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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KAREN JO ALLARD AND DONALD JAMES ALLARD, JR.

CLERK SUPREME COURT

Upon the Petition of	)	
KAREN JO ALLARD,	)	
Petitioner-Appellee,	)	
Cross-Appellant,	)	
And Concerning	)	
DONALD JAMES ALLARD, JR.,	)	
Respondent-Appellant,	)	0-340
Cross-Appellee.	)	2-64860

Appeal from Scott District Court - C. H. Pelton, Judge.

Respondent-husband appeals and petitioner-wife cross-appeals from economic provisions of the parties' dissolution decree. Respondent asserts that trial court's division of property is unjust and inequitable; petitioner asserts that she should have been awarded alimony and attorney fees at trial and that she should be awarded attorney fees for this appeal. AFFIRMED AS MODIFIED.

H. Reed Doughty of Winstein, Kavensky, Wallace & Doughty, Rock Island, Illinois, for respondent-appellant cross-appellee.

Edward N. Wehr of Wehr and DeLange, Davenport, Iowa, for petitioner-appellee cross-appellant.

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

Respondent-husband, Donald James Allard, Jr., appeals and petitioner-wife, Karen Jo Allard, cross-appeals from economic provisions of the parties' dissolution decree. Respondent contends that he should have been awarded \$34,272 which he claims to have contributed from his personal funds toward maintenance and improvement of the parties' property during their separation. He further asserts that trial court should have awarded him more than a one-half interest in two properties owned by the parties due to his greater contributions to the marriage. On cross-appeal, petitioner asserts that she should have been awarded alimony and attorney fees at trial and that she should be awarded attorney fees for this appeal. We affirm those provisions of trial court's decree dissolving the parties' marriage, denying alimony to either party, and requiring each to pay his or her own attorney fees. We, however, modify the property division by awarding petitioner a \$50,000 lump sum amount. We also award petitioner \$750 for attorney fees on appeal.

The parties' eight-year marriage was dissolved by decree on February 25, 1980. The parties have no children. This was the first marriage for both. Petitioner, age 32, is an office clerk for Iowa-Illinois Gas and Electric Company; she earned approximately \$13,000 per year at the time of hearing. She has two and one-half years of college education and is in good health. Respondent, age 32, is an industrial engineering technician with Iowa-Illinois Gas and Electric Company; he earns approximately \$24,720 per year. He has approximately six years of college education and is in good health. Both worked full-time throughout their marriage and pooled their earnings. Petitioner paid the insurance premiums on respondent's life insurance policy from a separate checking account in her name.

During the marriage, the parties were involved in numerous real estate transactions wherein they purchased houses and apartments, made improvements upon the buildings, and then sold the property for a gain. At the time of the dissolution hearing, however, all but two of these properties had been sold and the proceeds divided equally between the parties. The remaining two properties were a ten-plex and a twenty-plex apartment building. Petitioner assumed responsibility for the ten-plex, known as "The Ghetto," when a notice of foreclosure was issued. This property was titled in her name and operated at a monthly loss. Trial court set its value at \$80,000 (plus or minus \$20,000); the encumbrance on the property at the time of hearing was approximately \$66,000. Respondent continued with responsibility for the twenty-plex, which was in comparably good condition; title was held by a corporation in which

respondent was the sole stockholder. Trial court set its value at \$300,000 (plus or minus \$50,000); the encumbrance on this property was approximately \$213,000.

Following their separation in August of 1978, the parties each purchased a new residence by using sale proceeds from their investment properties. Petitioner purchased a duplex for \$75,000; respondent purchased a condominium for \$55,000. Each party furnished his or her residence. In addition, respondent bought a jet boat for \$7,000 and took several pleasure trips.

Trial court ordered an approximately equal division of the parties' assets acquired during the marriage and found it equitable to award each the real and personal property purchased after their separation, together with any liabilities incurred on these properties. Trial court further ordered that the parties hold title to the two apartment buildings as tenants in common. Each was given the right to purchase the other's interest for a sum equal to fifty percent of the net equity in the property, based upon the parties' agreed-upon value. If they were unable to reach an agreement, each was to select an appraiser; the two appraisers would select a third, and the three were to establish a fair market value for the properties. Petitioner was given first right to purchase respondent's interest in the twenty-plex; respondent received first right to purchase petitioner's interest in the ten-plex. If neither party exercised first right to purchase, the properties were to be placed on the market and sold; the net proceeds were to be divided equally. Time frames for these purchases were set by the court. Trial court also awarded to each party his or her own bank account, retirement funds, and insurance policies. Each kept the household goods in his or her possession at the time of separation. Petitioner's were valued at \$2,500, while respondent's were valued at \$2,000. Petitioner was granted the personal property items in her possession, which included jewelry, a fur coat, and a 1976 Cadillac Seville. Respondent was granted his jewelry, a gun, camera, and other items worth approximately \$1,000; he also had an antique car, a 1978 GMC four-wheel drive vehicle, a jet boat, and a sailboat. The court ordered both parties to share equally the operating costs and maintenance of the apartment buildings until sold. The court determined that the substantial delinquent property taxes would be disposed of with the sale of the properties. The parties also were ordered to be equally responsible for any income tax liability incurred during the marriage. The court further found that, while respondent had substantial expenses since the separation, he also had the benefit of the income from the twenty-plex. Petitioner had responsibility for the ten-plex, which the court found to be more of a liability to her

than was the operation of the twenty-plex to the respondent. Alimony was denied to both parties and no attorney fees were awarded. Respondent's appeal and petitioner's cross-appeal followed.

I. Scope of Review. Our review of dissolution proceedings is *de novo*. Iowa R. App. P. 4. We will examine the whole record and determine anew rights on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978) (quoting In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974)). While we give weight to trial court's findings of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Division of Property and Denial of Alimony. Respondent alleges trial court's property division involving the apartment buildings is unjust and inequitable. On cross-appeal, petitioner contends that trial court erred in failing to award her alimony. From our review of the record, we conclude that the property division set forth in the court's order should be modified, but the denial of alimony affirmed. Since the manner in which property is divided can be considered in determining amounts for support and alimony, we will discuss these matters in reference to each other. In re Marriage of Campbell, 204 N.W.2d 638, 639 (Iowa 1973).

A. Respondent's \$34,272 Contribution. Respondent contends that he should have been awarded \$34,272 which he claims to have contributed from his personal funds towards maintenance and improvement of the parties' properties during their separation. We find, however, that respondent failed to develop an adequate record to substantiate his claims and conclude his argument is without merit. Respondent testified that he made few improvements on the ten-plex; all of the other properties, except the ten-plex and twenty-plex, were sold during this period. Nowhere on respondent's financial statement is there any evidence of the alleged \$34,272 expenditure. Without addressing a specific dollar amount, trial court acknowledged respondent's expenses, but found these were offset by the income benefits he received from the twenty-plex. Trial court further found that the burden on petitioner of operating the ten-plex was greater than the burden of operating the twenty-plex was on respondent. We agree and conclude trial court was correct in not awarding respondent \$34,272 as his alleged contribution from personal funds.

B. Equal Division of Property. Respondent next contends that trial court's property division involving the apartment buildings is unjust and inequitable because the trial court failed to consider his greater contribution to the accumulation

of the parties' assets by awarding him only fifty percent of the net proceeds from sale of the two apartment buildings. He argues that he should have been awarded seventy percent of those proceeds. We disagree.

In dissolution proceedings, the court may make such property divisions as are justified. § 598.2, The Code 1979. Justified property divisions are those considered equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). The supreme court has rejected a mechanical rule that each spouse must receive one-half of the marital assets, but the court has recognized that an equal division of marital property is often equitable. In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980). Trial court's assessment of what constitutes an equitable division is to be given some weight. Iowa R. App. P. 14(f)(7). We are guided by 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), in reaching an equitable determination of the parties' financial or property rights and obligations.

Applying these principles, we find trial court's intent to effect an equal property division is proper. During the parties' eight-year marriage, each contributed substantially to the living expenses and the accumulation of assets through labor and income. While respondent directed considerable labor to the purchased properties, petitioner, at the same time, often worked a six-day week and carried major responsibility for the domestic work in the parties' home. While petitioner's earnings have been considerably less than respondent's, she nonetheless came into the marriage with greater assets and no liabilities. Respondent, on the other hand, brought greater liabilities. Petitioner also turned all of her earnings over to respondent's management; these earnings aided in acquiring the parties' rental properties. Interestingly, we note that all of the proceeds for sales made during the pendency of this action were voluntarily divided equally by the parties. Respondent also does not challenge that part of trial court's order which provided that the parties retain their equal proceeds and purchases made during the period of separation.

C. Alimony. An award of alimony is not an absolute right; in determining whether such an award is justified, we weigh the needs of petitioner against the respondent's resources and ability to pay. In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975). Even though both parties have employment, women have not reached economic equality with men so as to make an alimony award impermissible. In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974). Applying these principles to the facts, we find alimony properly could have been awarded.

Respondent set the lifestyle of the parties through his management of the parties' finances. Petitioner turned her earnings over to respondent. We agree with trial court's observation that the parties lived well, made a lot of money, and spent a lot of money through their practice and pattern of buying income property which was renovated and then sold for a gain. We believe that respondent, however, unlike petitioner, left the marriage with his lifestyle basically intact. While his personal earnings are approximately \$1,538 net per month, with expenses of \$1,462 per month, his income potential will be further enhanced by the specialized degree he is acquiring. We also note that his two loans for boats should have been paid off by the time of the decree. Respondent, therefore, leaves the marriage with nearly twice the income of petitioner, substantial vested retirement benefits, and numerous fringe benefits from his employment, including a car allowance of \$160 per month. He also belongs to the country club, a sailing club, and the chamber of commerce, and has been able to take numerous personal trips.

Petitioner's potential for income growth at her occupation, on the other hand, appears to be limited, even though she frequently works a six-day week. Her retirement benefits are not vested. Petitioner nets \$777 per month. Based on the record, petitioner's personal liabilities appear to be between \$1,035 and \$1,327 per month. This necessitates borrowing from her family or withdrawal from her savings account to meet her expenses. Petitioner is unable to maintain her living standard in any manner comparable to that experienced during the marriage. The disparity between the parties' earnings is likely to continue. In addition, during the pendency of this action, she covered the operating loss of the ten-plex at the rate of \$100 per month.

Because of delinquent property taxes, accumulated bills for operating expenses of the two apartments, assessments for past income taxes, and previous notices of foreclosure suggesting an on-going problem, the amount of the proceeds remaining from sale of the ten-plex and twenty-plex is difficult to ascertain. Furthermore, we note that respondent effectively blocked an opportunity to sell the twenty-plex for \$315,000, minus a \$213,000 encumbrance; such a transaction would have been of considerable significance in alleviating the parties' financial difficulties stemming from their pending dissolution. While any net proceeds would have benefited the parties equally, the liabilities from the court's order requiring an equal sharing of debts, property taxes, and income tax assessments, fall nearly twice as heavily on petitioner.

In light of the above, we believe equity is better served in this case by granting petitioner a lump sum award of \$50,000 in lieu of alimony or trial court's provisions for an equal division of the ten-plex and the twenty-plex. We thus order modification of the final decree to provide that respondent be declared sole owner of the ten-plex and the twenty-plex, together with all encumbrances thereon. Respondent also shall be solely responsible for the following: 1) any unpaid operating and maintenance costs of the ten-plex and twenty-plex, 2) all delinquent property taxes on the ten-plex and twenty-plex, and 3) any income tax liability incurred during the marriage. Petitioner shall promptly execute all documents necessary to effect transfer of titles to respondent.

Respondent shall pay petitioner \$50,000 in five installments of \$10,000 each. The first payment shall be due January 1, 1981. Subsequent payments shall be due January 1, 1982, January 1, 1983, January 1, 1984 and January 1, 1985, respectively. Interest shall accrue on the unpaid balance at nine percent (9%) per annum. Interest on past due amounts shall be seven percent (7%) per annum. Trial court's disposition of the parties' other assets and liabilities, whether separate or joint, is affirmed.

IV. Attorney Fees. Petitioner also contends that she is entitled to attorney fees both at trial and on this appeal. 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. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979); In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). Trial court has considerable discretion in 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 that trial court abused its discretion in refusing to award petitioner attorney fees at trial. After reviewing the entire financial situation of both parties, however, we find that an award of attorney fees on appeal is warranted. We conclude, without setting the amount petitioner's attorney may charge, that respondent shall pay \$750 toward these fees for this appeal. See In re Marriage of Peterson, 227 N.W.2d 139, 143 (Iowa 1975).

All provisions of trial court's decree not modified by this opinion are affirmed. Costs of this appeal are assessed to respondent.

AFFIRMED AS MODIFIED.

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

DONIELSON, J. (dissenting)

I dissent from the majority's decision to modify the decree to award a lump sum settlement to the petitioner. This was an eight-year marriage between two parties who are both in their early thirties. Both are in good health and both have had college educations, although neither completed a four-year degree. Both parties are employed and receive decent salaries. Given these considerations, I think that an equal division of the parties' property is both just and equitable. In any event, I would prefer to adopt the trial court's disposition because I do not view this particular case as one in which we are justified in fashioning an award.

Carter, J., joins in this dissent.