

IN THE COURT OF APPEALS OF IOWA

No. 5-174 / 94-1121

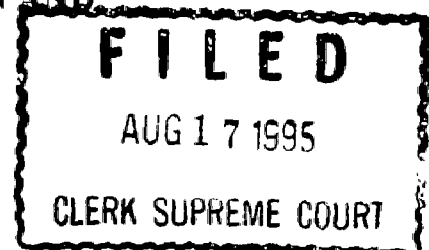
**IN RE THE MARRIAGE OF KENT JOEL McMILLEN AND
LYNAE DIANE McMILLEN**

Upon the Petition of
KENT JOEL McMILLEN,

Petitioner-Appellant,

And Concerning
LYNAE DIANE McMILLEN,

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Gene Needles, Judge.

Kent McMillen appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas J. Levis and Mark R. Schuling of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines. for appellee.

Carmen Janssen and Cheryl Richardson. West Des Moines, for appellee.

Considered by Sackett, P.J., and Habhab. and Cady, JJ.

CADY, J.

Kent McMillen appeals from a decree entered by the district court dissolving his marriage to Lynae McMillan. He objects to the division of property and award of permanent alimony. On our de novo review, we affirm the property division and modify the award of alimony.

Kent and Lynae were married in September 1979. They have four children: Alissa, born July 24, 1983; Emilee, born June 16, 1985; Ilaina, born January 16, 1988; and Orin, born February 21, 1990. At the time of the trial in May 1994, Kent was 37 years of age and Lynae was 36 years of age.

Kent has worked most of his adult life for a business started by his father. The business is known as United Services and principally involves remodeling and repairing damaged buildings. It typically performs the work for insurance companies. In 1991 and 1992, Kent's salary and bonuses totaled \$82,000 per year. In 1991, Kent received a one-third share of the business. He works in the office and is the contact person with insurance companies. His father and brother, Kirk, do the carpentry and remodeling work at the job sites.

Lynae was working as an accountant at the time of the marriage. She has not worked outside the home, except for the family business, since the birth of Alissa. Lynae received a wage from the business for several years. Lynae intends to stay at home until Orin enters grade school in 1996.

Kent and Lynae sold their home in Urbandale prior to their separation. The net proceeds of about \$78,000 were placed in a savings account, and Kent and Lynae began building a five-bedroom home in Waukee. Kent's parents advanced them about \$164,000 to pay down the mortgage on the Urbandale house, purchase the Waukee lot, and start the new house. The Waukee house needs between \$20,000 and \$30,000 in work before it will be completed. Kent and Lynae owe United Services about \$41,000 for work done on the Waukee property.

Kent filed a petition for dissolution of marriage. By agreement, Lynae was awarded primary care of the children. The matter proceeded to trial on the issues of property division and Lynae's request for ten years of alimony.

Kent introduced evidence at trial to show that the stock in the family business was gifted to him by his parents in 1991. Lynae submitted evidence showing Kent began to acquire an ownership interest in the business several years earlier and that the stock was received as a part of his service to the company. The district court rejected Kent's claim that the stock was a gift and concluded, in any event, that it would be inequitable to Lynae to refuse to divide Kent's stock in the family business. The court valued the stock at \$115,000. The court ordered \$30,000 of the Urbandale property proceeds to be used for the parties' attorneys' fees and awarded Lynae the remainder of the proceeds. Lynae was also awarded a car, money accounts, an insurance policy, and household goods in her possession. The district court awarded Kent the Waukee real estate, his stock in the family business, various bank accounts

and investments, and personal property. He was ordered to pay \$2000 per month in child support and \$300 per month in permanent alimony. Kent was to be responsible for the money owed to his parents and the company.

Kent contends on appeal that the district court erred in dividing his shares in the family corporation, and in awarding Lynae permanent alimony. Lynae seeks an award of appellate attorney fees. Kent asks the court to assess Lynae costs for unnecessary and lengthy exhibits placed in the appendix.

I. Standard of Review

Our duty in an appeal from an assignment of error in a dissolution action is to examine the entire record and adjudicate anew the rights of the parties. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight, however, to the findings of the trial court, especially when considering the credibility of witnesses. *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa App. 1991).

II. Gifted Property

Gifts received by a spouse during the marriage are not included in the property division unless the failure to do so would be inequitable. Iowa Code § 598.21(2) (1993); *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993). Before reaching the question of whether equity supports the distribution of gifts, however,

the court must first determine if the transfer of property constituted a gift to only one spouse.

To meet the requirements of a gift, there must be donative intent, delivery, and acceptance. *In re Marriage of Martens*, 406 N.W.2d 819, 821 (Iowa App. 1987). The controlling element is the donor's intent. *Gray v. Roth*, 438 N.W.2d 25, 29 (Iowa App. 1989). This element can also be the most difficult to establish, and turns on the particular facts and circumstances of the case.

In this case, Kent produced evidence that the stock was transferred to him in 1991 as a gift from his parents, which was done pursuant to their estate planning scheme. On the other hand, the corporate income tax returns dating back to 1984 listed Kent as the owner of fifteen percent of the business. Moreover, Kent worked in the family business throughout his marriage and rose to become the key management person. One of Kent's brothers, who had worked in the business for only a few years, did not receive a share of the business at the time of the 1991 transfers. Furthermore, Lynae testified that Kent told her the stock was a gift only after the parties had separated. Kent introduced no documents to support the estate planning arrangement, and the attorney who handled the transfer did not testify.

Appellate courts place special reliance on the trial court's findings involving the credibility of witnesses for good reason. The trial judge is able to listen and observe the witnesses, and is better positioned to make such an assessment. *See In re Marriage of Zabecki*, 389 N.W.2d 396, 397 (Iowa 1986).

We believe this principle is an important guide to our resolution of the issue whether Kent proved the transfer of stock was a gift. It is clear the trial court viewed Kent's evidence to be less credible than Lynae's. When we apply this credibility factor to our de novo review of the evidence, we too find it was more likely the stock was transferred to Kent as part of his employment relationship with the corporation, and not as a gift. The stock was properly considered in the distribution of assets.

III. Property Distribution

Kent first asserts it was unfair to award him the Waukee property because its value is unknown. He argues it should have been sold, with the proceeds distributed equally. We disagree.

The Waukee property did not have an unknown value. Its value was \$290,000 once completed, with \$20,000 to \$30,000 needed to complete the home. Moreover, the family business performed substantial services in building the home, and Kent's parents advanced substantial sums of money. Kent's parents also filed a mechanic's lien against the property.

The district court was correct to award the home to Kent. He will be in a better position to favorably resolve the liens against the property, complete the construction at the lowest cost, and acquire the most equity in the home.

We find the distribution of the property by the court was equitable. The value of the net awards to each party was almost identical.

IV. Spousal Support

Kent objects to the award of permanent alimony. He believes alimony should be limited to a five-year period.

Alimony is a stipend paid to an ex-spouse in lieu of the other ex-spouse's obligation for support. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). It is used in most instances to remedy the inequities in the marriage and compensate the spouse who leaves the marriage at a financial disadvantage. *Id.* Many factors are considered in determining the suitability, amount, and duration of alimony, most of which have now been codified. *See* Iowa Code § 598.21(3) (1993). These factors include the length of the marriage, distribution of property, educational level of the parties, earning capacity of the party seeking support, and the likelihood that the party seeking support will become self-supporting at a standard of living comparable to that enjoyed during the marriage. *Id.* The child care responsibilities required to be rendered by the primary custodian are also a factor. Similarly, the amount of child support paid under the decree is considered. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992).

In this case, the fighting question is not the suitability of alimony, but the length and amount of the award. The marriage spanned nearly fifteen years. The lifestyle of the parties evolved over the years to the point where they had begun to build a \$290,000 home. Kent was instrumental in developing a successful business. His financial future appears bright. Lynae is a hard-working and capable individual. She

earned an associate degree in accounting and worked as an accountant during the early years of marriage. By the end of the marriage, her primary responsibilities centered on the day-to-day care of the children. This will continue until the youngest child reaches grade school. Lynae has been absent from the job market for many years and has plans for additional education and training. At trial, she expressed a desire to become a child psychologist, which would require a considerable amount of additional education.

Lynae presented testimony valuing her household services during the marriage, together with calculations of her lump sum alimony needs until she can become self-supporting. Alimony, however, does not focus solely on the needs of the spouse seeking support, nor do we rely on a mechanical approach in making an award. An award of alimony depends upon the particular facts and circumstances of each case. *In re Marriage of Brown*, 487 N.W.2d 331, 334 (Iowa 1992).

Lynae will receive annual child support of \$24,000. Her child care responsibilities will become more manageable as the children grow, which will allow additional time for her to pursue her education and begin to enhance her earning capacity. The youngest child will soon be in grade school. Under all circumstances, we believe monthly alimony of \$300 for six years from the date of the trial court decree will adequately compensate Lynae for the financial disadvantage she will face following the divorce. Permanent alimony is not warranted.

V. Attorneys Fees And Costs

Lynae requests appellate attorney fees. An award of attorney fees on appeal rests largely with the financial position of each party. We award Lynae \$1000 in appellate attorney fees. We deny Kent's request to assess Lynae for the number of exhibits she included in the appendix. Costs shall be paid by Kent.

AFFIRMED AS MODIFIED.