

IN THE COURT OF APPEALS OF IOWA

No. 6-296 / 95-660

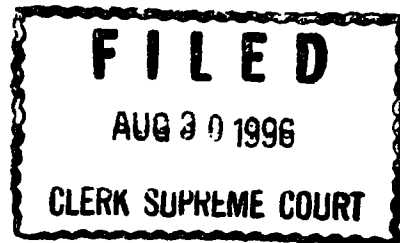
**IN RE THE MARRIAGE OF DOROTHY FAYE
DUNHAM AND KENNETH L. DUNHAM**

**Upon the Petition of
DOROTHY FAYE DUNHAM,**

Petitioner-Appellant,

**And Concerning
KENNETH L. DUNHAM,**

Respondent-Appellee.



Appeal from the Iowa District Court for Pottawattamie County, Keith E.
Burgett, Judge.

Dorothy Dunham appeals the property division of the parties' dissolution
decree. **AFFIRMED.**

G. Elizabeth Otte of the Law Office of G. Elizabeth Otte, Council Bluffs, for
appellant.

Drew H. Kouris, Council Bluffs, for appellee.

Considered by Sackett, C.J., and Cady and Vogel, JJ.

SACKETT, C.J.

The questions in this appeal from a decree dissolving the marriage of petitioner-appellant Dorothy Faye Dunham and respondent-appellee Kenneth L. Dunham are whether the trial court correctly valued and equitably divided a family-owned business. We agree with the trial court's decision on both issues and affirm.

Kenneth and Dorothy were married in 1972. It was Kenneth's second marriage and Dorothy's first. Kenneth had custody of the two children of his prior marriage who resided with Kenneth and Dorothy through adulthood. Two children were born to this marriage.¹

Kenneth and Dorothy are college graduates and are certified teachers. Dorothy taught school after the marriage. Kenneth focused his efforts on a small sawmill operation. The business was conducted on real estate adjacent to the home occupied by Kenneth and Dorothy. In addition to family and teaching responsibilities, Dorothy assumed record and bookkeeping responsibilities for the business. The home and adjoining real estate was owned by Kenneth's parents. Kenneth and Dorothy made improvements to the home but paid no rent. In 1986, due to the failure of the sawmill business, Kenneth and Dorothy filed bankruptcy and lost the assets they had.

¹ The older child was nineteen at the time of the hearing and no request was made for his support. The second child, sixteen years of age at the time of the hearing, was placed in Kenneth's physical care. Dorothy was ordered to pay child support of \$385 per month. Custody and child support are not issues on appeal.

Kenneth's son from his first marriage, Kenneth Taylor Dunham, purchased an old kiln and planer at Kenneth and Dorothy's bankruptcy sale for \$850. Kenneth Taylor received his grandparents' permission to operate a business on their land. The business became known as Dunham Hardwoods. Dunham Hardwoods sells woods to cabinet makers. Kenneth returned to teaching for a year and then joined Dunham Hardwoods, first as an employee and then as an equal partner in the business.

At the time of the dissolution, Dorothy represented her annual income before deductions for taxes and other payroll deductions to be approximately \$30,000. Kenneth represented his annual income to be \$21,027 contending he drew \$400 per week and the business paid his taxes at the end of the year. It appears the amount for taxes paid was approximately \$7000, giving him an annual gross income before deductions for taxes of about \$28,000.

In the March 1995 decree dissolving the marriage, the trial court concluded the liabilities of the business exceeded its assets. All interest in the business was awarded to Kenneth. The trial court made an allocation of assets and debts, but awarded no alimony to either party. Dorothy received her IPERS. Each was responsible for his or her own attorneys and expert witness fees and the court costs were divided equally.

Dorothy contends the trial court failed to equitably divide the property, and the trial court's treatment of Dunham Hardwoods is the crux of this appeal. Dorothy further challenges the trial court's failure to give adequate consideration to the fact Kenneth stands to inherit from his parents' trusts.

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 Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*; see also *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Havran*, 406 N.W.2d 450, 452 (Iowa App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Kenneth became an equal partner with Kenneth Taylor in Dunham Hardwoods in 1989, although he made no capital contributions to the business. The business has inventory, equipment, machinery, and seven buildings of various values all located on land owned by Kenneth's parents' trusts. The business pays the trusts no rent. In 1993, Dunham Hardwoods received a \$650,000 Small Business Administration loan for the purpose of business expansion. There was testimony at trial from Kenneth, Kenneth Taylor, and their accountant that the business had a negative net worth.

Dorothy had testimony from a certified public accountant that the business was worth \$90,000. The accountant questioned a \$530,000 reported loss by Dunham Hardwoods in the quarter preceding the dissolution trial. In arriving at the \$90,000

value, the accountant valued the goodwill of the business at a little more than \$130,000.

The trial court, in seeking to value the business, looked at the fact it was a family business operating on lease land and probably not salable. The trial court also considered the fact that, in essence, the evidence of both Kenneth and Dorothy found the liabilities of the business exceeded the assets and the accountant testifying for Dorothy only found the business to have value by allocating \$130,000 to goodwill. The trial court recognized the valuation by Dorothy's accountant of goodwill was a subjective finding and this was the first time the accountant had valued a lumber company. The trial court found the testimony of Kenneth's accountant more credible than the testimony of Dorothy's accountant. The trial court then proceeded to find that the liabilities of the business exceeded the assets.

The purpose of determining value is to assist the court in making equitable property awards and allowances. *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa 1991).

The real issue is whether the trial court should have rejected Dorothy's claim the business had substantial goodwill, as without the \$130,000 her accountant placed on goodwill, he, too, would find the debts of the business exceeded its assets. The business has no ownership rights on the land where it is located. Additionally, the fact the assets of the business are less than the current debt would, as testimony

indicates, discount the value of any goodwill to a potential purchaser. We agree with the trial court's decision to reject any value for goodwill.

The valuation of a family business is difficult. *See Dennis*, 467 N.W.2d at 808. Because of the difficulty of the task of valuation, the law provides much leeway to the trial court. *Id.* Where the values determined by the district court for a partnership are within the permissible range of the evidence, we will not disturb them on appeal. *See In re Marriage of Alexander*, 478 N.W.2d 420, 422 (Iowa App. 1991). We affirm the valuation of the business. We affirm the division of assets.

Dorothy also argues the likelihood of Kenneth inheriting from his parents' trusts should be considered. She makes no reference in her brief to where in the record information about the trust provisions and assets appear. There is no basis to award a future inheritance. *See In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

Dorothy further asks for Kenneth to pay one-half of the costs of the action, including expert witness fees. She asks for attorney fees on appeal.

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 agree with the trial court's allocation of fees and costs. Each party should pay his or her own attorney fees on appeal. Appellate court costs are taxed to Dorothy.

AFFIRMED.