

IN THE COURT OF APPEALS OF IOWA.

No. 6-758 / 95-1423

IN RE THE MARRIAGE OF MARILYN J.
LOEBACH AND MARVIN E. LOEBACH

Upon the Petition of
MARILYN J. LOEBACH,

Petitioner-Appellee/Cross-Appellant,

And Concerning
MARVIN E. LOEBACH,

Respondent-Appellant/Cross-Appellee.

000242

Appeal from the Iowa District Court for Emmet County, Charles H. Barlow,
Judge.

Marvin Loebach appeals from various economic provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED and REMANDED.**

Edward W. Bjornstad of the Bjornstad Law Office, Spirit Lake, for appellant.

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellee.

Considered by Habhab, C.J., and Streit and Vogel, JJ. Sackett, J., takes no
part.

STREIT, J.

Respondent appeals from various economic provisions of the parties' dissolution decree. He contends the district court erred in failing to divide 320 acres of farmland inherited by the petitioner during the marriage. He also claims the district court should have considered the tax consequences of the fifty percent pension distributions from the parties' pension and IPERS funds.

Marvin and Marilyn Loebach were married in 1965. At the time of trial, Marvin was fifty-five years of age and Marilyn was fifty-two. The parties have two children, Chris, age eighteen, and Matthew, age sixteen.

Marvin has been a highway patrolman since 1966. Marvin earns \$2439 per month and is eligible for retirement at age fifty-five.

Marilyn has worked several different jobs during the marriage. She has taught school and judged in police court and magistrate court. In 1985, she obtained employment with the Soil Conservation Service (SCS) as a computer operator. She became a technician in 1987. Her position became part of the federal system. Marilyn's net monthly income from SCS is \$2246.

Marilyn filed a petition for dissolution on April 15, 1994. During trial, Marvin asked the trial judge to recuse himself because Marilyn's attorney had performed legal work for the judge. The judge's recusal was conditioned on Marvin paying the costs

of preparation of the transcript and reimbursing Marilyn for legal fees she incurred as a result of the interrupted proceedings.

After the second part of the trial, the court awarded Marvin a forty-acre tract of land and marital home, valued at \$94,000, subject to a \$61,711 lien. Marvin was awarded custody of Matthew. The court ordered Marilyn to pay \$442 per month in child support. The court declined to award alimony. The court ruled that Marvin and Marilyn were entitled to fifty percent of their respective pension and IPERS funds. Each party received \$99,973.

Marvin appeals. He contends the district court erred in: (1) failing to consider Marilyn's inherited one-half undivided interest in a 320-acre farm when dividing the marital property; (2) failing to consider the tax consequences of the pension distribution from Marvin to Marilyn; and (3) assessing him attorney fees and costs after he requested the first trial judge to recuse himself.

I. Standard 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 witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Division of Property. Marvin contends the district court erred in failing to consider Marilyn's one-half undivided interest in the 320-acre farm she inherited prior to the marriage. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Iowa Code section 598.21(1) (1995) provides "the court shall divide all property *except* inherited property or gifts received by one party, equitably between the parties." (emphasis added). Only where nondivision of inherited property would be unjust will it be divided as marital property. *In re Van Brock*, 468 N.W.2d 40, 44 (Iowa App. 1991).

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; (5) any other matter which would if plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisees.

In re Marriage of Liebich, 547 N.W.2d 844, 850 (Iowa App. 1996) (citing *In re Marriage of Thon*, 319 N.W.2d 209, 211 (Iowa 1982)).

Neither party brought substantial assets into the marriage other than Marilyn's undivided one-half interest in a 320-acre farm which she inherited. Marilyn acquired one-third of this property by inheritance following the death of her father in 1948 and

the rest of the one-half interest was acquired by gift from her mother in 1962. The farm is rented on a cash rental basis. Marilyn receives proceeds from the farm cash rental once all farm expenses are paid. Marilyn's mother has always been responsible for managing the farm. Marvin claims he made significant contributions over the years helping to preserve Marilyn's interest in the 320-acre farmland. He argues that since he signed a note in 1967 encumbering the property, he risked suffering a default. He also notes he withheld \$110 every two weeks from his pay in order to pay income taxes on Marilyn's receipt of farm rental income.¹

In 1967, the farm was mortgaged by Marilyn's mother. The mortgage was signed by Marilyn as a tenant in common. Marvin also signed the mortgage to release his dower rights against the Farm. The mortgage was paid by Marilyn's mother. No note signed by Marvin has been produced where Marvin would incur personal liability. The mortgage has been paid in full since then by Marilyn's mother.

The \$110 withheld from Marvin's paycheck every other week was not used to pay income taxes on Marilyn's farm receipts. Marilyn deposited the proceeds from the farm into a farm account and paid her income tax payments from the account. Marvin and Marilyn had outside income from renting land to accommodate a radio tower located on their own farm acreage, as well as Conservation Reserve Program

¹Marilyn receives yearly payments of between \$14,000 and \$17,000 as her share of the farm rental income.

(CRP) payments and farm income from their acreage in Emmet County. The extra income tax Marvin withheld from his paycheck was used for the most part to pay for the income tax on these items and not for Marilyn's farm income tax liability.

There is no evidence Marvin substantially contributed to the care, preservation, or improvement of the farm other than planting some trees. *Cf. In re Marriage of Geil*, 509 N.W.2d 738, 741 (Iowa 1993) (Appellant devoted substantial time and effort to the farm's production and maintenance and was awarded one-half interest in the property upon dissolution of marriage, even though wife inherited property from her family). There was not an exceptionally close relationship between Marvin and either of Marilyn's parents.

It is not unjust to allow Marilyn to keep her inherited property. Marvin has already benefited from the farm income. Marilyn contributed some towards the down payment of the jointly owned acreage and remodeling and improvements, offsetting any contributions Marvin may have made to preserve Marilyn's interest in the 320-acre farm. We affirm the trial court on the property division.

III. Pensions. Marvin contends the district court erred in failing to take into consideration the tax consequences of the pension distribution. The district court ordered that Marvin and Marilyn were entitled to fifty percent of their respective pensions. Under the district court's order, Marvin pays one-half of the amount he receives to Marilyn. The distribution is included in his gross income and he pays the

income taxes on the entire amount. He argues if his pension were subject to a qualified domestic relations order (QDRO), Marilyn would be responsible for the tax liability on her half of the distribution. He maintains the appellate court should revise the pension formula or adjust the payment amounts from his pension to Marilyn to properly account for his tax liability.

Marvin's Police Officer's Retirement System pension was not subject to a QDRO at the time of trial. In 1996, Iowa Code section 97A.12 was amended to provide for a QDRO with a Police Officer's Retirement account. *See* Iowa Code § 97A.12 (1997).² In *In re Marriage of Kurtt*, __ N.W.2d __, __ (Iowa App. 1996), we recognized a QDRO's "simplicity and fairness is far superior to the percentage approaches."³ We modify the decree and remand this matter for the parties to present an order to the district court providing for a QDRO equal to fifty percent of Marvin's Police Officer Retirement earned or accumulated during the marriage up until the date

²The following language is found in amended section 97A.12:

. . . funds created under this chapter, are not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable *except for the purpose of enforcing child, spousal, or medical support obligations or marital property order*, or as otherwise specifically provided in this chapter.

Iowa Code § 97A.12 (1997) (emphasis added).

³The same situation in this case arose in *Kurt*, where a QDRO dealing with an IPERS pension was not available to the district court at the time of trial, but Iowa Code section 97B.39 (1997) was amended to provide for a QDRO. *Kurt*, __ N.W.2d at __.

of trial.⁴ We further modify the decree and order the parties to present to the district court a QDRO equal to fifty percent of Marilyn's IPERS pension earned or accumulated during the marriage up until the date of trial.⁵

IV. Attorney Fees. Marvin lastly argues the district court erred in ordering him to pay Marilyn's attorney fees and court costs when he requested the first trial judge to recuse himself. He contends his trial counsel was not aware of the conflict of interest between Marilyn's counsel and the original trial judge until the morning of trial. He asserts that to assess him these costs penalizes him for something he has a right to request.

An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn the decision of the trial court, Marvin must establish the trial court abused its discretion. *Id.*

Although the alleged conflict of interest did not arise until the morning of the trial, Marvin could have requested the judge to recuse himself before the trial began. This would have eliminated the costs of the proceedings and transcript. Marvin waited until noon to request for recusal. The trial court found the delay in the request

⁴Although the trial court used the date of separation as a valuation date for determining the amount of pension, the litigants fail to show a stipulation between them for the use of the date of separation, thus, without agreement, we will use the date of trial. See *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994); *In re Marriage of Benson*, 545 N.W.2d 252, 255-60 (Iowa 1996).

⁵The QDROs shall be in a form approved by the Plan Administrator pursuant to Internal Revenue Code section 401(a)(13) and ERISA section 206(d)(3).

cost Marilyn \$1,701 in attorney fees. We find there was no abuse of discretion for requiring the payment of these costs and attorney fees.

AFFIRMED AS MODIFIED and REMANDED.