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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BARBARA ANNE NIELSEN AND VIRGIL JAMES NIELSEN

Upon the Petition of)
BARBARA ANNE NIELSEN,) Filed March 21, 1977
Appellant,)
And Concerning)
VIRGIL JAMES NIELSEN,) 83 / 2-58241
Appellee.)

Appeal from Shelby District Court - E. F. Hanson, Judge.

Wife appeals from the economic provisions of the dissolution decree; husband cross-appeals these same provisions and objects to the refusal of the trial court to allow application of "clean hands doctrine" to wife. Modified, affirmed and remanded with instructions.

J. C. Salvo, of Harlan, for Appellant.

Ken Sojka, of Harlan, for Appellee.

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

OXBERGER, J. 353

Petitioner, Barbara Anne Nielson, age 40, appeals the property settlement, child support and attorney fee allowances of the March 25, 1975 decree dissolving her 18-year marriage to Virgil James Nielson, age 43. Virgil cross-appeals on these same issues. We modify the property settlement and affirm the attorney fees and the child support ordered by the trial court.

The trial court made the following findings of fact which we adopt:

1. Virgil is a farmer capable of earning substantial income.
2. Barbara has extremely limited earning capacity.
3. At the time of marriage, neither of the parties possessed substantial assets and the present financial condition of the parties is a result of their joint efforts.
4. A valuation of $85,000 was a reasonable and fair approximation of the family's net worth.

The trial court in its decree ordered the $85,000 net assets of the parties split 71% to Virgil and 29% to Barbara. Virgil's share included the family home and 220 acre farm. He was awarded custody of the two boys, ages 11 and 14. Barbara was removed from the home and given custody of the two girls, ages 16 and 17. She was unemployed, awarded no alimony and no cash settlement. She received household goods and a 1971 automobile. Virgil was ordered to pay $100 per month per child as child support; Barbara was not ordered to pay any child support for the boys. Barbara's share of the parties' assets was to be paid to her over a 10.5 year period at the rate of $200 a month.

Our review is de novo; we examine the whole record and

adjudicate rights anew on those propositions properly presented; while we give weight to the findings of the trial court, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974).

In considering the property division we use the criteria explained in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding considerations of fault as required by In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

The major disagreement between Barbara and Virgil is the question of Barbara's contribution to the accumulation of the parties' assets. The court in In re Marriage of Ralston, 242 N.W.2d 269, 271 (Iowa 1976) said:

> The parties came into the marriage as equals. We are unable and unwilling to say that James contributed more to it than Juanita simply because he brought the bulk of the income into the home while she worked in the home and devoted her attention to home-making and child rearing."

The court in In re Marriage of Freese, 226 N.W.2d 800, 803 (Iowa 1975) increased the wife's property share from 45% to 50% in dividing net assets of $57,000 stating, "We can discern no reason why there should not be an equal division of the net assets, applying the guidelines laid down in *Schantz* and *Williams, supra.*" The court in *Schantz* observed:

> " . . . these parties started their married life with little or no assets and by joint efforts, over a period of 28 years, managed to accumulate a substantial estate. In fact, there is nothing in the record which compels us to conclude other than that plaintiff's efforts and labor were as productive and fruitful as those of defendant. Her rights should be accordingly determined." 163 N.W.2d at 406.

Considering all the relevant factors, Virgil's substantial earning capacity, Barbara's "extremely limited earning capacity", the eighteen years of marriage, the rearing of four

children, the parties' equal status at the beginning of the marriage, the equal efforts of both parties to meet the family needs during the marriage, we perceive no reason why the parties' assets should not be divided equally. The fact that Virgil's efforts resulted in cash and Barbara's efforts were not cash producing may not support a disproportionate award under *Ralston*, *Freese* and *Schantz*.

The decree is hereby modified to grant Virgil an option to pay Barbara 1/2 of the $85,000 net assets of the parties, i.e. $42,500 within 180 days of the filing of this opinion. In the event Virgil does not exercise this option, the assets of the parties shall be sold, the indebtedness ordered by the trial court to be assumed by Virgil shall be paid from the proceeds, and the net proceeds remaining shall be divided 50-50. The assets of the parties shall include all the property, both real and personal, awarded to Virgil by the trial court except his personal clothing, jewelry and personal effects. In the event the parties cannot agree on the procedure to sell this designated property, the trial court shall appoint a receiver to conduct such sale and apply the proceeds according to this decision.

Barbara objects to the child support award. The parties have stipulated that during the period of 1969 to the time of trial Virgil's average gross income per month was $703.07. He is required to pay $200 per month child support to Barbara and he needs to support himself and the two boys. We believe the award was adequate. Child support duties are borne by each parent according to their respective abilities to pay. In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1976); In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974).

Barbara also objected to the attorney fee award. We do not decide whether the amount charged is reasonable. We

only determine whether Barbara is "equipped" to pay her attorney fees. Craft v. Craft, 226 N.W.2d 6, 9 (Iowa 1975). Our modification will alter her available cash so that she can now pay the remaining trial court fees. Accordingly, we affirm the attorney fee award. Each party should bear his own expense of attorney fees on appeal. Costs on appeal are taxed equally to each party.

Virgil in addition to his objections to the economic matters, has objected on cross-appeal to the ruling of the trial court that denied him the right to establish a lack of clean hands on the part of Barbara. The court in In re Marriage of Morgan, 218 N.W.2d 552, 557 (Iowa 1974) held the "clean hands doctrine" does not apply to dissolution cases.

Any allegation of conspiracy to prevent witnesses to testify in a judicial proceeding concerns us greatly. Courts cannot function if witnesses are intimidated. However, counsel did not raise this issue adequately. He focused on the "clean hands doctrine."

The trial court award of $200 for 10.5 years is voided. Appellee shall be given credit for any payments made to date under the trial court's award. Appellee shall continue to make $200 a month payments during the six month option period for which he shall receive credit on the property award.

All judges concur except DONIELSON, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. This is an extraordinarily difficult case to arrive at an equitable solution. It would appear that considering the net worth, Barbara should have more. The facts are, however, that she has two of the children, he has two of the children and he must support all four of the children as appropriately decided. This complicates the problem of solving and arriving at a satisfactory financial solution.

The most difficult part of the decision is the enormous financial obligations that are now facing the husband as it relates to the mortgage on the farm, the bank notes, attorney fees, support obligations and to continue the farming operation with a modest income of approximately $700 per month.

I view the trial judge as making an attempt to find a solution that would not require the sale of this homestead, an effort that I find particularly appealing.

The record reflects that these 220 acres could well be the foundation for support of all of the parties in this matter and perhaps could be used in a way that would give these four children a chance to achieve a satisfactory adulthood that most certainly was not available to them as children.

I view the majority opinion as calling for the inevitable sale of the farm which seems to me, the least desirable of all available solutions. I would have avoided what I consider to be this undesirable result, while still making some solution that could hopefully increase Barbara's share somewhat. I would have made some modification but on a different basis.

Had I concurred with the majority, which I do not, I would have added an additional provision. In the event the farm is sold and Barbara is given the $42,500, I would have added an additional provision that since Barbara has the two

daughters, ages 16 and 17, and Virgil has the boys, ages 11 and 14, that he no longer be required to pay the $200 per month child support to Barbara. They are in essence starting anew. Barbara testified she is good health and can do general office work and was a steno-clerk at the time of the marriage. She has, however, stayed on the farm since they moved there.

Virgil, likewise, has lost his chosen profession of being a self-employed farmer and now must move from his preferred line of work. Therefore, I see no reason to continue the child support under these circumstances. There might, however, have to be some resolution of this aspect in the future.

Faced with a very difficult decision under this record and having to choose between the solutions proposed, I would affirm the trial court.