

17 L-3580
DEC 27 1979

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

IN RE MARRIAGE OF BEVERLY J. McFADDEN & VINCENT M. McFADDEN

Upon the Petition of	)	
BEVERLY JEAN McFADDEN,	)	
Petitioner-Appellant,	)	Filed December 27, 1979
And Concerning	)	
VINCENT MICHAEL McFADDEN,	)	276
Respondent-Appellee.	)	<u>2-62708</u>

Appeal from Scott District Court - R. K. Stohr, Judge.

Petitioner-wife appeals from property division and attorney fees provisions of dissolution decree. - Affirmed as modified.

Glenn F. Ruud of Winstein, Kavensky, Wallace & Doughty, Rock Island, for petitioner-appellant.

John J. Carlin of Carlin & Darbyshire, P.C., Davenport, for respondent-appellee.

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

PER CURIAM

Petitioner-wife appeals from the property division and attorney fees provisions of a dissolution decree, contending that she should have been awarded the entire marital home rather than one-half, as well as a sufficient monetary award to enable her to complete her college education, and that she should have been awarded the entire amount requested for her attorney fees incurred at trial. Petitioner also seeks attorney fees incurred on this appeal. We affirm.

I. Initially, we feel compelled to address various procedural errors committed by petitioner's attorney in the taking of this appeal. There was a failure to comply with Iowa Rule of Appellate Procedure 6(a) when petitioner's attorney apparently instructed the clerk of the district court to serve the notice of appeal on opposing counsel, rather than performing such service himself as is required by rule 6(a). There is no record of a filing of proof of such service with the clerk of the supreme court pursuant to Iowa Rule of Appellate Procedure 30(d). There is no showing that the costs of printing the appendix and petitioner's brief were certified by petitioner's attorney pursuant to Iowa Rule of Appellate Procedure 16(c). We have the authority to dismiss this appeal for failure to comply with an appellate rule. Iowa R. App. P. 19. We decline to do so in this case because of the expressed preference for disposition of cases on the merits and not on mere procedural technicalities. Hawkeye Security Insurance Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972).

We note that petitioner's attorney's offices are located in Illinois, and he may have confused our procedures with those in Illinois courts. Our excusal of his noncompliance with our rules of appellate procedure in this case will in no way preclude our automatic dismissal of any future appeals he may bring before this court in which he fails to fully comply with our appellate rules.

II. Respondent contends that the failure of petitioner to serve him with notice of appeal pursuant to rule 6(a) constituted a failure to properly perfect this appeal, and, furthermore, that respondent was prejudiced by this noncompliance with the rules to the extent that he was denied an opportunity to cross appeal within the time limit set out in Iowa Rule of Appellate Procedure 5(a). However, the particular provision of rule 6(a) addressed here appears to be a procedural, rather than a jurisdictional provision.

Respondent did not move to dismiss under rule 19, and, as stated above, we decline to so move sua sponte because of our preference to decide this case on the merits.

Rule 5(a) provides that a cross appeal may be taken within the thirty day limit for taking an appeal or within five days after the appeal was taken. That respondent did not receive the notice of appeal until more than five days had elapsed since the taking of the appeal did not extend the time under the rule. Thus, we do not address any issues raised in respondent's brief that would be appropriately raised only in the context of a cross appeal.

III. In addition, respondent contends that petitioner did not comply with rule 6(a) in that the notice of appeal did not specify the judgment or order appealed from. The pertinent portion of petitioner's notice of appeal stated:

[T]he above named petitioner, Beverly Jean McFadden, has appealed and does hereby appeal . . . from the final judgment of said District Court rendered in the above entitled cause on or about September 27, 1978, in a Decree of Dissolution on petitioner's cause of action, and also from each and every adverse order, decision and ruling of said District Court made during the pendency and progress of said cause and trial . . .

The provision of rule 6(a) requiring specificity in the notice of appeal applies to specifying the particular judgment appealed from, not as respondent contends, to specifying the particular issues petitioner intended to raise on appeal. See Hawkeye Security Insurance Co., 199 N.W.2d at 378. Petitioner's notice of appeal sufficiently apprised respondent of the judgment appealed from, and thus satisfied the specificity requirement of rule 6(a).

IV. Respondent also contends that since petitioner caused execution to issue by way of garnishment for attorney fees awarded at trial, petitioner is precluded from raising the issue of attorney fees on appeal. However, since petitioner only accepted a part of the award of attorney fees that was admittedly due under the decree, she is not precluded from taking an appeal on the issue of her right to a recovery of attorney fees beyond what was awarded by the decree, especially when there is no cross appeal on the amount of attorney fees awarded under the decree. See In re Marriage of Abild, 243 N.W.2d 541, 543 (Iowa 1976). With these procedural and jurisdictional issues thus disposed of, we now turn to the merits of this case.

V. Our review of this equity case is de novo. Iowa R. App. P. 4. We give weight

to the trial court's findings of fact, but are not bound by them. Iowa R. App. P. 14(1)(7). When called on to review the property division provisions of a dissolution decree, we apply the guidelines set out 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).

Petitioner asserts that to remedy the alleged inequity of this decree's property division, she should be awarded the entire marital home rather than one-half, and she should also receive a sufficient monetary award to allow her to complete her college education. In addressing this property division, we acknowledge the principle that equitable does not mean equal. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976); In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). Although we concern ourselves only with the property division provisions of this decree, we take note of the other provisions of the decree regarding child support, since those provisions are significant in evaluating the propriety of the property division. In re Marriage of Willeoxson, 250 N.W.2d 425, 426 (Iowa 1977); In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976).

Pursuant to the decree, petitioner was awarded possession of the marital home for five years, whereupon the house was to be sold and the equity divided equally between respondent and petitioner. She was also awarded two automobiles valued at \$3200 and \$2500, and the household furnishings valued at \$14,600. Respondent was awarded, in addition to his half of the marital home, his dental equipment valued at \$20,200, stocks and a life insurance policy that were entirely encumbered by debt, and an automobile valued at \$800. Respondent also has a Keogh Retirement Plan with a vested interest amounting to \$26,500. Petitioner is a certified x-ray technician with a potential annual income of \$9000. Respondent is a dentist with an annual income of approximately \$60,000.

The decree required respondent to pay \$1000 per month to petitioner for the support of the parties' six children, whose custody was awarded to petitioner. The decree provided that this monthly payment would be decreased once the children reached age eighteen, however, if the children chose to attend college, respondent would be required to pay for their tuition and room and board. At the time of the taking of this appeal, two of the children had reached age eighteen and were attending college. Thus, respondent's yearly child support was reduced to \$800 per month while

those children were in school, but respondent was obligated to pay approximately \$2000 per year per child for their education. In addition, respondent is required to pay for major medical, health, and dental insurance for the children. Respondent is also required to pay the mortgage payments on the marital home occupied by petitioner and the children, as well as the home insurance and property taxes, meaning that petitioner enjoys rent-free living until the house is sold in 1983 pursuant to the decree. Respondent's income is further dissipated by his loan liabilities, payments to his retirement plan, and federal and state income taxes. Given this overall picture of the effect of this dissolution decree, we cannot conclude that the trial court's division of the property was inequitable, and we affirm that portion of the decree.

With respect to petitioner's request for a sufficient monetary award to allow her to complete her college education, we note that such an award would potentially decrease the discrepancy between the parties' incomes, since petitioner would be in a better position to find higher paying employment upon receipt of her college degree. In light of our desire to achieve a sense of equity in the economic provisions of this decree, we conclude that respondent should be required to pay petitioner \$200 per month in the form of alimony for two years beginning with the issuance of procedendo of this decision. Thereafter, the alimony obligation shall be reduced to one dollar per year as originally provided in the trial court's decree.

VI. Petitioner contends that the trial court erred in not awarding her all of her attorney fees incurred at trial. Attorney fees are not recoverable as a matter of right in a dissolution proceeding. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978); In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). The determinative factors are need and ability to pay. Locke, 263 N.W.2d at 696; Willcoxson, 250 N.W.2d at 427. The trial court has considerable discretion in the allowance of attorney fees. Locke, 263 N.W.2d at 696; In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). From our review of the record, we cannot conclude that the trial court abused its discretion in its award of attorney fees to petitioner.

Petitioner also seeks attorney fees incurred in connection with this appeal. In evaluating a request for attorney fees on appeal, we must consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re

Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). Without fixing the amount to be charged by petitioner's attorney, we conclude that petitioner should be awarded \$500 for her attorney fees on appeal.

Costs are taxed equally to both parties.

AFFIRMED AS MODIFIED.