during the instantly involved marriage period; (2) respondent received a gross salary, after 1962, of not more than \$13,500 per year; (3) petitioner's post-decree annual income is limited to about \$3500 gross earnings, plus \$1200 alimony; (4) since petitioner is not well her earning potential is restricted; and (5) respondent is in good health with increased earnings in prospect."

In Conaway, at the time of dissolution, petitioner held assets valued at \$38,695.43, respondent held assets worth \$12,728.13, and \$20,968.01 in assets were held jointly. In that case, the trial court awarded petitioner child support, \$100 per month alimony, and \$38,695.43 in property. Respondent was given assets having a total value of \$33,696.14. Approximately \$4,000 in debts were ordered paid by respondent. On appeal, the supreme court modified the trial court award by giving petitioner an additional \$11,846.29 in assets.

In the instant case, petitioner also performed services as a wife and mother for almost 25 years and inherited property during marriage. Respondent seldom received a gross salary or income approaching that of the respondent in Conaway. Furthermore, petitioner's future earning potential is generally limited to the income her inheritances will produce, since no alimony was awarded here as it was in Conaway. Petitioner must also remain at home with the minor children and receive less child support than the Conaway petitioner. Respondent is in good health and has good prospects of an increased earning capacity in the future.

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A comparison of these similar fact patterns leads me to conclude that the provisions made by the trial court were just and equitable under the circumstances. I can find no support, either in the record or otherwise, which justifies this type of modification based upon the appreciation in value of assets during the pendency of the marriage, nor do I believe that respondent is entitled to an increased share of the property. For all these reasons, I would affirm the trial court.