FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-235 / 88-1468

IN RE THE MARRIAGE OF LINDA LOUISE SPILLERS AND KENNETH FRANKLIN SPILLERS

Upon the Petition of

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LINDA LOUISE SPILLERS,

Appellant,

And Concerning

KENNETH FRANKLIN SPILLERS,

Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

The wife has appealed from a dissolution decree, challenging the economic provisions. **AFFIRMED AS MODIFIED.**

Lylea Dodson Critelli of Nick Critelli Associates, P.C., Des Moines, for appellant.

Roger J. Hudson and Steven H. Shindler of Wimer, Hudson, Flynn & Neugent, P.C., Des Moines, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J.

Appellant wife appeals from certain provisions entered by the district court. Linda contends the trial court erred in: (1) setting the amount of child support Kenneth was ordered to pay; and (2) failing to equitably divide the marital property. Linda also seeks attorney's fees on appeal. We affirm as modified.

The parties, Linda and Kenneth Spillers, were married in 1971. They have two children, girls born in 1977 and 1980. The dissolution decree placed the two children in joint legal custody and in Linda's physical care. These custody provisions are not challenged in this appeal.

Kenneth is a stockbroker. He is paid primarily on a commission basis. In 1987 he earned over $55,000, but he testified this included a special bonus commission of $18,000 for an exceptionally large sale which is unlikely to recur. He testified his usual income is in the middle 30's. At the time of trial his gross income was $3,125 per month, and his net income was $2,037 per month.

Linda is employed in a clerical job, earning a gross salary of $1285 per month and a net salary of $929 per month. She interrupted her college education to marry Kenneth, and she would now like to return to college.

In spite of Kenneth's salary, the parties had accumulated relatively little property. The court valued the parties' house at slightly over $70,000, but the house

was subject to a mortgage debt of $56,000. The court awarded this house to Linda, subject to its debt and also subject to a lien in favor of Kenneth in the amount of $11,282. This lien is payable three months after the younger child turns eighteen or graduates from high school, or when Linda vacates the house, remarries, or cohabits. Linda was also awarded all the household furniture. Kenneth received savings of about $4800, and Linda received accounts of about $400. Each party received a car. Linda was directed to assume unsecured debts of $4600, and Kenneth was directed to assume unsecured debts of $1300.

The trial court made the following distribution of assets and debts:

	Value	Petitioner	Respondent
House	$70,750		
Mortgage	(56,055)	$14,695	
1986 Renault	4,200		
Loan	(3,137)		$ 1,063
1980 Chrysler	1,000	1,000	
IRA's	2,705		2,705
Savings	851	200	651
Life Insurance	450		450
Checking	1,700	200	1,500
Furniture & Appliances	5,000	5,000	
Tools, etc.	1,000		1,000
	$87,656	$21,095	$ 7,369
Debts	(59,192)	(4,600)	(1,300)
	$28,464	$16,495	$ 6,069

Total net value of property to be divided: $22,564

Respondent's lien on the real estate: $11,282

The decree directed Kenneth to pay child support of $600 per month while both children are eligible for support and $400 per month when only one child remains eligible. The decree also directed Kenneth to pay Linda rehabilitative alimony of $200 per month for those months when she is enrolled in at least nine hours of college credit. This rehabilitative alimony award is to terminate on January 1, 1994.

I.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Iowa Code section 598.21(4) (1989) details those factors which should be considered in arriving at an award of child support. Kenneth's net income is $2,037 per month while Linda's net income is $989. We believe Kenneth's bonus in 1987 not likely of repetition. As such, it would be unduly speculative of us to include this bonus in our

calculation of his child support. Cf. In re Marriage of Heineman, 309 N.W.2d 151, 152 (Iowa App. 1981) (Overtime wages which are entirely speculative should not be considered in calculating child support.) Our de novo review of the record leads us to conclude that the child support award was equitable and need not be disturbed.

II.

The trial court awarded Linda net assets, including the marital home and its furnishings, of $16,495. Kenneth was awarded $6,069 in net property. However, he was also given a $11,282 lien on the marital home. When this lien is added to his property award, his award rises to $17,351; while when the lien is subtracted from Linda's award, her award falls to $5,213. Each partner in the marriage is "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The effect of Kenneth's lien causes the division of property herein to be inequitable. We, therefore, modify the decree by reducing his lien to $5,200.

Linda also asserts that the trial court erred in failing to divide Kenneth's $18,000 commission he received in 1987. We disagree. After taxes, the amount of the bonus was $11,700. While the record does not indicate when this bonus was earned, it was paid to Kenneth in December of 1987, some six months after the parties had separated.

Kenneth used over $4,000 of this money to pay off debts. He further used these funds to pay temporary child support of $935 per month. Appellant's reliance on In re Marriage of Smith, 351 N.W.2d 541 (Iowa App. 1984), is misplaced. In that case, this court ordered that a commission which was part of a real estate venture pursued by both parties be divided equally between the parties. Id. at 543. The commission involved here was procured solely through the efforts of Kenneth and the funds were dissipated prior to the dissolution in order to pay temporary child support and debts of the parties. Under these facts, we do not believe the trial court erred in not considering this bonus when computing the property division. See Driscoll v. Driscoll, 414 N.W.2d 441, 447 (Minn. Ct. App. 1987) (Bonus which was used to pay temporary maintenance and child support, as well as purchasing appliances, need not be included in property settlement).

III.

Linda also seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Both parties are currently employed. Each shall pay his or her respective attorney fees. Costs of this appeal are divided equally between the parties.

AFFIRMED AS MODIFIED.