FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 138

IN RE THE MARRIAGE OF CAROLE JEAN SPOO AND CLIFFORD G. SPOO

Upon the Petition of)
CAROLE JEAN SPOO,) Filed May 30, 1980
Petitioner-Appellee,)
And Concerning)
CLIFFORD G. SPOO,) 0-60
2-63577
Respondent-Appellant.)

Appeal from Emmett District Court - Tom Hamilton, Judge.

Husband appeals economic and visitation provisions of dissolution decree asserting 1) specified visitation rights to mother are not in the best interests of the minor children, 2) the property division is unreasonable, inequitable and unjustified in light of all the circumstances, 3) the award of 9% interest on the unpaid balance of the cash property settlement violates Iowa law setting interest rates on judgments, 4) the award of $750 for wife's attorney fees at trial is inequitable, and 5) failure to impose child support obligations on mother is inequitable. Wife cross-appeals alleging trial court's property award to her was inadequate. AFFIRMED.

Ruth Fillenwarth of Fillenwarth & Fillenwarth, Estherville, Iowa, for respondent-appellant.

Richard Meyer of Fitzgibbons Brothers, Estherville, Iowa, for petitioner-appellee.

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

Respondent-husband, Clifford G. Spoo, appeals economic and visitation provisions of trial court's decree dissolving his marriage to petitioner-wife, Carole Jean Spoo. He asserts 1) visitation rights of petitioner as specified by trial court are not in the best interests of the minor children, 2) property division is unreasonable, inequitable and unjustified in light of all the circumstances, 3) award of 9% interest per annum on the unpaid balance of the cash property settlement to petitioner violates Iowa law setting interest rates on judgments, 4) award of $750 for petitioner's attorney fees at trial is inequitable, and 5) failure to impose child support obligations on petitioner is inequitable. Petitioner cross-appeals alleging trial court's property award to her is inadequate. We affirm.

The parties' twenty-four year marriage was dissolved by decree on April 27, 1979. Four children were born to the marriage. Two had reached majority, although a twenty-two year old son was residing with respondent as a result of a disabling industrial accident. Two minor children, Diane, born October 21, 1961, and Teresa, born February 17, 1967, remain at home. Diane has had two previous surgeries for club feet and was scheduled for a third operation shortly after the hearing in this matter. She also attends special education classes in high school. Teresa has chronic kidney problems and, at time of hearing, was repeating fifth grade. Custody of the minor children were awarded to respondent and is not at issue on this appeal.

Petitioner brought approximately $1,800 and a bedroom set to the marriage; respondent contributed $2,900 in cash, a near-new automobile and a motorcycle. The parties jointly accumulated assets during the marriage, including a house valued at approximately $32,500, household goods and furnishings of undetermined value, a travel trailer valued at $1,400, and a 1977 Buick worth $4,300. Proceeds from a current mortgage on the house were utilized to purchase the 1977 Buick. The balance of the encumbrance on the date of hearing was $5,854.

Respondent inherited an 80-acre farm from his father's estate in 1959 but his interest was subject to his mother's life estate which terminated upon her death in 1976. The farm was valued between $184,000 and $188,000.

Respondent, age 51, and a high school graduate, has been gainfully employed throughout the marriage and has worked as a stamp-press operator in a manufacturing plant since 1963. His 1978 earnings were $11,082 from wages and $5,400 from farm income. Except for a congenital leg deformity which causes respondent to walk with a limp, and an occasional problem with bloodclots, respondent enjoys good health.

Petitioner, age 4[illegible] completed 8th grade plus 60 hours training as a nurse's aide and worked as a maid [illegible] nurse's aide at a minimum wage throughout their marriage. The parties presented conflicting testimony as to the number of years petitioner worked prior to 1974, but both agreed she was gainfully employed for the years 1974 through 1978. Her 1978 gross income was $6,027. Petitioner has suffered recurring problems with cancer, resulting in a radical mastectomy of her left breast in 1970, surgical removal of a benign lump in her right breast in 1971, and removal of a cancerous thyroid gland in 1975. As a result, petitioner is required to have annual checkups at the Mayo Clinic in Rochester, Minnesota, and semi-annual checkups by her local physician. Her prognosis at the time of hearing was uncertain as she had been told she would probably have no difficulties if she remains cancer-free until 1985.

Throughout the marriage, both parties deposited their respective incomes in a joint checking account utilized for family needs. Petitioner later established a joint savings account with one of the children and frequently deposited her check therein to provide funds for the parties to remodel their home. Respondent also deposited approximately $4,900 of his inheritance from his mother's estate in the account. When she left the family home in 1978, petitioner withdrew $800 from the savings account.

Trial court awarded petitioner the few items of household goods she took with her when she left the family home, $800 from the savings account she had previously withdrawn, sale proceeds of a 1967 Chevrolet which respondent had transferred to petitioner, $600 proceeds from her retirement annuity, and a $48,000 lump sum cash payment to be made in amounts not less than $2,500 annually, with annual interest at 9% per annum from May 1, 1979. Trial court also ordered respondent pay $750 of petitioner's attorney fees at trial. Trial court set scheduled rights of visitation with the two minor daughters.

Respondent was awarded the homestead, the bulk of the parties' household goods and furnishings, the 1977 Buick, the travel trailer, and the 80-acre farm.

I. Scope of Review. Our review is de novo. Iowa R. App. P. 4. We give weight to trial court's findings of fact, especially with regard to credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). In reviewing the division of property, we consider the factors enumerated 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).

II. Visitation. Respondent first challenges trial court's specification of visitation rights to petitioner. He asserts the children have health and school problems, do

not desire to see their mother, are old enough to make their own choices regarding visitation, and, thus, should not be forced to visit their mother on specific occasions as decreed.

While visitation is not an absolute right, the best interests of a child requires a continuing association with a non-custodial parent unless the contrary is shown. Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973); Lamansky v. Lamansky, 207 N.W.2d 768, 772 (Iowa 1973).

We find no evidence in the record to indicate the children's best interests would be served better by re-defining petitioner's rights in terms of the girls' desires. We believe the record reveals petitioner to be a mature individual, capable of foregoing her specified rights if the girls are uncooperative or distressed. We also remind respondent of his duty not to interfere with petitioner's rights through his actions or comments about petitioner.

III. Division of Property. Respondent alleges the net value of property accumulated by the parties through their joint efforts is approximately $30,746 and an equitable award would be obtained by an equal division of that amount. Petitioner, on the other hand, asserts the $48,000 award to her represents only 21% of the marital assets and should be increased substantially to reach a fair and equitable distribution. Despite several subsidiary points of contention regarding the parties' contribution to the remodeling project, efforts in performance of household chores, and respondent's responsibility for care and support of the minor children, the major controversy concerns the 80-acre farm inherited by respondent.

While each case must be decided on its own facts, we find the reasoning in Locke v. Locke, 246 N.W.2d 246 (Iowa 1976), applicable to the instant case. In Locke, the court concluded the value of property inherited by the wife and awarded to her was a proper factor to consider in arriving at the net worth, relative needs, and value of resources of the parties. 246 N.W.2d at 253.

In view of respondent's status as custodial parent, award of the parties' home to him is appropriate. Further, in view of petitioner's uncertain health status, the fact she neither sought nor received alimony, award of virtually all the parties' household goods and furnishings to respondent, petitioner's limited earning capacity, and the length of the marriage, we conclude trial court's award, while not generous, is equitable. See also In re Marriage of Beeh, 214 N.W.2d 170, 175 (Iowa 1973); In re Marriage of Cook, 205 N.W.2d 682 (Iowa 1973).

IV. Award of Interest. Respondent next asserts trial court's award of interest on the $48,000 cash settlement was contrary to section 535.3, The Code 1979, which provides: "Interest shall be allowed on all money due on judgments and decrees of courts at the rate of seven cents on the hundred by the year. . . ." He further asserts Arnold v. Arnold, 253 Iowa 850, 140 N.W.2d 874 (1966), which holds fixed awards of money for property settlement draw interest at five percent per annum, the rate allowed under previous code sections, from the date or judgment or the date each specified periodic payment becomes due, applies to this case. However, we cannot agree that section 535.3 or the language of Arnold precludes trial court from setting an interest rate in excess of the statutory rate. Wright v. Hulbert, 67 Iowa 722, 25 N.W. 897 (1895). We further believe trial court's award of interest at 9% can be considered a part of petitioner's original award which trial court properly considered as a factor in fixing the amount she should receive. See In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1977); In re Marriage of Briggs, 225 N.W.2d 911, 913 (Iowa 1975).

V. Award of Attorney Fees. Trial court awarded petitioner $750 for her attorney fees incurred at trial. Respondent argues petitioner should be required to pay her own attorney fees in light of all the circumstances of the case.

Attorney fees are not recoverable as a matter of right in a dissolution proceeding. Locke v. Locke, 263 N.W.2d 694, 698 (Iowa 1978). The elements to be considered in determining reasonable attorney fees are set out in the cases of In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972), and In re Marriage of Jayne, 200 N.W.2d 532, 534 (Iowa 1972). The determinative factors are need and ability to pay. Locke, 263 N.W.3d at 696; In re Marriage of Wilcoxson, 250 N.W.2d 425, 427 (Iowa 1977). Trial court has considerable discretion in the allowance of attorney fees at trial. Locke, 263 N.W.2d at 696; In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Applying these standards to the instant case, we cannot conclude trial court abused its discretion in requiring respondent to pay $750 of petitioner's attorney fees.

VI. Petitioner's Child Support Obligations. Respondent finally argues trial court's failure to require petitioner to contribute to the support of the minor children is inequitable in light of her earning capacity, her estimated living expenses, respondent's modest monthly income, and the children's special needs. While both parents are liable for support of their children, that obligation is proportionate to their ability to pay. In re Marriage of Novak, 220 N.W.2d 592, 598 (Iowa 1974). In view of respondent's greater income and earning capacity, his receipt of the bulk of the parties' assets, and the

relative needs of the parties, as well as those of the minor children, we conclude trial court's decree requiring support of the minors to be undertaken completely by respondent is equitable and nondiscriminatory.

VII. Attorney Fees on Appeal. Petitioner requests respondent be required to pay her attorney fees and expenses incurred in this appeal. Attached to petitioner's application is an itemized list documenting expenditure of 30 hours by her counsel. Without determining the amount petitioner's attorney may charge, we hold respondent shall be ordered to pay $750 of petitioner's attorney fees incurred by this appeal.

Costs of appeal are taxed equally to the parties. Judgment of trial court is affirmed.

AFFIRMED.

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

DONIELSON, J. (dissenting in part, concurring in part)

I dissent from division III of the majority decision. The majority's affirmance of the property division is inequitable and without support in the record. Using the criteria set out in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), modified, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972) (fault excluded), I would modify the property division award by giving Carole one-half of the net value of property accumulated by the parties through their joint efforts, approximately $30,746, and exclude from division the eighty-acre farm and $8500 inherited by Clifford.

The property division issue facing this court focuses on whether it is equitable to award Carole an interest in an inheritance received by Clifford. The estimated value of the inherited farm is $184,000. The majority cites In re Locke, 246 N.W.2d 246 (Iowa 1976), for the proposition that the value of property inherited by a spouse and awarded to that spouse was a proper factor to consider in arriving at the net worth, relative needs, and value of resources of the parties. Id. at 253. However, a critical analysis of the facts of this case does not support the trial court's award of part of the inherited property to Carole.

Most of the Schantz factors of this case are set out in the majority opinion's statement of facts. The following considerations are, however, especially important and in my view decisive. Living with Clifford are the parties' two daughters, born respectively on October 21, 1961, and February 17, 1967, and a son who was twenty-one at the time of the dissolution. The two daughters are educationally handicapped and each has physical health problems. Clifford's son is residing with him as a result of an industrial accident that caused severe injury to both hands and for which he was receiving treatment at the time of trial. Clifford is furnishing his son a home since he is not currently able to care for himself. The son is receiving workmen's compensation for his injuries, but this does not cover all of Clifford's expenses in caring for him. While Clifford owes no legal support obligation to the son, his moral commitment should not be ignored.

During the marriage, Clifford rendered extraordinary services to his children and wife. In addition to being the primary income producer in the family, he performed a large bulk of the household and child rearing chores. This is significant since property is

divided on the basis of a wife's contribution to the family's assets through homemaking tasks, see In re Marriage of Moorhead, 224 N.W.2d 243, 245 (Iowa 1974), as well as her earnings from jobs. Here, Carole's homemaking contributions were not substantial. Although Carole has a limited earning capacity, her current economic needs except for clothing are apparently furnished by a man with whom she is living in Rosemont, Minnesota. Additionally, Carole pays no child support, even though the burden is to be borne equally by the parents. In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1976). Her cash contribution to the accumulation of assets was minimal.

Carefully reviewing these facts and the record as a whole, I would find that Carole is entitled at most to one-half of the net value of property she and Clifford accumulated during their marriage through their joint efforts and is entitled to no portion of the inherited farm or the inherited $8500. The Locke case merely approves of the use of inherited property as a "factor to be considered by the court in arriving at the net worth of each party, relative needs of the other and the value of the resources of the parties." Locke, 246 N.W.2d at 252-53. The Locke case did not grant an absolute entitlement[1] to a party's inheritance in a dissolution proceeding. Id. The focus appears to be more on the effect of the inheritance on a party's ability to pay rather than on an absolute division. Id.

In this light, majority's affirmance of the trial court's award of part of Clifford's inheritance is not justified. The $48,000 cash award to Carole awards her all of the parties' jointly accumulated assets plus approximately ten percent of the value of the inherited farm. This result is grossly inequitable and unfair to Clifford.

Carter, J. joins in this dissent.

---

[1]Section 598.21, The Code 1979, was amended to provide that:

> Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

1980 Session, 68th G.A., H.F. 2562, § 3 (to be codified in § 598.21, The Code 1979). Although not applicable to this case, this law indicates a legislative intent not to award inherited property except when it is equitable to do so. Under these facts it would be clearly inequitable to award the inherited property to Carole since Clifford is caring for two educationally and physically handicapped children and his injured son on a very limited income.