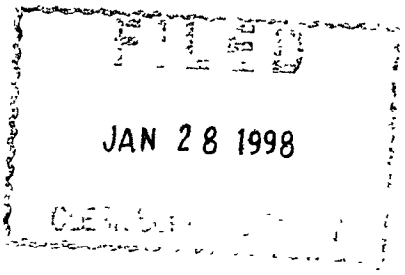
**IN THE COURT OF APPEALS OF IOWA**

No. 7-593 / 96-2020 000135

**IN RE THE MARRIAGE OF MARIE DAVIS AND RICHARD W. DAVIS**

Upon the Petition of
**MARIE DAVIS,**
Appellant,

And Concerning
**RICHARD W. DAVIS,**
Appellee.




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Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Petitioner, Marie Davis, appeals the economic provisions of the dissolution decree. **AFFIRMED AS MODIFIED; REMANDED.**

Jill Southworth Rolek of the Rolek Law Office, West Des Moines, for appellant.

Susan L. Ekstrom, Des Moines, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

**VOGEL, J.**

Marie and Richard Davis were married in April 1962. Marie appeals the economic provisions of the dissolution decree. She argues the trial court erred in (1) failing to set aside more of her inherited funds, (2) dividing the pension funds and failing to treat Richard's pension fund as property subject to a qualified domestic relations order, (3) not requiring Richard to pay her health insurance, and (4) failing to award attorney fees. She also requests appellate attorney fees and costs.

***Background facts.*** Richard and Marie raised five children, two born of their union and three from Marie's previous marriage. All of the children have reached adulthood and are not directly at issue on appeal. During the thirty-four year marriage, Marie held various jobs. Richard worked as a Des Moines police officer for over twenty-five years and voluntarily retired in March 1996.

***Scope of review.*** In this equity action, our review 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 fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

***Distribution of assets.*** In making an equitable distribution of assets, the court must first determine what assets are available to be allocated between the spouses.

*In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa App. 1997). To do this, the court must identify and value the assets of the parties, both jointly and separately. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). The value of the assets should then be determined as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994). Next, a determination must be made as to the allocation of those assets. Assets are equitably, not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1) (1995).

Gifted and inherited property is not subject to division unless the court finds it would be inequitable to not do so. Iowa Code § 598.21(2). When inherited property becomes commingled with marital property, it may be subject to division as marital property. *See In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992); *In re Marriage of Van Brocklin*, 468 N.W.2d 40, 44-45 (Iowa App. 1991).

We first determine whether the trial court set aside an appropriate amount of inherited assets to Marie. Marie did not make a clear record of what she actually inherited from her grandmother and when the inheritance was received. She claims her inheritances totaled approximately $220,000. There is evidence that in 1995, an educational trust funded with inherited money was restated with a value of $165,693. By the time of trial, the fund had diminished to $88,000. Richard did not dispute the

$88,000 valuation and the trial court, faced with the evidence before it, set that amount aside to Marie as inherited property.

Marie submitted an exhibit accounting for expenditures of an additional $99,650 of inherited funds and asked for that amount to be set aside to her. She claims there is still a shortfall of some $36,500 of inherited money unaccounted for from the original amount of $220,000 which was commingled with marital property and she does not seek to be awarded that amount. Regardless of the reliability of Marie's records, we note Richard disputed very little and acknowledged that $20,000 for the down payment on the farm came from Marie's inheritance. We modify to set an additional $20,000 aside to Marie. To accomplish this, we remove the $15,000 lien awarded to Richard on the homestead and further order him to pay to Marie $5000 ninety days from procedendo issuing. We are unable to justify further modification of the trial court's assessment of Marie's inherited property, considering the length of the marriage and the commingling of assets.

Our next task is to determine whether the trial court made an equitable distribution of the marital assets. This task is difficult as the decree does not contain specific findings as to the value of most of the assets. The court made the following distribution:

**ASSETS:**

| *Marie* | *Richard* |
|---|---|
| Homestead - $94,000 | $15,000 lien[1] |
| | Farm |
| ½ Marie's 401K | ½ 401K |
| ½ Marie's IPERS | ½ IPERS |
| ½ Marie's PDI plan | ½ PDI plan[2] |
| ½ Richard's police retirement | ½ police retirement |
| Personal property | Farm equipment |
| | Guns & ammo |
| | Hunting & fishing equipment |
| | Boat & trailer |
| | Camper |
| 1993 Olds car | 1992 Chevy pickup |
| | 2 clocks, deer head, baseball cards, wildlife prints |

**DEBTS:**

| *Marie* | *Richard* |
|---|---|
| Unpaid '95 income tax - $2,000 | Farm mortgage |
| Homestead mortgage - $7,000 | Pickup balance - $10,000 |
| | MasterCard - $5,300 |
| | Personal loan - $1,500 |

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[1]Modified herein.

[2]Modified herein.

From our de novo review of the record, including the valuations claimed by both Marie and Richard, we determine the trial court made an equitable distribution of the marital assets subject to our modifications.

Marie next argues Richard should be required to pay her health insurance premiums. Her prospects of obtaining insurance are questionable due to her health problems. Marie claims a supplemental premium is available to Richard to cover Marie, but the record does not support that assertion. We will not assign that obligation to Richard in spite of the inequities argued by Marie. However, to compensate Marie for having to seek and pay for her own health insurance, if indeed she is even insurable, we modify the asset distribution to allow Marie to retain her entire PDI pension plan. This shifts approximately $9076 from Richard to Marie.

Both parties indicated they are amenable to subjecting Richard's police retirement to a Qualified Domestic Relations Order (QDRO). We therefore remand to the trial court to enter a QDRO granting Marie one-half of Richard's police retirement plan.

***Attorney fees.*** Marie argues Richard should have been assessed a portion of her trial court attorney fees and requests Richard pay a portion of her appellate attorney fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 Roberts,* 545 N.W.2d 340, 345 (Iowa App. 1996). We determine each party must each pay their own attorney fees.

Having carefully considered all other arguments, we affirm the trial court's decision, as modified, and remand for determination of the QDRO terms. Costs on appeal assessed one-half to each party.

**AFFIRMED AS MODIFIED; REMANDED.**