IN THE COURT OF APPEALS OF IOWA

No. 7-368 / 96-1421

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IN RE THE MARRIAGE OF KATHY JO BUMGARNER AND CRAIG CAROLL BUMGARNER

FILED
NOV 25 1997
CLERK SUPREME COURT

Upon the Petition of
KATHY JO BUMGARNER,
Appellant,

And Concerning
CRAIG CARROLL BUMGARNER,
Appellee.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

The petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Stephen M. Terrill of Terrill & Hege Law Offices, Ames, for appellant.

Brenda K. O'Neill of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellee.

Heard by Cady, C.J., and Huitink and Streit, JJ.

CADY, C.J.

Kathy Bumgarner appeals the property distribution, alimony, and child support provisions of the district court's dissolution decree. She also appeals the district court's attorney fee findings and requests appellate attorney fees. She claims the district court erred in its distribution of property, determination of alimony, calculation of child support, and determination of attorney fees. Craig Bumgarner cross-appeals claiming the trial court erred in distributing the parties' estate due to an overvaluation of the parties' corporation and in failing to set off two inheritances to him. We affirm as modified.

Kathy and Craig Bumgarner divorced in May 1996, after over twenty years of marriage. They have two children, Brett, born August 15, 1979, and Brant, born November 21, 1986.

Kathy graduated from high school, earned a one-year registered dental technician degree, and attended design courses at Iowa State University. Currently, she works full time for a furniture store, earning a base salary and bonuses. Her gross annual income is $29,688, including bonuses.

Craig also graduated from high school. He attended classes at Iowa State for approximately two years. Craig worked full time at UPS for eighteen years. Both parties worked together on a part-time photography business during the marriage. Later, Craig terminated his full-time employment with UPS and began working full-time on the photography business. Craig and Kathy eventually built a successful photography business.

At the time of trial, Craig was a fifty-one percent shareholder in the photography business and Kathy held forty-nine percent. Craig earned $39,000 in gross income from the business. Additionally, the business realized $33,420 in corporate profits and $27,900 in gross rental income.

During the marriage, the parties received two inheritances. Craig's father left Kathy approximately $60,000. This money, however, was actually intended for Craig. Craig's father named Kathy beneficiary to prevent Craig's creditors from obtaining the funds. Kathy gave the money to Craig and he used most of it for improvements to the photography business. Craig also received a $20,000 inheritance from his mother. This money was used to purchase photography equipment and to make a down payment on the family home.

The trial court determined Kathy's net monthly income as $2288.70. The court awarded her assets in the amount of $207,102, including the homestead valued at $183,000. Her total liabilities equaled $111,077, including a $100,000 mortgage on the family home. Kathy received a net award of $96,025 which is thirty-six percent of the net marital property.

The court determined Craig's monthly income as $4604.47. The trial court awarded him assets in the amount of $330,065, including the photography business and the building, worth $308,000. Craig's total liabilities equaled $162,621. Craig received a net award of $167,444 or sixty-four percent of the net marital property.

The district court awarded joint custody of the children with primary physical care to Kathy and ordered Craig to pay $1248 in child support per month. The trial

court also required Kathy to maintain health insurance for the children at a cost of $80 per month. Craig was ordered to pay alimony of $300 per month for thirty-six months. Additionally, the court ordered Craig to pay $2500 in attorney fees for Kathy.

On appeal Kathy claims the district court erred in failing to award her an equitable distribution of property, failing to award adequate alimony, miscalculating child support, failing to award her a vehicle, and failing to award reasonable attorney fees. Craig cross-appeals claiming the district court erred in overvaluing the corporation and in failing to set off the inheritances.

I. Standard of Review

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Property Distribution

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). We do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98.

Instead, each particular circumstance determines what is fair and equitable. *Id.* We consider all relevant criteria codified in Iowa Code section 598.21(1) (1995). *Id.* We also evaluate property distribution and alimony together to determine their sufficiency. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa App. 1996); *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App.1987).

Kathy asserts the district court erroneously calculated the property distribution by awarding Craig nearly two-thirds of the marital property while she received slightly over one-third. She claims the court failed to consider the duration of the marriage, her contributions to the marriage, and the income-producing value of the property Craig received.

In this case, neither of the parties brought significant assets to the marriage. Additionally, both worked hard to build a successful photography business. While both Kathy and Craig contributed significantly to the marriage, Kathy was only awarded approximately one-third of the assets. Moreover, Kathy's job will provide her a relatively fixed income with limited growth potential. Conversely, Craig received a substantial income-producing business which Kathy helped establish. In light of her contributions to the marriage and the nature of property awarded to Craig, we find a more equitable distribution will result by awarding Kathy an additional $15,000. This sum shall be paid in five annual payments of $3000, commencing thirty days after the issuance of procedendo and continuing on the same date thereafter for the next four years. The unpaid balance shall accumulate interest at five percent, which shall be paid annually with each payment. In the event any annual

payment, plus interest, is not timely paid, the entire balance shall become due and payable. Although Craig still receives more property than Kathy, we believe the difference is justified by the inheritance Craig received from his mother during the marriage and the alimony we award to Kathy.

Kathy also asserts the district court erred in failing to award her a vehicle or providing her the means to acquire a vehicle. Our modification of the property distribution and alimony provisions of the decree result in an equitable distribution of property. We decline to make a specific award of a vehicle to Kathy.

III. Valuation of Photography Business

We value property for division purposes at its value at the time of the dissolution. *See In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994). It is the net worth of the parties at the time of trial which is relevant in adjusting property rights. *Id.*; *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989).

The purpose of determining value is to assist the court in making equitable property awards. *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa App. 1991). The valuation of a closely held corporation is frequently difficult. *See id.; In re Marriage of Wiedemann*, 402 N.W.2d 744, 747-49 (Iowa 1987). Consequently, the law gives leeway to the trial court, and even allows the trial court to devise its own scheme for valuation. *Dennis*, 467 N.W.2d at 808.

Craig claims the district court erred in valuing the photography business at $140,000. He asserts the correct value of the business at the time of trial was $120,000.

The parties agreed to retain an appraiser to value the business. The appraiser valued the business as of December 31, 1995, rather than closer to the trial date of March 28, 1996. Craig maintains the photography business is cyclical. In particular, the cash on hand in December is considerably more than other times of the year and is used to help carry the business to the Spring. Thus, he asserts it was unfair to value the business at the peak season when the cash reserves were high.

The photography business should have been valued closer to the time of trial, or at a time when the cash on hand would reflect an annual average. *See McLaughlin*, 526 N.W.2d at 344. Testimony from the appraiser and both parties confirmed the business was more active at the end of the year than in the first quarter. Consequently, we find the district court erred in valuing the business at $140,000. In considering the relationship between the changing volume of business and the time of year involved, we value Craig Carroll Photography, Inc. at $130,000, instead of the trial court's valuation of $140,000. This valuation reduces the amount of assets Craig received by $10,000, and reduces his net assets to $142,444. We find this valuation results in a more equitable distribution of property.

IV. Inheritances

Iowa Code section 598.21(1) provides, "[t]he court shall divide all property, except inherited property or gifts received by one party, equitably between the parties

. . . ." This provision, however, does not establish an absolute set aside requirement. Instead, we look to a variety of factors in determining whether to set aside an inheritance of gift. *See* Iowa Code § 598.21(1). In determining whether inherited property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the inheritance or gift. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa App. 1996); *In re Wertz*, 492 N.W.2d 711, 714 (Iowa App.1992). Placing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property. *Liebich*, 547 N.W.2d at 850.

Inherited property may be divided as marital property where nondivision would be unjust. *Id.* Factors to consider in determining whether inherited 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; and (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. *Id.*; *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Iowa Code section 598.21(1) sets out additional factors to consider in a property distribution. Further, 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. *Liebich*, 547 N.W.2d at 850.

Craig asserts the district court erred in failing to set aside a $20,000 inheritance from his mother and a $60,000 inheritance from his father. Craig asked his father to change his will to name Kathy as a beneficiary to avoid creditors. Craig put most of the $60,000 into the photography business. The trial court found his father indicated he wanted the money to be used for the children's education or for family purposes. We find it significant that Craig's father expressly named Kathy as the beneficiary. *See In re Trust of Cross,* 551 N.W.2d 344, 346 (Iowa App. 1996) (testator's intent is determined by the language used in the will, the scheme of distribution, the circumstance's surrounding the will's execution, and the existing facts). We agree with the district court the money was intended for family purposes and decline to set aside the inheritance to either party.

Craig also inherited approximately $20,000 from his mother. In this case, the testator's intent was clearly to leave an inheritance to Craig, rather than for family purposes. After considering the factors enumerated in Iowa Code section 598.21, we do not find it would be unfair to set aside the inheritance for Craig. We therefore set aside the $20;000 inheritance Craig received from his mother. After setting aside $20,000 for Craig, his assets are reduced to $122,444. Kathy receives net assets of $111,025.

V. Alimony

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Gonzalez,* 561 N.W.2d 94, 99 (Iowa App. 1997). When determining the appropriateness of alimony, we consider: (1) the

earning capacity of each party; and (2) present standards of living and ability to pay balanced against the relative needs of the other. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa App. 1997); *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *Gonzalez*, 561 N.W.2d at 99. Many factors are considered in determining the appropriate amount of alimony to be awarded to a spouse. *In re Marriage of Siglin*, 555 N.W.2d 846, 850 (Iowa App. 1996); Iowa Code § 598.21(3) (1995). Alimony may be used to remedy the inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great. *Gonzalez*, 561 N.W.2d at 99; *Geil*, 509 N.W.2d at 742 We also consider the division of property in determining alimony. *Siglin*, 555 N.W.2d at 850.

Kathy asserts the district court erred in awarding her only $300 in alimony. Craig has received a greater percentage of the marital property and received the income producing asset both parties worked to establish even after the modification of property distribution. Kathy's job also lacks the income-producing potential of the photography business. In consideration of the property division already established, we modify Kathy's monthly alimony to $500 per month for a period of six years.

VI. Child Support

The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994); *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 464 (Iowa App. 1995). The scheduled amount, however, is not unassailable, but may be increased or decreased if the court finds it is necessary to provide for the needs of the children or do justice between the parties under the special circumstances of the case. *State ex rel. Miles*, 540 N.W.2d at 464. *See* Iowa Code § 598.21(4)(a).

In applying the child support guidelines, we must determine the parents' current monthly income from the most reliable evidence presented. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). This often requires us to consider all of the circumstances relating to the parties' income. *Id.* All income that is not anomalous, uncertain, or speculative should be included in determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). Deduction of alimony payments from monthly income for purposes of computation of child support is within the discretion of the court. *Id.* at 892.

The thrust of Kathy's argument is the trial court failed to consider the depreciation allowance of $15,892 used by the business in calculating Craig's income. The amount of depreciation to consider in determining income available for child support depends on the circumstances of each case. *In re Marriage of Gaer*, 476 N.W.2d 324, 328-29 (Iowa 1991). In this case, we find no evidence the depreciation allowance was not a legitimate cost of operating a business. We agree with the net

income determined by the trial court, and the amount of child support set by the trial court.

VII. Attorney Fees

We have considerable discretion in awarding attorney fees. *Gonzalez*, 561 N.W.2d at 99. To overturn an award of attorney fees, the complainant must show the trial court abused its discretion. *Id.* We find the trial court did not abuse its discretion in awarding attorney fees and we decline to disturb the trial court's findings.

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *Kurtt*, 561 N.W.2d at 389. In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.*

Considering Kathy's need and both parties' ability to pay, we find Craig should contribute $1500 for Kathy's appellate attorney fees.

VIII. Conclusion

We have considered all the arguments raised by the parties. We affirm the decree of the district court except as modified by this opinion. We modify the property award to require Craig to pay Kathy a lump-sum amount of $15,000 over a period of five years as provided by this opinion. We further modify the decree to

increase Kathy's alimony to $500 per month for six years. We otherwise affirm the district court and award Kathy appellate attorney fees of $1500.

AFFIRMED AS MODIFIED.