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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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IN RE THE MARRIAGE OF BEVERLY F. MARTIN AND DEAN MARTIN

Upon the Petition of)

BEVERLY F. MARTIN,)

Petitioner-Appellant/ Cross-Appellee,)

And Concerning)

DEAN MARTIN,)

Respondent-Appellee/ Cross-Appellant.)

Filed December 26, 1984

4-436
84-316

Appeal from the Iowa District Court for Bremer County - Ray E. Clough, Judge.

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

Gary J. Boveia of Boveia Law Offices, Waverly, for petitioner-appellant/cross-appellee.

Terry Diane Parsons of Olsen & Parsons, Cedar Falls, for respondent-appellee/cross-appellant.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Petitioner-wife appeals and respondent-husband cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner-wife asserts: (1) that the trial court should have set aside to her the inheritance she received during the marriage; and (2) that the child support award was inadequate. She also requests attorney fees on appeal. On cross-appeal, respondent-husband asserts that the trial court should have provided for joint custody of the parties' children with petitioner-wife having physical care.

Beverly F. Martin and Dean Martin were married in 1966. They have two children: Wendy, born in 1972, and Christin, born in 1977. Dean is employed by the family's foundry business; he has a net income of $1,451 per month. Beverly is employed by a subsidiary of the foundry business; she earns $261 a month. Each party received an inheritance during the marriage: Dean's was approximately $13,000 and Beverly's was approximately $46,000. The parties' main assets are their house and their interests in several businesses, including the foundry.

The trial court awarded Beverly sole custody of the parties' two children. Dean was directed to pay child support of $200 per month per child and alimony of $200 per month.

In making the property division, the court did not set off to either party his or her inheritance. It stated that the inheritances had been invested in the parties' businesses and house, and that the investments had been affected by inflation. Beverly was awarded the parties' house and household goods, the parties' car, her personal possessions and those of the children, her life insurance policies and those of the children, a $1,400 bank account, and the parties' interest in High Hopes Investments and A & M House. The court awarded Dean his personal possessions and life insurance policies; his bank and IRA accounts; the parties' interests in Heritage Real Estate, M & W Aviation, Martin Leasing, and Dawson Foundry; and the parties' stock in A T & T, I.P.S., Clarksville Country

Club, Clarksville Nursing Home, and Clarksville Improvement Company. The trial court directed Dean to pay the mortgage on the parties' house. Beverly has appealed from the decree and Dean has cross-appealed. We affirm as modified.

I.

Beverly's first contention is that the trial court erred in failing to set aside her inheritance when dividing the property. Iowa Code section 598.21 specifies the criteria to be considered by the trial court in dividing property. One provision of this statute addresses the treatment of inherited property. Such property is not subject to division "except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." Iowa Code § 598.21(2) (1983). In In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982), the supreme court set forth factors that would bear on whether inherited property should be divided under this statutory exception:

> (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 devisee.

The court also indicated that other factors such as the length of the marriage or length of time the property was held may bear indirectly on the question. Id.

Upon consideration of these factors, we conclude that it was proper for the trial court to divide the inherited property. A decision to the contrary would only result in inequity. Both parties inherited property which has been commingled with the marital assets. As the trial court indicated, it is apparent that an award

of inheritances to the respective parties can only be made from assets presently owned, none of which are readily subject to liquidation.

Beverly claims her inheritance permitted the purchase of a controlling interest in Dawson Foundry, Inc. and that she should not be penalized for "having assisted her husband undertaking a successful business venture." We do not believe that the lower court's division of the property has "penalized" Beverly in this respect. Even assuming the inherited property can be traced to the purchase of stock, we cannot ignore the fact that David made contributions to the business. Furthermore, both parties benefited from the investment. Essentially, we agree with the trial court's determination that an equitable property division requires that the inheritances of the respective parties not be set aside.

II.

Beverly also argues that the award of child support is inadequate. She asserts that the needs of the children require the increase and that Dean has the ability to pay.

In considering Beverly's claim, we examine the facts of this case in light of the factors listed in Iowa Code section 598.21(4). Both parties to the marriage have an obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each person to contribute. In re Marriage of Heinemann, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981).

Our examination of the record convinces us that the child support obligation is adequate. Dean has a net income of $1,451 per month. Pursuant to the decree, he is required to pay $600 per month in support and alimony. We see no reason to increase this support obligation. Beverly has skills and experience as a laborer and clerical worker. We recognize that she has been a homemaker for several years and that her work experience is somewhat limited. Yet we are confident that in time Beverly can secure suitable employment and contribute to the support of her

children. Contrary to Beverly's assertions, we do not believe the child support obligation imposed is so limited that the children will not enjoy the same standard of living that existed prior to the dissolution. We therefore affirm the child support obligation set forth in the decree.

III.

On cross-appeal, Dean asserts that the trial court should have awarded joint custody of the children. He does not request physical custody. The legislature recently amended Iowa Code section 598.41(2), which now provides in part:

> If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence . . . that joint custody is unreasonable and not in the best interest of the child to the extent that the joint custodial relationship between the child and the parent should be severed.

Iowa Code § 598.41(2); 1984 Iowa Legis. Serv. No. 3 at 43 (West). This provision expresses a clear preference for joint custody over other custody arrangements. In light of this statutory preference, we believe joint custody is appropriate in this case. The record does not contain clear and convincing evidence that joint custody would be unreasonable under the circumstances. Both parties indicate that they have been able to communicate about the children since their separation. Furthermore, Dean has continued to have regular contact with the children. Accordingly, we modify the decree to provide for a joint custody arrangement with Beverly having physical custody of the children.

IV.

Beverly has requested attorney fees on appeal. Evaluating the request in light of the factors set forth in In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa 1981), we conclude that an award of attorney fees would be inappropriate.

AFFIRMED AS MODIFIED.