

IN THE COURT OF APPEALS OF IOWA

No. 8-169 / 97-1316

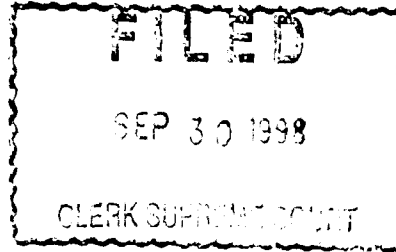
**IN RE THE MARRIAGE OF KIM BERNARD
AND WES BERNARD**

**Upon the Petition of
KIM BERNARD,**

Petitioner-Appellant,

**And Concerning
WES BERNARD,**

Respondent-Appellee.



Appeal from the Iowa District Court for Clay County, Frank B. Nelson, Judge.

Kim Bernard appeals from the provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Willis J. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellant.

Paul D. Havens of Havens and Havens, Storm Lake, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ. Sackett, J., takes no part.

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MAHAN, J.

Kim Bernard appeals from the provisions of the parties' dissolution decree. She contends the district court erred when it: (1) did not award Kim a share of Wes's inherited property; and (2) denied Kim's request for alimony. We affirm as modified.

This is the second marriage between the parties. Wes and Kim first married in June 1971 when Kim was still in high school. Their first marriage ended in 1975, but they remarried within six months. The second marriage was dissolved in 1997. Kim is forty-three years old and Wes is forty-four. Kim and Wes have a son, Michael, who is twenty-five years old, and a daughter, Stacey, who is sixteen. The district court granted Wes primary physical care of Stacey.

Both Kim and Wes have high school diplomas. Both work outside the home. Kim has worked throughout the marriage. At the time of trial Kim was unemployed due to her employer's difficulties with the F.A.A. Kim referred to her situation as a furlough:

When I was furloughed it was with the understanding I could be back to work within a week or a few months. At this present time I am filed with the unemployment but I do not have to actively seek a job because they're anticipating calling us back.

Kim did note her return to work depended on whether or not the F.A.A. approves Great Lakes Aviation's flight schedule. Kim has also worked as a secretary, receptionist, bookkeeper, and data entry person for two medical clinics, a podiatrist, and Clay County Rural Water. Kim was ordered to pay \$238 per month in child support when she returns to work, and \$100 per month until that time. She was also

ordered to provide health insurance for Stacey as long as it was available through her employer. Wes works for a trucking firm that lays him off in the fall and rehires him in the spring. During this time Wes stays home and collects unemployment. Kim contends her gross income is approximately \$15,500 and Wes's gross income is approximately \$27,500.

In 1952, prior to his birth, Wes inherited an undivided one-half remainder interest in farmland in Clay County. Wes shared the remainder interest with his sister. The interest was subject to life estates in his grandmother and his father. Wes's father died in 1983. Wes and his sister divided the property in 1996 so that each had a whole interest in specific farmland. Upon the split, Wes received 72.6 acres. This land included the parties' home. Wes and Kim moved onto the farm in 1977 when Wes's grandmother died. Between 1977, when Kim and Wes moved into the home, and 1983, when Wes' father died, new carpeting and a new furnace were installed, and rural water was connected. These improvements were paid for by Wes's father. Since 1983 the parties replaced windows in the home that were broken by a storm, repainted, put a roof over the porch, and put in a couple of doors and a counter top. Wes receives \$10,000 per year in cash rent from the farmland. However, Wes has been borrowing money against the rent he expects to receive. At the time of trial, the 1998 income was pledged to pay off prior debts. Both parties admit they have not been very successful at managing their money. The district court found the parties had debt in excess of \$45,000 at the time of trial.

The district court awarded the farm worth \$140,000 and all of the household items and motor vehicles to Wes. The parties valued those household items and motor vehicles to be worth between \$2595 and \$5095. The district court made this award based upon a pretrial stipulation between the parties. Kim entered into this stipulation because she felt it was in Stacey's best interest to have these items remain with the home. The court did award Kim a few personal items.

I. STANDARD OF REVIEW. Our review of this equitable proceeding 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. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. PROPERTY DIVISION. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997). The courts are not bound to achieve a precisely equal division in awards of marital property. *In re Marriage of Kurtz*, 561 N.W.2d 385, 388 (Iowa App. 1997). The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1995). *Id.*

Generally, gifts or inheritances received by a party during the marriage are not subject to a property division unless failure to do so would be inequitable to the other party. *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993).

A number of factors might bear on a claim that property should be divided under this exception. These include:

(1) contributions of the parties toward the property, its care, preservation or improvement;

(2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;

(3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;

(4) any special needs of either party;

(5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

Other matters, such as the length of the marriage or the length of time the property was held after it was devised or given, though not independent factors, may indirectly bear on the question for their effect on the listed factors. Still other matters might tend to negative or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception.

In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982).

In making its decision, the district court stated, "Clearly, this inheritance was intended to be [Wes's]. There is no basis upon which it could be considered marital property. The land will remain [Wes's]." The district court assigned \$5064 of debt as Kim's personal debt, \$24,020 to Wes as his personal debt, and \$15,614 as joint debt. The district court noted, "There is nothing the Court can do to force [Kim] to pay her share because she has no assets or current income sufficient to allow her to do so." Kim contends it is inequitable for her, "to be sent packing with a few meager personal possessions and over \$5000 in debts after twenty-five years of marriage."

We have carefully reviewed this matter and conclude the property division should be modified to carry out the purpose and intent of Iowa Code section

598.21(1), as well as the cases cited above. We agree with the district court the farmland should remain with Wes and not be sold or split up. However, we conclude it would be unfair and inequitable to Kim to exclude this inherited property from consideration in the overall property division. We modify the district court decree to award Kim the sum of \$25,000 payable at the rate of \$5000 per year. The first payment will be due and owing within sixty days of the date of the filing of this opinion. All other payments shall be due on July 1 of each succeeding year until paid in full. Any unpaid amounts shall incur interest at the rate of five percent per annum. We further modify the district court decree to assign the entire marital debt of \$15,614 to Wes.

III. ALIMONY. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Eastman*, 538 N.W.2d 874, 876 (Iowa App. 1995). When determining the appropriateness of alimony, the court must consider “(1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against relative needs of the other.” *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994) We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996). The court may consider the amount of child support ordered under the decree when determining if spousal support is to be awarded and, if so, the appropriate amount of the award. *In re Marriage of Will*, 489 N.W.2d 394, 400.

Alimony has traditionally taken the place of support that would have been provided ~~had~~ the marriage continued. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). It is awarded to accomplish one or more of three purposes. We have observed:

Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining. Its objective is self-sufficiency. An award of *reimbursement alimony* is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other. *Traditional alimony* is payable for life or for so long as a dependent spouse is incapable of self-support. The amount of alimony awarded and its duration will differ according to the purpose it is designed to serve.

O'Rourke, 547 N.W.2d at 866-67.

Kim contends the decision regarding alimony is inappropriate considering the child support the district court ordered her to pay to Wes, and the disparity between the parties' incomes. We disagree and affirm the district court on the alimony issue.

IV. APPELLATE ATTORNEY FEES. Wes asks this court to order Kim to pay his attorney fees and expenses on appeal. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We decline to award Wes attorney fees on appeal. Each party shall be responsible for his or her own attorney fees on appeal.

AFFIRMED AS MODIFIED.