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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

IN RE THE MARRIAGE OF OLIVER S. LUTZ, JR., AND BONNIE L. LUTZ

Upon the Petition of	)	
OLIVER S. LUTZ, JR.,	)	Filed September 23, 1980
Petitioner-Appellee,	)	
And Concerning	)	
BONNIE L. LUTZ,	)	0-208
Respondent-Appellant.	)	<u>2-63964</u>

Appeal from Clinton District Court - Lowell D. Phelps, Judge.

Respondent-wife appeals economic provisions of trial court's decree of dissolution terminating her marriage to petitioner-husband and from the subsequent order enlarging and modifying the decree alleging 1) that trial court's property award to her is inadequate and 2) that she should have received an alimony award and attorney fees. Both parties seek attorney fees on appeal. **AFFIRMED.**

Donald G. Senneff of Shaff, Farwell & Senneff, Clinton, Iowa, for respondent-appellant.

John P. Murphy of Holleran, Shaw, Murphy & Stoutner, Clinton, Iowa, for petitioner-appellee.

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

Respondent-wife, Bonnie L. Lutz, appeals economic provisions of trial court's decree of dissolution terminating her marriage to petitioner-husband, Oliver S. Lutz, Jr. Respondent also appeals from the subsequent order enlarging and modifying the decree. She alleges 1) that trial court's property award to her is inadequate and 2) that she should have received an alimony award and attorney fees. Both parties seek attorney fees on appeal. We affirm the trial court and deny any awards of attorney fees on appeal.

The parties were married in 1965. The marriage was dissolved by decree on May 25, 1979. No children were born to the parties during their marriage. Both had one prior marriage. Petitioner has three children from his prior marriage; two of these children lived with the parties for several years. At the time of the dissolution hearing, petitioner was 47 and respondent was 38. Both were in good health.

Petitioner brought to this marriage a car subject to debt, his clothes, three to four thousand dollars of debts from his prior marriage, and child support obligations. Respondent brought to the marriage household furnishings and a car subject to debt. The parties accumulated assets during the marriage including a house worth between \$45,500 (appraisal value) and \$49,900 (market price), household goods and furnishings worth approximately \$2500, a boat valued at \$12,000, a one-half interest in a floating boat house valued at \$400, retirement funds, cemetery lots, a 1977 Chrysler Cordoba (net value \$2772), and a 1976 Pontiac Firebird (net value \$3,000). The parties' indebtedness was approximately \$14,633, plus the \$16,350 house mortgage.

Petitioner has been gainfully employed throughout the marriage. He earns approximately \$30,000 gross yearly income as an insurance salesman for Prudential Insurance Company. Respondent, throughout the marriage, was employed full time at an hourly wage as a service representative for Northwestern Bell Telephone Company. Her annual gross income was \$13,500 in 1978. Both parties deposited their earnings in a joint checking account utilized for family needs, including child support payments for the children of petitioner's first marriage, as well as for maintenance of two of petitioner's children while they lived with the parties.

Trial court's original order of May 24, 1979, was subsequently modified upon motion by respondent for enlargement of findings of fact, conclusions of law and decree, and motion for new trial. The final awards to petitioner included the 1977 Chrysler Cordoba, his interest in the Prudential retirement fund, the 1975 Sea Ray 24'

cruiser, the one-half interest in the floating boat house, tools, golf equipment, skiing and fishing equipment, insurance policies on his life, cemetery lots, various items of household goods, personal and lawn property, and one-half interest in the net equity of the house after the house mortgage and equity in the boat of \$8,400 are deducted from the value of the house. Petitioner was ordered to assume financial obligations for the 1977 automobile, the 1975 boat, miscellaneous bills totalling \$343.07, a Clinton National Bank loan for \$1,788, and the Visa account of \$700.

Respondent was awarded the 1976 Pontiac Firebird, her insurance policies, her interest in the Northwestern Bell retirement fund, household goods, miscellaneous personal and lawn property, \$8,400 representing equity in petitioner's boat and boat house (to be subtracted from the house proceeds) and a one-half interest in the net equity of the house, with the right to purchase petitioner's interest within thirty days. Respondent was ordered to assume financial obligations for the 1976 automobile, the credit union debt of \$1,509, and Master Charge debt of \$700. Neither party was awarded alimony. Each was ordered to pay his or her own attorney fees.

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. Respondent alleges the division of property was not justified. She seeks award of the residence of the parties, subject only to the mortgage thereon. Petitioner contends the property division should be two-thirds in his favor since he earned \$30,000 and respondent \$13,500. After reviewing the record, we conclude the property divisions set forth in the court's orders of May 24, 1979, and July 20, 1979, are equitable and should be affirmed.

Section 598.21, The Code 1979, provides in dissolution proceedings "... the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified." Justified property divisions are those considered to be equitable under the given circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975). We consider 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 arriving at an equitable determination of financial or property rights and

obligations. The supreme 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).

We believe a more equal division of property than contended by petitioner is justified here since each party contributed substantially, financially and otherwise, to the marriage. Even though respondent's income is lower than petitioner's, her contribution includes her services as wife and mother to petitioner's children, as well as her efforts to assist with petitioner's debts from his first marriage. Further, in light of these relative contributions, we conclude that awarding the residence to respondent is not justified. Trial court's division not only properly reflects each party's contribution but also achieves reasonable results. Dividing the proceeds from the future sale of the house fairly compensates each party for his or her economic and other contributions to accumulation of their assets. We therefore affirm trial court's property division.

III. Support Award. Respondent claims trial court should have awarded alimony to her. Applying Schantz, 163 N.W.2d at 405, we disagree. Alimony is not an absolute right, but is instead dependent on the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976).

Trial court found that respondent had sufficient income to support herself and denied alimony. This is not a case where respondent has given up career opportunities to stay at home and care for children, thereby having few job skills. Respondent has worked throughout the marriage for the same company and has a stable, although much lower income, than petitioner. We find she is not in need of "rehabilitative alimony." See In re Marriage of Schissel, 292 N.W.2d at 428. We also have considered the equities of requiring petitioner to pay alimony to maintain respondent in a style more nearly approximating that enjoyed during the marriage and conclude this is not appropriate. See In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975). Balancing respondent's needs and available resources, including her earnings and the house equity against petitioner's award, debts, and income, we find the provisions of trial court's decrees denying alimony are just and equitable.

IV. Attorney Fees.

A. At trial. Respondent contends the trial court should have awarded attorney fees to her. We disagree.

Attorney fees are not recoverable as a matter of right, but depend on one party's financial needs and the other party's ability to pay. In re Locke v. Locke, 263 N.W.2d 694, 695-96 (Iowa 1978). Trial court has considerable discretion in awarding attorney

fees. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). Trial court found respondent to have adequate resources to pay her own attorney. We find no abuse of discretion here.

B. On appeal. Both parties request an award of attorney fees for this appeal. Such an award is not allowed as a matter of right; any award must depend upon the financial circumstances and earnings of both parties. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). In light of the available resources, each party shall pay his or her own attorney fees on appeal. Costs of this appeal are assessed equally.

Trial court's judgment is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., and Snell, J., who dissent.

OXBERGER, C.J. (dissenting)

I dissent. While the trial court attempted to equitably distribute the assets and debts of the marriage and to plan for the future sale of the residence, it failed to consider Bonnie's future life style. The economic provisions of the dissolution decree are inequitable in that Bonnie's only income does not allow her to maintain her living standards to a comparable level with the marriage situation. Oliver is not so inhibited.

Even though both have secure employment, women have not yet reached economic equality with men to make an award of alimony impermissible. In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974). Oliver earns \$30,000 per year, while Bonnie is an hourly wage earner of \$13,500 per year. This discrepancy is not likely to change. The court found Bonnie had not abandoned a career to stay home and care for children. However, Oliver's was the primary career; Bonnie's was only supplemental. The court did not consider her contribution to Oliver's children by prior marriage. Bonnie abandoned plans to have children of her own to help support these children. Although alimony is not an absolute right, it is warranted in this circumstance.

Snell, J., joins in this dissent.