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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF F. RICHARD THORNTON AND JUDITH A. THORNTON

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Upon the Petition of)
F. RICHARD THORNTON,) Filed September 25, 1984
Petitioner-Appellant/Cross-Appelle,)
And Concerning)
JUDITH A. THORNTON,) 4-178 / 83-426
Respondent-Appellee/Cross-Appellant.)

Appeal from the Iowa District Court for Polk County - George W. Bergeson, Judge.

Petitioner appeals and respondent cross-appeals from the economic provisions of the parties' dissolution decree. AFFIRMED.

David L. Brown and John A. McClintock of Hansen, McClintock & Riley, Des Moines, Iowa, for respondent-appellee/cross-appellant.

C. Carleton Frederici and Patricia A. Shoff of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, Iowa, for petitioner-appellant/cross-appellee.

Heard by Snell, P.J., Schlegel and Hayden, JJ.

SCHLEGEL, J.

Petitioner, F. Richard Thornton, appeals from the decree entered in this dissolution action. He contends that the division of property, division of debts, the child support obligation decreed by the trial court, and the alimony obligation imposed upon him are all inequitable. He also seeks a specific visitation schedule, and requests that the respondent be directed not to move the children's residence outside Iowa without court permission. Respondent, Judith A. Thornton, challenges on cross-appeal the division of property and debts, and requests attorney's fees on appeal.

I. Scope of Review. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4; In re Marriage of Castle, 312 N.W.2d 147, 148 (Iowa Ct. App. 1981). Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 158 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

II. Division of Assets. Richard and Judith were married in 1963. At the time of their marriage, Richard had completed his first year of law school at the University of Iowa College of Law. Judith had completed work on her B.A. degree and had received her teaching certificate in elementary education. During the last two years of Richard's attendance at law school, Judith was employed, first at a bank, and later as an elementary teacher in Iowa City. Following his graduation from law school and his admission to the Iowa Bar, Richard and Judith moved to Des Moines. Richard became employed by the Iowa Attorney General and Judith became employed by the Des Moines Public School System.

Richard subsequently changed jobs, first working for the City of Des Moines and later associating with the first of two law firms in which he has been engaged in the private practice of law. Judith continued her employment as an elementary school teacher until her pregnancy with the first of the two children of this marriage. Subsequent to that time, she has not worked outside the home, except in the capacity of a volunteer worker. Her role as homemaker and mother was carried out with the full approval and encouragement of Richard. Richard's law practice prospered and he became recognized as an outstanding lobbyist in the Iowa Legislature, the area in which he became a specialist. It is apparent from the testimony in this case that Richard's earnings, both actual and potential, enabled him to provide an affluent life-style for himself and for his wife and children. The evidence showed, without dispute, that his earnings from his law practice in 1982 was $79,000, and that it was estimated his earnings would be between $75,000 and $95,000 for 1983. The court found Richard to have a potential earning capacity in excess of $100,000 a year. Such finding is supported by the evidence.

In spite of Richard's high earnings, the parties have accumulated few assets capable of a ready determination of value. The major asset consisted of the family home occupied by Judith and the children at the time of trial. The parties did not agree upon the value of the home. Richard submitted expert testimony that it had a market value of $160,000. Judith's expert set the value at $115,000. Judith's expert testified that the home was in need of substantial maintenance, and that spending approximately $25,000 on carpeting, paint, roof repair, drainage repair, fireplace flu repair and other matters would tend to increase the market value to a level of approximately $140,000. Both experts relied for the most part upon comparable sales information. The court found the property to have a value of $137,500.

The record shows that the family home was purchased in 1974 for $75,000. It was purchased with a down payment apparently consisting of proceeds ultimately received from the sale of a home the parties had owned since 1968, and $50,000 borrowed from Judith's parents. The terms of that note (secured by a mortgage) called for interest at the rate of 8% per annum; and by agreement, interest payments were made monthly, with a payment of $1,000 being made on the principal each year. At the time of trial, the balance on the loan from Judith's parents was $44,000.

The evidence indicates that Richard expended very substantial amounts during the marriage upon personal items primarily for himself. He followed various sporting events, and apparently purchased many items that supplemented the following of his hobbies. He purchased a large amount of clothing for himself and he owed substantial sums of money to numerous retailers at the time of trial on these purchases. The evidence did not clearly show whether these purchases were for the benefit of his family, or were for his lobbying occupation. It is clear from the record of this trial, however, that Richard made little effort to live within his earnings, and that he did not share the financial condition of the famly with Judith. At the time of trial, it was generally stated that outstanding unsecured debt and accounts payable owed by Richard amounted to approximately $70,000. There is no evidence that Judith incurred any of the indebtedness owed to the banks. Further, there is nothing in the record to suggest that she was even aware of the parties' financial condition. Her questions to Richard about family finances were not welcomed or answered.

A justified property division is one that is equitable under the circumstances. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976); In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). Although frequently an equal division of assets is made, there is no mechanical rule that dictates this result. 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).

The trial court, after ordering the homestead of the parties sold ". . . in order that various debts [could] be paid," went on to provide as follows:

> Respondent, however, is given 30 days in which to pay the sum of Forty Thousand Dollars ($40,000.00) to the Court to be used to partially satisfy the accrued debts. In the event this is done, the homestead shall not be sold and Petitioner shall execute a Quit Claim Deed to Respondent and otherwise give her good title. Thereafter, Respondent shall assume all further obligations on any mortgage with her parents. In the event of the taxable capital gains, Petitioner shall be responsible for said taxes.

Richard proposes, in the alternative, that the homestead be sold, the $70,000 worth of indebtedness be paid from the proceeds, and that he and Judith share equally in the remaining proceeds so long as Judith's one-half equals at least $15,000. He claims that under the court's ruling, Judith has been awarded property with a value of $137,500, and debts of $84,000, making a net award of $53,000. Richard claims that he has been awarded his interest in the law firm, in which he is a partner, with a value of $7,500, plus his prints and paintings with a value of $10,000; and was required to assume debt in the amount of $30,000 plus attorney fees payable to Judith's attorneys in the amount of $12,000, resulting in a net negative award of $24,500. It is his contention that, under these circumstances, the division of property made by the court is inequitable. He also asks us to give consideration to the sums furnished to this marriage by his parents in arriving at an equitable division of property. He refers to the $300 per month his parents furnished while he was in law school, the $10,000 down payment furnished by his parents when they purchased their first home, and the car given to him when he finished law school.

Richard disagrees with Judith's reliance in making the property division upon In re Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978), wherein it is stated:

> We hold a trial court in a dissolution case where proper evidence is presented may consider the future earning capacities of both parties and in determining those capacities it may consider the education, skill, or talent of both parties. This statement of principle, articulated in

> Schantz [163 N.W.2d 398, 405 (Iowa 1968)], applies to the court's determination of an equitable distribution of assets and property and to a determination of whether alimony should be awarded and, if so, to the amount to be awarded. [citation omitted]

While that case reaffirms the principle that a law degree is not an asset that is capable of division, it bears upon the relative earning capabilities of the parties and is to be considered in the division of assets, as well as in matters of alimony and the amount thereof, to make an equitable division. In re Marriage of Jannsen, No. 68917, slip op. at 6-7 (Iowa May 16, 1984). So, too, it is proper to consider the contributions made by one spouse to the education of the other in making an equitable adjustment of these matters.

From the record in this matter, it seems clear that Richard's parents, in contributing to the support of the parties during the completion of law school, in making the down payment on the first house, and in making other gifts, intended that the gifts be to both parties, and not to Richard alone. As such, they are not to be set aside for the benefit of one party alone in making the determination of an equitable division of assets in this case. In re Marriage of Wendt, 339 N.W.2d 615, 616 (Iowa Ct. App. 1983). Even if the down payment of $10,000 is considered to have been a gift to Richard alone, it would be unfair and inequitable to single that item out for special disposition, while placing no value upon other gifts and contributions over the period of this nearly twenty-year marriage. We therefore believe it is equitable to treat this item as susceptible to division. § 598.21(2), Iowa Code (1983).

It is clear that the trial court did not place a value upon all of the items of property considered by it in the determination of its division. Richard urges the conclusion that because the court failed to place a value upon each item, it considered those items to be without value. Accordingly, he recognizes no value upon such things as sailboats, golf clubs, electronic equipment, and obviously valuable clothing used by Richard in his business and recreational life. We consider these items in our de novo review of the property division.

We likewise do not believe that the record on appeal supports the conclusion that his interest in the law firm in which he is a senior partner has a value of only $7,500. That value is merely that affixed to the interest Richard had purchased under the "buy in" provisions of the partnership agreement. That amount, which by his testimony would total $25,000 in either three or five years, appears to be the amount, plus interest, which he would receive or his estate would receive, plus any unpaid interest in the net earnings of the partnership to which he would be entitled upon his death, disability, or termination as a partner of the firm. This interest in Richard's legal partnership is the most valuable asset these parties had available to them in terms of the education, clientele, and earning capabilities that Richard developed and possessed during the parties' marriage. It is impossible to place an exact value upon that asset. It is a factor, in this case, which weighs heavily in making an equitable property division. Richard believes it would be equitable to sell the family home, pay off the mortgage, pay off the notes held by the various banks and the current bills, taxes, and attorney fees, and to divide the balance remaining after those payments. We disagree. We believe the trial court has made an equitable division of the property in this case after carefully considering all the factors in this case. Accordingly, we affirm its decision.

We are asked, by Judith, to reduce the amount that she was required to pay upon the outstanding debts in order to obtain clear title to the homestead. While we believe that the party responsible for the creation of most of the indebtedness should bear the larger share of that debt upon dissolution, we also recognize that the discharge of that indebtedness must be carried out, at least in part, by permitting the party responsible to utilize the value of the equity available to him. If it were possible to order a sale of all the assets of these parties (i.e., sailboats, sporting equipment, paintings, etc.) and realize a reasonable share of the original cost of them, there might be a fairer way to dispose of the debts of

this family. Under these circumstances, we believe the utilization of $40,000 of the equity in the house for the discharge of debts is reasonable.

III. Child Support. Two children were born of this marriage. Jennifer Susan Thornton, born July 16, 1968, is now 16 years of age. Wendy Ann Thornton, born October 30, 1970, will soon be 14 years of age. The parties agreed that the custody of the children should be placed with their mother. The trial court found that they would be in need of substantial support. Richard was ordered to pay $750 per month per child, with the support to be increased by $50 per month per child on March 25, 1985, $50 per month per child on March 25, 1987, and $100 for Wendy Ann on March 25, 1989. (Jennifer should graduate from high school in 1986, so that the last two increases would apply only to Wendy.)

Although there was no order for temporary support or alimony in this case, in order to maintain the standard of living of Judith and the girls, Richard provided approximately $2,000 per month for their support. His "draw" from the law firm is in excess of $5,600 per month. His earnings are in excess of that amount. It is clear that he has the ability to support the children in nearly the same life-style that he has heretofore chosen for them. They will remain in the family home where they have lived for a number of years, will attend school in the same neighborhood as their peers, and Richard will be able to provide the means for them to maintain themselves in the manner he has wanted for them.

Judith, on the other hand, has remained out of the job market for a number of years and must redevelop her earning capacity. Moreover, there is very little likelihood that Judith will be able to ever develop her earning capacity beyond a small fraction of Richard's.

Under the record in this matter, we believe the child support order is equitable.

IV. Visitation. Richard complains that the trial court should have ordered a specific visitation schedule. He also sought to have the court order that

Judith not remove the children's residence from the State of Iowa without prior court approval.

We find nothing in the record that indicates that Richard will be denied visitation at any and all times that are reasonable, and when he wants to have the girls with him. There has been no difficulty during the pendency of this case, and there is nothing that would indicate any attitude on Judith's part that would interfere with extensive and appropriate visitation. If problems not present upon this record develop in the future, Richard may seek relief from the district court.

We likewise find nothing in the record of this trial that would justify the entry of any order restricting the place of residence of the children. It would be unreasonable to restrict Judith. See In re Marriage of Lower, 269 N.W.2d 822 (Iowa 1978).

V. Alimony. Richard claims that there is no justification for the award of any alimony, and in any event, if there is a need for alimony, it should be for no more than a short period of time to enable Judith to obtain a renewal of her Iowa teaching certificate and become employed. From the evidence in this record, it appears that Judiths' employment opportunities may result in income of $12,000 to $15,000 per year. Her teaching opportunities seem to be limited, assuming that she returns to that profession.

As a result of these proceedings, Judith, in order to provide a home for the two children, has assumed the mortgage indebtedness on the homestead in the amount of $44,000. From the record, it appears that payments of $440 per month are required on that debt. In addition, she has been required to borrow an additional $40,000. The interest rate on that debt is not a matter of record, but it is apparent that she will have to pay interest. Adding the real estate taxes on the residence to the cost of debt service will result in payments of approximately $1,000 per month to continue to live in the house. The expenses of utilities, food, clothing, transportation, and miscellaneous expenses of caring for the two teenage

children will make Judith's return to the work force more urgent than appears in the record. Under these circumstances, alimony is essential, and is minimally adequate at $500 per month.

There are, of course, alternative life-styles which might be pursued by Judith at a lesser cost. However, Richard should not be able to direct that Judith so completely alter her life-style as to give up most of the things she has grown to appreciate and do, in order that he may maintain an extravagent manner of life to his liking. Richard contends that expenses for himself alone will amount to $36,000 per year. As stated in In re Marriage of Janssen, No. 68917, slip op. at 9:

> We think Gary has his priorities askew. He is asking his former wife and his two children, altogether, to live on considerably less than he has for himself alone. . . . Now that he has reached the threshhold of financial affluence, a court of equity cannot permit him to walk away from the marriage without adequate provision for the family's material well being.

The actual effect of the court's award of child support and alimony is that from March 25, 1983 until approximately March 25, 1985, he will pay $750 per month for each child, plus $500 alimony, for a total of $2,000 per month. As stated above, such is the amount he has paid during the pendency of this action, in addition to the payment of certain other amounts which are not Judith's obligation. From March 25, 1985 to July 1, 1986, he will pay $800 per month per child, plus $500 alimony, for a total of $2,100 per month. (This assumes that Jennifer will graduate from high school in June 1986). From July 1, 1986 until March 25, 1987, he will pay $800 for Wendy Ann plus $500 alimony to Judith, making a total of $1,300 per month. From March 25, 1987 until approximately July 1, 1989, (Wendy's graduation), he will pay $900 per month for Wendy Ann and $500 alimony, for a total of $1,400 per month. After July 1, 1989, he will pay $1,250 per month as alimony.

Alimony and property division, while being closely related, are distinguishable and have differing purposes. In re Marriage of Hitchcock, 309

N.W.2d 432, 437 (Iowa 1981). Division of property is based on each marital partner's right to a just and equitable share of the property accumulated as a result of their joint efforts. Knipfer v. Knipfer, 259 Iowa 347, 353, 144 N.W.2d 140, 143 (1966). Alimony is an allowance to the ex-spouse in lieu of a spouse's obligation of support. Id. at 352, 144 N.W.2d at 143.

The payment of alimony is not an absolute right; it must be determined in light of all the circumstances, including property settlement. In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982). The factors we consider in this case in making a determination of spousal support are codified in Iowa Code section 598.21(3).

The length of the marriage, Judith's educational level, the unlikelihood of Judith becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the needs of the children of the parties, are all factors which strongly support an award of alimony in this case. We believe, however, that Judith's need for alimony will not continue indefinitely, due to her need to reenter the labor market, and become gainfully employed. Accordingly, alimony should continue at the rate of $1,250 per month for five years from the date of the last payment of child support provided herein. This provision should enable Judith to train herself for employment either in the teaching profession, or in such other endeavor as will provide her the needed security and satisfaction. We therefore modify the trial court's decree to terminate alimony upon the death of either of the parties, upon Judith's remarriage, or at the end of five years from the date Richard's obligation to pay child support ends. For purposes of this provision, the date child support ends, upon the graduation of Wendy Ann from high school shall be the commencement of the final five years of alimony obligation. Excepting for this modification, the trial court's provision for child support and alimony is affirmed.

Reference needs to be made to Richard's claim that the property, child support, and alimony awards in this case were made on a punitive basis. We

disagree with his characterization of the trial court's ruling. The consideration of fault as a factor in the division of property is, of course, improper. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In this case, Richard is at what appears likely to be the beginning of his prime earning years. It would be manifestly inequitable to leave his former wife and his children without support while he enjoys the fruits of the joint efforts of the parties. His efforts to reach his present earnings have not included the building of lasting security for his family. Twenty years of marriage involving Judith's support by her employment when Richard's career was just beginning, by her maintenance of the parties' home, by her primary role in childbearing, child rearing and care, by her participation in P.T.A. work in the children's schools, and by her participation in other charitable works in the community, all of which contributed to the famly reputation and status; are all elements that would make it manifestly unfair to require that Judith carry on without support from Richard. To impose such an obligation upon him is in no way punitive. It is to require him to perform an obligation he created, and one which he has ample means to perform.

VI. Attorney's Fees. Richard urges us to hold that the court was in error in awarding $12,000 for fees for Judith's attorney's fees. Richard asserts that there was no evidence properly in the record to enable the court to make an award of fees. It is his position that the evidence upon which the court awarded fees was not properly before the court.

The request for fees by Judith was initially made by Application for Temporary Attorney Fees, filed on or about June 22, 1982. Resistance to that application was filed by Richard on September 22, 1982. In Judith's testimony, she requested an award of attorney fees. The court allowed several reopenings of the evidence in this case after the case had been tried and submitted. Judith requested fees in her proposed findings and conclusions. The court made an award

of fees. Following the court's decree, Richard filed motions to amend and modify the court's ruling and decree, raising the issue of attorney's fees.

Our review of the record satisfies us that the record was sufficient to support the court's award of fees. This case was vigorously tried, was complicated by the special nature of the law practice and relationship of Richard to his firm, and required extraordinary patience and study to reach a fair and equitable determination of the case. We believe the court did not abuse its discretion in reopening the evidence, as it did, or in considering additional evidence concerning the award of attorney's fees. We believe the court properly awarded fees.

VII. Fees on Appeal. Judith seeks fees on appeal. Richard resists that request and states that in view of the relative financial positions of the parties, Judith should be required to pay her own attorney's fees on appeal. Initially, we note that the parties have reproduced what appears to be the transcript of all the testimony of the trial in this case, as the appendix, and that as a result, the cost of printing the appendix alone was $4,080. At least the spirit, if not the rule, set out in Iowa Rule of Appellate Procedure 15 was not followed. As therein set forth, "[i] n designating parts of the record for inclusion in the appendix, the parties shall consider the fact that the entire record is available to the appellate courts for examination and shall not engage in unnecessary designation." This case, expensive to try under the best of circumstances, has been thus rendered even more so by what may be unnecessary designation. We admonish the parties accordingly.

Without in any way suggesting what a proper charge would be for representation of Judith in this appeal, we award an additional $3,500 for Judith's attorneys for services in connection with this appeal. The costs of this action, including such award, are taxed to Richard.

AFFIRMED.

Special concurrence by Snell, J.; dissent by Hayden, J.

SNELL, J. (specially concurring)

I concur in the results stated by Judge Schlegel, except that the payment of $10,000 to petitioner by his parents should not be subject to a property division. Iowa Code § 598.21(2) (1983). Accordingly, that amount should be set aside and constitute a judgment lien on the homestead bearing 10% interest per annum from the date of the trial court's decree until paid.

HAYDEN, J. (dissenting)

This is a bankrupt marriage and the majority places all of the responsibility upon Richard. It is difficult for me to accept this. Judith and Richard have been married for 20 years and both have contributed to their extravagant and affluent respective individual life-styles.

I would modify the trial court's decree as follows:

1. The $10,000 gift from Richard's parents should be set aside to him, and become a judgment lien upon the homestead which is now Judith's property and bear interest at ten percent per annum from the date of decree until paid in full.

2. Child support should be $600 per month per child until each child respectively attains the age of 18 years, marries, or becomes self-supporting, but to continue, in any event, until graduation from high school.

3. In keeping within the parameters of Janssen, upon which the majority heavily relies, Richard should be required to pay Judith $800 per month for five years from the date of the decree and $400 per month thereafter for five additional years. The alimony payments should terminate upon Richard's death or upon Judith's death or remarriage.

4. Delinquent installments of alimony or child support, in whole or in part, and whether they accrued heretofore or accrue hereafter, should bear interest at 10% per annum from their respective due dates until paid. See Janssen.

5. As in Janssen, Judith should be awarded $1,500 from Richard to apply on her attorney fees on appeal rather than the $3,500 awarded by the majority.