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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-214 / 93-1230

IN RE THE MARRIAGE OF JULIA INGAMELLS AND LYNN INGAMELLS

Upon the Petition of
JULIA INGAMELLS,

Appellee,

And Concerning
LYNN INGAMELLS,

Appellant.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Lynn Ingamells appeals the property division and child support provisions of the parties' dissolution decree. **AFFIRMED IN PART AND MODIFIED IN PART.**

Robert J. Murphy of Roberts & Murphy, Independence, for appellant.

Judith Jennings Hoover, Cedar Rapids, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

This is an appeal from the property division and child support provisions of the parties' dissolution decree. We affirm the trial court's judgment in part and modify in part.

Julia and Lynn Ingamells' seventeen-year marriage was dissolved in 1993. The parties have one child, Eric, born September 12, 1978.

Julia is forty-nine years of age, works for U.S. West, and has a net monthly income of $1,497.69. Lynn is fifty-five years of age, works for ABCO Engineering (ABCO), and earns a net monthly income of $1,316.78 including overtime pay.

Shortly after the parties married, they purchased a farmhouse, outbuildings, and approximately one hundred acres on contract from Lynn's mother. The purchase price was $127,000. Previously, the parties had been living in a home owned by Julia. She sold the home when the parties purchased the farm and contributed the proceeds to improving the new property.

Lynn's mother died in 1983, before the contract was paid off. At that time, the parties had reduced the contract by $50,388, leaving a balance of $76,812. Lynn and his five brothers and sisters were equal devisees under their mother's will. Thus, while Lynn became a one-sixth owner in the balance due on the contract, he and Julia became indebted to the five other devisees. By 1985 the

parties had reduced the contract another $10,000; however, they decided to sell a majority of the property due to pressure from the farm crisis and the other devisees. Lynn and Julia sold all but six acres surrounding the house for $90,000. This exceeded the sum owed to the other devisees, leaving the house free of encumbrance. The house was the only asset the parties had to divide at the time of dissolution.

The parties' dissolution decree ordered Lynn to pay $296.28 per month in child support based on his income, including overtime. It also awarded Julia a lump-sum judgment lien of $27,500 on the family home as a property settlement. The home is valued at $55,000. The lien is to draw ten-percent interest per annum, and the principal and interest are payable eighteen months from the decree date.

Lynn appeals. He contends the trial court should have reduced the value of the homestead by the amount of gifts and inheritance he received during the marriage. Lynn also argues the court improperly considered his overtime pay in assessing child support.

Julia requests appellate attorney fees.

I. **Scope of Review.**

Our review of this equitable action is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the findings of the

trial court, but are not bound by them. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. **Division of Inheritance and Gifts.**

The partners in a marriage are "'entitled to a just and equitable share of the property accumulated through their joint efforts.'" In re Marriage of Wertz, 492 N.W.2d 711, 713 (Iowa App. 1992) (quoting In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987)). The distribution of the parties' property should be equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1) (1991). Wertz, 492 N.W.2d at 713 (citing In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983)).

During the marriage, Lynn received gifts and inheritance from his mother totaling $35,995.53. Lynn asserts the trial court should have offset Julia's property settlement (her interest in the house) by the amount of the gifts and inheritance. He argues but for the gifts and inheritance, the parties would have lost the house or incurred a significant lien on it.

The division of gifts and inheritance received by a party during the marriage is governed by Iowa Code section 598.21(2) (1991). When either party receives gifts or inheritance prior to or during the marriage, the controlling factors in determining whether the property constitutes marital property for purposes of dividing the property at dissolution include "(1) the intent of the

donor and (2) the circumstances surrounding the inheritance or gift." Wertz, 492 N.W.2d at 714.

Applying these factors, we modify the trial court's decision not to offset Julia's property settlement by the amount of Lynn's gifts and inheritance. We must consistently apply our clear precedents. Under Wertz, the gifts and inheritance belong solely to Lynn.

In regard to the first Wertz factor, all the evidence demonstrates the gifts and inheritance at issue were intended to belong solely to Lynn. According to the inheritance tax report, the inheritor of the property is solely Lynn. Furthermore, the real estate contract itself was made out solely to Lynn. There is no evidence to the contrary.

In regard to the second Wertz factor, the circumstances surrounding the gifts and inheritance demonstrate they should not be considered marital property. Lynn used the gifts and inheritance to pay expenses. The evidence is clear but for the gifts and inheritance, there would be at the very least a significant lien on the homestead real estate.

It should further be noted in reaching its decision, the trial court stressed the gifts and inheritance were commingled. The Wertz court expressly held that whether the gifts or inheritance were placed in joint ownership is not a controlling factor. Wertz, 492 N.W.2d at 714.

For these reasons, we modify the trial court on this issue. We offset Julia's property settlement (her interest in the house) by the amount of Lynn's gifts and inheritance as follows. The house at issue is valued at 55,000. Subtracting the $35,993.53 of gifts and inheritance to Lynn leaves $19,004.47 in equity to be divided. Under the circumstances of this case, we divide this remaining $19,004.47 evenly. One-half of $19,004.47 is approximately $9,502.50. We therefore award Julia $9,502.50 as a lien upon Lynn's real estate. The lien will draw interest at ten percent per annum. The principal and interest shall be due and payable to Julia one year after the clerk of the Iowa Supreme Court issues procedendo.

III. Child Support.

Lynn contends the trial court erred by including overtime pay in his net monthly income for determining his child support obligation under the guidelines. He asserts the evidence indicated overtime was not always available during the eight years he was employed by ABCO and there is no guarantee of overtime in the future.

Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes unless the overtime is speculative or uncertain, or a parent is forced to work overtime to meet a burdensome child support obligation. In re Marriage of Geil, 509 N.W.2d 738, 742 (Iowa 1993) (citing In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992)).

Here, Lynn failed to submit a timely affidavit of financial status. Thus, the trial court determined his net income from the two pay stubs he submitted at trial. Each of these reflected a forty-hour week with nine hours of overtime. Lynn testified overtime was voluntary and he had participated in it since he began work at ABCO. However, he testified he had been laid off four times during his eight years of employment. He also provided a letter from his employer indicating there is no guarantee of future overtime or continuous employment without layoffs.

Although Lynn provided evidence of a potential change in the availability of overtime, presently there is no basis to depart from the amount of support specified by the guidelines and awarded by the trial court. See Geil, 509 N.W.2d at 742. There was no testimony Lynn would need to work overtime solely to meet his child support obligation. If Lynn's income substantially changes, it may be appropriate for him to seek a modification of the decree. See In re Marriage of Lee, 486 N.W.2d 302, 304 (Iowa 1992); Iowa Code § 598.21(8) (1991).

IV. Attorney Fees.

Julia seeks appellate attorney fees for the cost of defending the trial court's decree. 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). We deny Julia's request for attorney fees.

To sum up, we modify the trial court's decision in regard to the property settlement. We award Julia $9,502.50, as a lien upon Lynn's real estate. The lien will draw interest at ten percent per annum. The principal and interest shall be due and payable to Julia one year after the clerk of the Iowa Supreme Court issues procedendo. We affirm the trial court's decision in regard to Lynn's child support obligations. Lynn must pay $296.28 per month in child support. We deny Julia's request for attorney fees.

Costs on appeal are assessed one-half to each party.

AFFIRMED IN PART AND MODIFIED IN PART.

Habhab, J., concurs; Cady, J., dissents.

CADY, J. (Dissenting)

I respectfully dissent. I believe the district court equitably divided the parties marital property and Lynn's gifts and inheritance.

As the majority correctly noted, property which has been inherited or received as a gift is generally not subject to division. This premise must yield, however, where its application would be unjust. In re Marriage of Geil, 509 N.W.2d 738, 741 (Iowa 1993); Iowa Code § 598.21(2) (1991) ("[I]nherited property or gifts may be divided where a refusal to divide the property is inequitable to the other party. . . ."). Relevant factors effecting the issue include: (1) the length of the marriage; (2) contributions of the parties toward the property, its care, preservation, or improvement; (3) separate contributions of the parties to their economic welfare to the extent those contributions preserve the property for either of them; (4) the impact of the property on the parties' standard of living; and (5) the length of time the devised property was held after it was devised or given. In re Marriage of Van Brocklin, 468 N.W.2d 40, 44-45 (Iowa App. 1991); See also Geil, 509 N.W.2d at 741.

Applying these factors, I believe the majority's decision to offset Julia's property settlement in the amount of Lynn's gifts and inheritance is unjust and inequitable. The parties were married for seventeen years and ten years passed between the time Lynn inherited the

property and the time Julia commenced her suit. Additionally, the gifts and inheritance are not easily identifiable. Lynn voluntarily co-mingled the gifts and inheritance with the marital assets in order to meet the family's immediate financial needs.[1] Unlike the situation in Wertz refered to by the majority, Lynn did not specifically apply either of them to the contract on the house, and the house is the only asset the parties have to divide.

Furthermore, in order to uphold the family's economic welfare, Julia maintained the home and an outside job, and assisted in the farming. Without these contributions a greater portion of Lynn's gifts and inheritance would have dissipated.

The parties also substantially modified and improved the farmhouse and the outbuildings throughout the marriage. Julia contributed her labor and the proceeds from the sale of her house to these endeavors. Thus, she used her premarital assets to enhance the value of the property Lynn eventually inherited a portion of.

Finally, at the time Lynn's mother died, the parties had already paid $50,000 toward the balance on the real estate contract. This sum is close to the current value of the home and was paid from marital assets and joint labor.

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1. Wertz, does not hold that whether the gifts or inheritance were placed in joint ownership is not a factor; only that it is not a controlling factor.

In view of the facts in this case, reducing Julia's property settlement by almost $18,000 would be plainly unfair.

The district court's decision not to reduce the value of the homestead by the amount of gifts and inheritance received by Lynn during the marriage was just. I would affirm the district court.