

IN THE COURT OF APPEALS OF IOWA

No. 7-267 / 96-0529

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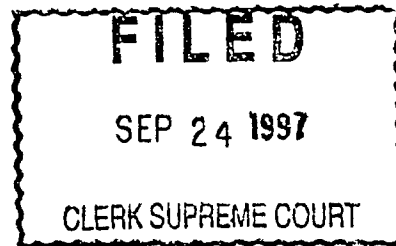
**IN RE THE MARRIAGE OF MARJORIE J. BODENSTEINER
AND THOMAS W. BODENSTEINER**

**Upon the Petition of
MARJORIE J. BODENSTEINER,**

Petitioner-Appellant/Cross-Appellee,

**And Concerning
THOMAS W. BODENSTEINER,**

Respondent-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey,
Judge.

Petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Stacey N. Warren and Brent A. Cashatt of Smith, Schneider, Stiles, Hudson,
Serangel, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellant.

C. Bradley Price of De Vries, Price & Davenport, Mason City, for appellee.

Heard by Sackett, Streit, and Habhab*, JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SACKETT, J.

Petitioner-appellant Marjorie J. Bodensteiner appeals and respondent-appellee Thomas W. Bodensteiner cross-appeals from various economic provisions of the parties' dissolution decree. Marjorie contends the district court (1) should have set aside to her accumulations from assets she inherited or owned prior to the marriage; (2) should not have considered debts she contends were incurred by Thomas after the parties separated in dividing property; and (3) should have awarded her alimony. Marjorie asks for appellate attorney fees. On cross-appeal, Thomas contends (1) the district court inflated the value of property inherited by Marjorie or owned by her prior to the marriage; and (2) Marjorie should be held responsible for additional debt. We affirm on both appeals.

Thomas and Marjorie were married in June 1973. Marjorie had three children from a previous marriage born in December 1960, October 1963, and July 1966. At the time of trial, Marjorie was fifty-seven years of age, a high school graduate, and in good health. Thomas was forty-seven years of age at the time of trial. Marjorie's first husband died in 1972 and she received a substantial inheritance. This property followed her into the marriage.

During the marriage, Marjorie was not employed outside the home. She received social security benefits for the children and contributed this money, in addition to some earnings from her property, to the family household. Thomas was at all times employed outside the home. He contributed his earnings to the household.

The trial court divided assets and debt acquired during the marriage nearly equally. The trial court further set off to Marjorie annuities she had at the time of the marriage. The result of this division was Marjorie received \$477,797 and no debt, and Thomas received \$491,473 and was required to pay debts of \$173,000.

The trial court found the major problem to be whether Thomas should receive a portion of the appreciation on property Marjorie inherited and then brought into the marriage. The trial court considered evidence Thomas advised Marjorie on investing her money, this was a twenty-two year marriage, and in 1980 Thomas and Marjorie agreed to use Thomas's earnings for household expenses and allow Marjorie's annuities inherited and brought into the marriage to appreciate. Weighing this evidence, the trial court found it would not be equitable to set the entire appreciation aside to Marjorie.

On appeal, Marjorie challenges the trial court's decision on the appreciation. Marjorie contends all this property should be considered inherited property and set aside to her. Thomas contends Marjorie's property should be treated as property she brought into the marriage, not inherited property.

At the time Marjorie entered the marriage, her interests in the property she had inherited were vested. Therefore, the question appears to be one of whether the appreciation on property she brought into the marriage should be set aside to her. However, the factors present in this case make the division of the appreciation

equitable whether the property is considered to have been brought into the marriage or inherited.

Generally, property inherited by one spouse is set aside to that spouse in dividing property in a dissolution. *See* Iowa Code § 598.21(2); *In re Marriage of Thomas*, 319 N.W.2d 209, 210 (Iowa 1982). This rule is not ironclad and division of the property can occur to avoid an injustice. *Id.* In making an equitable division of property, the court should consider property brought to the marriage. Iowa Code § 598.21(b). There is support for dividing appreciation on inherited or gifted property and/or property brought to the marriage. *See In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995); *In re Marriage of Friedman*, 466 N.W.2d 689, 693 (Iowa 1991); *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989).

We consider the factors weighed by the trial court, particularly the finding of an agreement to spend Thomas's earnings and save accumulation on the annuities for retirement. If inherited property has been invested by family decision, the division of appreciation is equitable under certain circumstances. *See White*, 537 N.W.2d 746. Additionally, we consider the fact Thomas's earnings paid substantial portions of expenses for Marjorie's children, including college tuition and expenses, purchasing cars, medical and treatment costs, and down payments on houses. The property division made by the trial court is equitable in all respects and is affirmed.

Marjorie contends she was charged with debts Thomas incurred after their separation. The debt of which she complains included debts from the marriage. We find no reason to modify the trial court's decision on this issue.

Marjorie contends she should receive alimony of \$2000 a month until she reaches age 65. Marjorie is healthy. She has made no effort to find employment. She is a high school graduate but has little work experience. We recognize her employment opportunities are limited.

Thomas argues Marjorie has substantial income and no debt and this is not a case for alimony.

In awarding alimony, we look at the circumstance of each case to determine what is equitable under the circumstances. *In re Marriage of Bethke*, 484 N.W.2d 604, 609 (Iowa App. 1992). We look to Marjorie's needs and Thomas's ability to pay. *See In re Marriage of Imhoff*, 461 N.W.2d 343, 345 (Iowa App. 1990). There is not a substantial disparity in the annual incomes of Marjorie and Thomas. We consider, too, the property division leaves Marjorie with a greater net worth than Thomas enjoys. We affirm the trial court's decision not to award alimony.

Thomas on cross-appeal challenges the values placed on certain assets and contends Marjorie should pay additional debt. We find the values to be within a permissible range. We have considered the property division equitable. We affirm on this issue.

Marjorie contends she should have attorney fees on appeal. Attorney fees are not recoverable as a matter of right but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *In re Marriage of Orgren*, 375 N.W.2d 710, 714 (Iowa App. 1985); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Any award of attorney fees depends on the financial circumstances and earnings of each party. *In re Marriage of Burham*, 283 N.W.2d 269, 278 (Iowa 1979). Considerable discretion is assigned to the trial court in the allowance of attorney fees. *Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978).

Marjorie was not successful in her appeal. She leaves the marriage with substantial assets. There is no basis to award her attorney fees.

AFFIRMED.