

IN THE COURT OF APPEALS OF IOWA

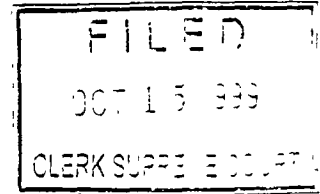
No. 1999-62 (9-217) / 98-1662

Filed October 15, 1999

**IN RE THE MARRIAGE OF PATRICIA BUTIKOFER
AND RONALD BUTIKOFER**

**Upon the Petition of
PATRICIA BUTIKOFER,**
Petitioner-Appellant,

**And Concerning
RONALD BUTIKOFER,**
Respondent-Appellee.



Appeal from the Iowa District Court for Fayette County, John Bauercamper,
Judge.

Petitioner appeals from the economic provisions of the dissolution decree. She argues the trial court erred in failing to (1) properly value and distribute the marital property, (2) award her alimony, (3) give her a credit for an inheritance she received during the marriage, and (4) award her attorney fees. She also requests an award of appellate attorney fees. **AFFIRMED.**

Dale L. Putnam of the Putnam Law Office, Decorah, for appellant.

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C.,
Decorah, for appellee.

Considered by Sackett, C.J. and Zimmer and Miller, J.J.

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MILLER, J.

Petitioner-Appellant Patricia Butikofer appeals challenging the economic provisions of the decree dissolving the parties' marriage. She contends the trial court erred in failing to (1) properly value and distribute property, including property she inherited, (2) award her alimony, and (3) award her attorney fees. She also requests an award of attorney fees on appeal. We affirm.

In this equity case our review is de novo. Iowa R.App.P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). 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).

Patricia and Ronald were married in October of 1969. They have one child, Amber, who was twenty years of age and a college student at the time of trial in mid 1998.

At the time of trial Patricia was 48 years of age and in good health. Ronald's age is not shown, and there is no evidence that he is in other than good health. Both are high school graduates, with no additional education except one adult education computer class taken by Patricia.

Until 1983 both parties worked for a farm cooperative, Patricia as a bookkeeper and Ronald as a truck driver. In 1983 their employer discovered that funds of the business were unaccounted for and both were dismissed.

In 1983 Ronald started his own trucking business. From that time until March of 1997 Patricia was not employed outside the home. Ronald was gone from home extended periods of time in the trucking business. Patricia managed the parties' home, took care of their child, did the bookkeeping for Ronald's trucking business, and handled the parties' household and family finances.

Ronald is the owner-operator of one long haul semi-tractor and a flatbed trailer which he leases to a Montana company. He is the only driver. The Montana company arranges loads and pays him a percentage of the revenues. Since the parties' November 1997 separation, he has been living in his truck, using his brother's Fayette County residence as a mailing address.

Since March 1997 Patricia has been employed part-time as a bookkeeper for a lumber yard. She works twelve to twenty-five hours per week and earns approximately four thousand five hundred dollars per year. She has looked for, but been unable to find, full-time employment as a bookkeeper. She has not actively sought employment other than bookkeeping. She states a desire to take computer and bookkeeping courses to enhance her employment opportunities.

Ronald's tractor and trailer are heavily mortgaged and his net income has been limited due to heavy expenses including interest, depreciation, repairs and maintenance. His pre-tax net trucking income for 1997 was eighteen thousand nine hundred thirty-six dollars, the highest ever for the years shown by the evidence, 1992 through 1997. His pre-tax net trucking income for 1996 and 1995 was seven

thousand seven hundred seventy-three dollars, and nine thousand one hundred sixty-three dollars, respectively.

Patricia's father died in 1984. She received an inheritance of some thirty-five thousand dollars to thirty-eight thousand dollars. Her inheritance consisted of approximately eight thousand dollars in life insurance proceeds, a house, a cabin, a trailer, some land and perhaps some cash. The house was sold in 1984 and she received sixteen thousand dollars. The cabin was sold 1987 and she received nine thousand three hundred dollars. The trailer brought her only three hundred dollars in 1996 or 1997 and the land brought her one thousand three hundred twenty dollars at some undisclosed time.

The trial court placed values on assets as to which the parties were unable to agree concerning values. Based on those values it divided assets and liabilities in a manner which awarded Patricia approximately sixteen thousand dollars more in net assets than was awarded to Ronald. In doing so it noted that Patricia's inheritance from her father would normally be considered her own, but found that she had spent a significant portion of the inheritance and had also incurred substantial unsecured debt, all without input from Ronald. These findings are supported by substantial evidence. The trial court concluded that the under circumstances it would be inequitable to award her more of the net assets to reimburse her further for her inheritance.

Patricia claims the trial court erred in the values it placed on certain assets. We have reviewed the record presented on appeal. Although Patricia's evidence would

support somewhat different values for a small number of assets, Ronald's evidence supports the values used by the trial court. Within the realm of the evidence the trial court is at liberty to accept or reject any or all opinion evidence as to the value of property in the dissolution action. *Schantz v. Schantz*, 163 N.W.2d 398, 404 (Iowa 1968). Where the values found by the trial court are well within the permissible range of the evidence, we are not inclined to disturb them. *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973); *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994); *In re Marriage of Versluis*, 521 N.W.2d 760, 761 (Iowa App. 1994). We affirm the trial court on this issue.

Patricia separately complains that the trial court did not order Ronald to pay twenty-four thousand six hundred fifty-five dollars to her over time with interest. Under the trial court's ruling she is to receive the parties' home, subject to the debt on it. The twenty-four thousand six hundred fifty-five dollars represents that part of the debt on the home which is attributable to the purchase of Ronald's semi-trailer and certain repairs, maintenance and parts for his semi-tractor.

Adjudicating property rights in a dissolution action inextricably involves a division between the parties of both their marital assets and liabilities. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). The allocation of marital debts between the parties is as integral part of the property as is the apportionment of marital assets. *Id.* The allocation of marital debts therefore inheres in the property division. *Id.*; *In re Marriage Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1996). We therefore conclude that trial court error may not be based on the allocation of one debt

or part of a debt considered in isolation. Rather, the trial court's allocation of debts, including any particular debt, must be reviewed only in the context of the trial court's overall disposition of assets and debts. We consider the trial court's adjudication of property rights below.

Patricia contends the trial court erred in its property division by not awarding her the inheritance she received, or more of it. Approximately twenty-two thousand dollars of her inheritance had gone into the parties' home, some five thousand dollars went into an automobile, and the rest was spent for smaller purchases and payments of debt.

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division ... except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage. The Code of Iowa, section 598.21(2). The requirement to set aside to a party the property which has thus been inherited or received as a gift is thus not absolute, and division may nevertheless occur to avoid injustice. -*Id.*; *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Factors which might bear on a claim that property should be divided 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 designee. *Id.* Other matters, such as the length of the marriage or the length of time the property was held after it was devised or given may indirectly bear on the question for their effect on these factors, and still others might tend to negative or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception. *Id.*

The manner in which a married couple titles or holds inherited or gifted property is not a controlling factor in assessing its treatment as a gift or inheritance under section 598.21(2). *In re Marriage of Fall*, 593 N.W.2d 164, 167 (Iowa App. 1999); *In re Marriage of Wertz*, 492 N.W.2d 711, 714 (Iowa App. 1992). In determining whether inherited or gifted property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the property. *Id.*; *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa App. 1996). The length of the marriage is an important factor in considering whether inherited or gifted property should be divided. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989); *In re Marriage of Oler*, 451 N.W.2d 9, 11 (Iowa App. 1989). Ordinarily, if a marriage lasts a very short time, the claim of either party to the property inherited by the other during the brief duration of the marriage is minimal at best. *In re Marriage Liebich*, 547 N.W.2d 844, 850 (Iowa App. 1996).

A justified property division is one that is equitable under the circumstances. *In re Marriage of Stewart*, 356 N.W.2d 611, 612 (Iowa App. 1984).

The parties had been married some twenty-eight years at the time of their 1997 separation. Patricia received almost all of her inheritance in 1984 and 1987, more than ten years before the parties' separation and the following dissolution of their marriage. She spent the very great majority of her inheritance on the parties' home and an automobile, both of which were available to Ronald and were used and enjoyed by him as well as by her. Upon dissolution of the parties' marriage their assets exceeded their liabilities by only approximately three thousand dollars. It thus appears that Patricia's inheritance had by then in whole or in large part been consumed or dissipated. She had managed the parties' finances, spent a significant portion of her inheritance without input from Ronald, and had incurred substantial unsecured debt without input from him. The trial court awarded her some nine thousand five hundred dollars more in assets than the debts it assigned to her, and assigned Ronald some six thousand five hundred dollars more in debt than the assets it awarded to him. Under the facts we find that it would be inequitable to Ronald to award Patricia more of the net assets. We further find that the trial court's property division was equitable.

Patricia contends the trial court erred by failing to award her rehabilitative alimony. She was not employed outside the home from 1983 to 1997, a period of time which she worked as bookkeeper for Ronald's trucking business. She now earns only four thousand five hundred dollars per year in her present part-time employment as a bookkeeper. She has looked for other employment. However, she has limited her job searches to other bookkeeping positions and has not investigated or pursued

any other employment opportunities. With her high school diploma and years of work experience it would appear highly likely that in today's economy she could secure full-time minimum wage employment or its equivalent in part-time positions. If she were to do so she would have gross income of approximately eleven thousand dollars per year. It thus appears she has the capacity to earn that amount.

Ronald has a high school diploma. His only employment since 1983, and for some undisclosed time before then, has been as a truck driver. His pre-tax income from trucking has averaged just less than twelve thousand dollars per year for the last three years.

Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following dissolution of marriage, thereby creating incentive and opportunity for that spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). Factors for the court's consideration in determining whether or not an order for spousal support is appropriate and, if so, the amount and duration of an award, are set forth in section 598.21(3) of the Code of Iowa. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Any form of alimony is discretionary with the court. *Id.* The trial court is vested with some discretion in considering the ability to pay. *Mitvalsky v. Mitvalsky*, 191 Iowa 8, 10, 179 N.W. 520, 521 (1920). We consider the division of property in determining alimony. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa App. 1998).

The twenty-eight-year length of the parties' marriage would support an award of rehabilitative alimony if other relevant facts did also. However, the parties are both in good health, have the same levels of education and appear to have approximately equal earning capacities. The trial court found that Ronald's "actual earnings would not cash flow alimony payments due to the heavy debt load on his business assets and the differential in value of the assets divided by the court." This finding is supported by the evidence. The trial court did not abuse its limited discretion in determining that Ronald did not have the ability to pay rehabilitative alimony, and did not abuse its discretion or fail to do equity by declining to order it.

Patricia complains that the trial court did not award her trial attorney fees. Trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn an award the complaining party must show that the trial court abused its discretion. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). Awards of attorney fees must be for fair and reasonable amounts, and based on the parties' respective abilities to pay. *Id.* An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Id.* We are to consider the needs of the party making the request and the ability of the other party to pay. *Id.*

The trial court noted Ronald's limited income and inability to "cash flow" rehabilitative alimony payments. It awarded Patricia somewhat more than one-half of the parties' property. The parties appear to have relatively equal earning capacities. Although Patricia had a need for an award of trial attorney fees, Ronald had very little

ability to pay. The trial court did not abuse its discretion in ordering that each party pay their own attorney fees.

Patricia requests appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). In determining this question, we 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. Although Patricia needs an award of attorney fees, Ronald has very limited ability to pay. Patricia challenged the trial court's decision, rather than being obligated to defend it, and has been unsuccessful in doing so. We decline to award appellate attorney fees.

AFFIRMED.