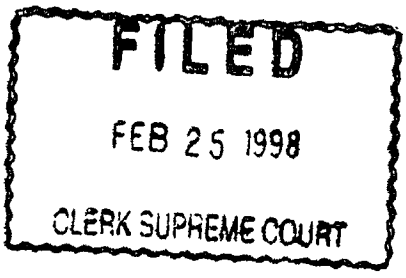
IN THE COURT OF APPEALS OF IOWA



No. 7-732 / 96-1504

000181

IN RE THE MARRIAGE OF MARK W. JORGENSEN AND KATHY JORGENSEN

Upon the Petition of
MARK W. JORGENSEN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KATHY JORGENSEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Audubon County, James S. Heckerman, Judge.

Kathy Jorgensen appeals from the economic portions of a dissolution of marriage decree. Mark Jorgensen cross appeals. **AFFIRMED AS MODIFIED.**

Dorothy K. Goodman of Barnhill & Goodman P.C., West Des Moines, for appellant.

Julie A. Greteman and Gregory J. Siemann of Green and Siemann, Carroll, for appellee.

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

VOGEL, J.

Respondent, Kathy Jorgensen, argues she should have been awarded a more equitable share of the marital assets, her alimony award should not be reduced after seven years, there should be no cap on Petitioner, Mark Jorgensen's, obligation to pay medical expenses not covered by insurance, and she should be awarded trial and appellate attorney fees. In his cross-appeal, Mark claims Kathy should receive a smaller property settlement and less alimony.

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).

I. 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. *Brainard*, 523 N.W.2d at 616. 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).

Mark and Kathy were married in 1980. At the time of trial Mark was 38 years old and Kathy was 37. They have four children, Brian, born in 1982, Holly, born in 1985, Shane, born in 1987, and Anne, born in 1988. Brian is handicapped and resides with his maternal grandparents. The district court ordered Mark to pay $410 per month in child support.

Mark was awarded all of the farms and Kathy was awarded a cash property settlement. Mark argues he should receive a greater portion of the marital assets as he was the sole reason the parties assets increased during the fifteen-year marriage and Kathy did not contribute to the parties accumulation of assets.

We must 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. Mark was ordered to pay all farm-

related debt although the district court made no finding as to how much debt existed. The court also made no findings as to the value of any gifts or assistance Mark may have received from his family over the years.

Kathy is disabled by a loss of peripheral vision and the loss of the majority of her hearing in both ears. She testified and Mark stipulated Kathy is currently unable to work outside of the home. During the marriage, Kathy did not work outside the home but maintains she made a substantial contribution as a wife and mother. She assisted with the farm work to the extent she was able. Kathy receives Social Security benefits each month in the amount of $400, in addition to Medicare benefits. She came into the marriage with no significant assets. Mark brought assets totaling approximately $70,000 into the marriage.

On our de novo review, we find Mark received three farms, and other assets along with farm debt for a net distribution of approximately $778,000. Although Mark claims he should be given credit for gifts from his family totaling $180,000, we find his family's assistance was more in the form of temporary shifting of assets, or shared farming operations, which varied from year to year, rather than outright gifts. One example of this was an 80 acre farm deeded to Mark several years ago to skirt a CRP payment limitation. Sometime prior to the filing of this action, Mark deeded the farm back to his father.

Kathy received her vehicle and other personal property along with a cash settlement of $100,000 for a net property distribution of approximately $126,000. We find the discrepancy between the two net property awards to be unjustified in the record. We therefore modify to order Mark to pay an additional $100,000 to Kathy, payable in $10,000 installments, for ten years. The first payment will be due January 2, 1999 with each subsequent payment due on January 2 of the following year. The additional sums due Kathy will bear no interest, unless delinquent, and then at the rate of 7% per annum. The entire unpaid balance shall be due and payable if any installment is delinquent by ten or more days.

II. Alimony. The decree required Mark to pay Kathy permanent alimony in the amount of $1065 per month for seven years. Thereafter, the district court reduced the obligation to $250 per month to continue until Kathy's remarriage or death.

We consider property awards and alimony together in evaluating their individual sufficiency. *In re Marriage of Hardy*, 539 N.W.2d 729, 732 (Iowa App. 1995). Based on the record, and our modification of the property award, we affirm the amount and duration of the alimony set by the district court.

III. Health insurance. The district court ordered Mark to maintain medical and hospital insurance covering the minor children. He was also ordered to pay "50% of all non-covered medical, dental, optometric, and orthodontic expenses up to a maximum of $750 per calendar year." We find the district court, in placing a cap on

the non-covered medical expenses, has unfairly burdened Kathy to bear potential medical expenses disproportionate to Mark. We accordingly modify the district court's order by removing this $750 per year limitation.

IV. Attorney fees. Kathy requests both trial court and appellate court 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 find Kathy is not entitled to trial attorney fees, but award her $1000 for attorney fees on appeal.

Having carefully considered all issues before us on appeal, we increase Kathy's property award by $100,000, affirm the alimony award, and lift the restriction on the uncovered medical expenses. Costs on appeal are taxed to Mark.

AFFIRMED AS MODIFIED.

Vogel, J., concurs; Cady, C.J., and Sackett, J., concur in part and dissent in part.

CADY, C.J. (concurring in part and dissenting in part)

I concur with the majority except in the award of alimony. Kathy is disabled and unable to work outside the home. She was 37 years old at the time of trial. Before she reaches 45 years of age, her monthly alimony will be reduced from $1065 to $250. I cannot find any justification for such a reduction.

SACKETT, J. (concurring in part; dissenting in part)

I concur with the result reached by the majority, except I would affirm the trial court's decision.

The economic provisions, when considered in their entirety, are adequate. The alimony award is substantial given Mark's modest annual income. However, paying alimony rather than a property settlement gives Mark a tax advantage.