

IN THE COURT OF APPEALS OF IOWA

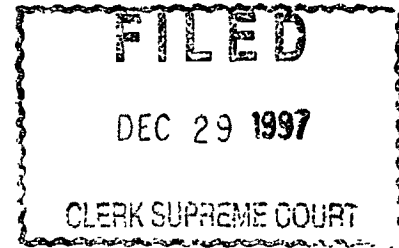
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No. 7-445 / 96-0759
Filed December 29, 1997

**IN RE THE MARRIAGE OF CLIFFORD K. KUHSE
AND JUDITH J. KUHSE**

Upon the Petition of
CLIFFORD K. KUHSE,
Appellant,

And Concerning
JUDITH J. KUHSE,
Appellee.



Appeal from the Iowa District Court for Clayton County, Margaret Lingreen,
Judge.

Clifford appeals the district court's dissolution of marriage decree.

AFFIRMED.

Dennis G. Larson of Larson, Nichols & Strand, Decorah, for appellant.

Michael J. Gau of Kane, Norby & Reddick, P.C., Dubuque, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

STREIT, J.

Clifford argues the court did not properly account for the inheritance he received from his mother. He also contends the \$15,000 cash settlement he was ordered to pay Judith was inequitable and contests the amount and duration of alimony awarded to Judith. Judith was awarded \$2000 attorney fees at trial. She claims she is entitled to appellate attorney fees. We affirm the trial court's property division and alimony award.

I. Background & Facts.

Clifford and Judith were married for thirty-nine years. At the time of the dissolution, Clifford was sixty-one and Judith was fifty-eight.

Clifford has been a truck driver for most of the marriage. He also works as a seasonal farmhand. His gross annual salary from the two jobs is about \$31,000. For fourteen years the parties farmed. They quit farming in 1971, but continued to live on the farm and rent out the land. In 1994, Clifford inherited \$79,726.09 from his mother. Judith never worked outside their home. She did household tasks, cared for children, and paid household bills.

The court's March 1996 decree ordered the parties to split the sale proceeds of their farm after paying off the mortgage. Clifford kept the 1995 truck, free and

clear of debt.¹ Judith kept the 1995 Chevy Astro van free and clear of debt.² Clifford was awarded a life insurance policy worth \$2080.80. Each party kept their burial trust. The parties divided their bank accounts which included monies from inheritances and gifts. After distributing the property, the court ordered Clifford to pay Judith \$15,000 and alimony in the amount of \$750 per month until Judith turned age sixty-five—at that time her alimony is reduced to \$250 per month. The alimony terminates upon Judith's remarriage or the death of either party. Judith was awarded \$2000 in attorney fees.

II. Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4; *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Property Division.

A. Clifford's Inheritance. Clifford contends the trial court did not set aside his inheritance from his mother. Clifford's contention is two fold: first, he argues the court assigned only \$4788 of the purchase price of his Ford pickup as inheritance

¹ The truck was worth \$25,000.

² The van was worth \$19,275.

rather than \$9412; second, he argues the court failed to set aside the remainder of his inheritance by distributing the bank accounts titled in each party's name to the respective parties.

In dividing property to marriage, the court shall equitably divide all property *except* inherited property or gifts received by one party. Iowa Code section 598.21(1) (1995)(emphasis added). Only when not dividing the inherited property would be unjust, will it be divided as marital property. *In re Van Brock*, 468 N.W.2d 40, 44 (Iowa App. 1991); *see also In re Marriage of Mental*, 359 N.W.2d 505, 506 (Iowa App. 1984)(“[P]roperty inherited by either party or gifts received by either party prior to or during the marriage . . . is the property of that party and not subject to a property distribution . . . except upon a finding that refusing to divide the property is inequitable”). When gifts and inheritance become so commingled with and transformed into the marital property, they are subject to division as marital property. *See In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). However, inherited property which is easily identified and not commingled with marital assets is not. *See In re Marriage of Van Brocklin*, 468 N.W.2d 40, 44-45 (Iowa App. 1991).

Clifford's initial inheritance was \$79,726.09. Ten thousand dollars of the money was used for burial trusts for himself and Judith. It would be unjust to force Judith to give up her burial trust.

A portion of Clifford's inheritance money was used to buy a 1995 pickup truck. He traded in a 1993 vehicle, bought with marital assets, for the 1995 pickup truck. At the time, the trade in value of the 1993 vehicle was \$20,211. The purchase price of the 1995 pickup was \$29,623. Clifford paid the cash difference between the trade in and the purchase price with his inheritance money. By the time of the dissolution, the value of the 1995 truck had depreciated to \$25,000.

Clifford contends the court incorrectly valued his inheritance contribution to the 1995 pickup. He wants credit for a contribution of \$9412. Clifford chose to invest his inheritance money in a depreciable asset. He can not expect his \$9412 invested in a pickup truck to hold its value. It would be unjust to allow him to do this.

Clifford misses the trial court's point in distributing the vehicles. By awarding each party a vehicle, encumbrance free, the court was not seeking an equal percentage distribution, but rather, a fair and equitable distribution. *See In Re Marriage of Hoffman*, 493 N.W.2d 84 (Iowa App. 1992). Judith kept the van worth about \$19,000. Clifford kept the new pickup worth about \$25,000. This was fair and equitable in light of the fact that Clifford used inheritance money to pay the cash difference between the trade-in and the new pickup's price.

Clifford contends the trial court erred in not identifying Clifford's inheritance and specifically setting it aside after finding Clifford's inheritance was not subject to division. Clifford's contention is without merit. The parties told the court they

agreed to the division of the parties' bank accounts, household items, and miscellaneous assets. Further the parties represented the bank accounts contained inheritance monies, gifts, and Judith's alimony. The trial court had no reason to believe Clifford's inheritance was anywhere other than in bank accounts and assets owned by Clifford.³ No evidence exists that Judith's bank accounts contain any inheritance of Clifford's. Clifford has not articulated, at trial, or in his appellate brief, where the funds he is allegedly deprived of are located. Any portion of Clifford's inheritance money spent on the farm and homestead, or family needs such as food, electricity, and gas, was so commingled with the marital property that it is subject to equitable division. *See In re Hoffman*, 493 N.W.2d at 89. The trial court's award of Clifford's bank accounts and miscellaneous items to him adequately set aside his inheritance.

B. Equitable Cash Settlement. After dividing the marital property, the court awarded a \$15,000 cash settlement to Judith to make the distribution equitable. When seeking to equitably divide marital property the court considers the factors set out in Iowa Code section 598.21. Among those factors are the length of the marriage, the age, the physical and emotional health of the parties, the earning capacity of the parties, and the economic circumstances of each party.

³ Clifford and Judith's statement of affairs and financial affidavits reflect that Clifford owns a Chevy Blazer worth \$30,000; a savings account worth \$27,000; and 304 shares of Pacific Corporation stock. None of these items were included in the division of marital assets.

The parties agreed upon the division of their bank accounts and household contents. The remaining marital assets have a value of approximately \$270,206. This includes the real estate, vehicles, and life insurance.⁴ Marital debt is approximately \$41,599. The net value of the marital property is \$228,607. This does not include Clifford's inheritance not subjected to equitable division. In the courts's initial property division, Clifford received approximately \$122,932 worth of these assets and Judith received approximately \$105,674. Clifford was awarded one-half of the value of the real estate after sale (\$100,641), the 1995 truck valued at \$20,211, and life insurance with a cash value of \$2081. Judith was awarded one-half of the value of the real estate after sale (\$100,641), and the 1995 Astro van worth \$5033 after paying off the encumbrance.

After making the division, the court awarded Judith a cash settlement of \$15,000. In the final decree, Judith received \$120,674 of marital property and Clifford received \$107,932 of marital property. Although this is not an equal distribution of marital property, we think it is fair under the considerations of section 598.21. The cash settlement of \$15,000 to Judith is affirmed.

IV. Alimony.

Clifford appeals Judith's alimony award.

⁴ Clifford indicated in his financial affidavit that he owned 304 shares of Pacific Corporation. However, no evidence of value was assigned to the securities.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Miller*, 532 N.W.2d at 162; *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). Judith was awarded permanent alimony. The purpose of traditional or permanent alimony is to provide the receiving spouse with support comparable to that he or she would receive if the marriage continued.

When considering whether to award alimony or not, the factors listed in Iowa Code section 598.21(3)(1997) are considered. *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Along with those factors the earning capacity of each party is measured, as well as the standard of living each party has become accustomed to, and the ability of one party to pay alimony is balanced against the other's needs to receive alimony. *See In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). The court considers the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *In re Marriage of Debbler*, 459 N.W.2d 267, 270 (1990); Iowa Code § 598.21(3)(f).

When deciding if the amount of alimony is appropriate, we look at the alimony and property division together. *See In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984). Following a marriage of long duration, appellate courts will affirm awards of both alimony and substantially equal property distributions, especially where the

disparity in earning capacity has been great. *In re Marriage of Geil*, 509 N.W.2d at 742; *In re Marriage of Hitchcock*, 309 N.W.2d 432, 438 (Iowa 1981).

Judith and Clifford have been married thirty-nine years. Judith is a fifty-eight-year-old high school graduate with no identifiable job skills. She has never worked outside the home, although she did the majority of the child raising, house cleaning, and handling family finances. Judith has health problems which force her to incur significant health costs. She has a bad back, arthritis, and high blood pressure. She cannot lift more than fifteen pounds and has a limit on how long she can stand. She suffers from depression. Judith needs alimony to meet her needs. Her need for support will continue for life.

Clifford has the ability to pay Judith alimony. He is now employed and has a gross annual salary of about \$31,000. He will continue to earn about this amount until he retires. He and Judith have nearly equal marital assets after division. He has more money and assets than Judith because of his inheritance. *See In re Marriage of Helme*, 514 N.W.2d 461, 464 (Iowa App. 1994)(inherited property can be considered in awarding alimony). Given the circumstances of the parties, the trial court's alimony award of \$750 per month to Judith until she reaches age sixty-five and \$250 per month thereafter, until the death of either party, is appropriate.

V. Attorney Fees.

The district court awarded Judith \$2000 for attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 524

N.W.2d 442, 445 (Iowa App. 1994). The amount of fees awarded, if any, depends on the parties needs and ability to pay. *Id.* We will not interfere absent an abuse of discretion. *Id.* We cannot say the district court abused its discretion and accordingly affirm the award of \$2000 to Judith in attorney fees.

Judith has requested attorney fees on appeal. In consideration of the cash settlement and alimony award Judith received, she is able to pay her own attorney fees. Costs are taxed to Clifford.

AFFIRMED.

Mahan, J., concurs; Sackett, P.J., specially concurs without opinion.