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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-272 / 92-1535

IN RE THE MARRIAGE OF MARY E. FUGLSANG AND LAURENCE J. FUGLSANG

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Upon the Petition of

MARY E. FUGLSANG,

Appellee/Cross-Appellant,

And Concerning

LAURENCE J. FUGLSANG,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Clinton County, James E. Kelley, Judge.

The husband appeals and the wife cross-appeals the district court decree that dissolved their marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Patricia Rhodes Cepican of McDonald, Stonebraker & Cepican, P.C., Davenport, for appellant/cross-appellee.

James D. Bruhn of Farwell & Bruhn, Clinton, for appellee/cross-appellant.

Considered en banc.

OXBERGER, C.J.

Mary and Larry Fuglsang were married on October 12, 1968. They have three sons. Matt and Greg are twins and were born in March 1969. Brad was born in July 1973. Matt and Greg were attending the University of Northern Iowa. Brad is a senior in high school and plans to go to college. He resides with his mother.

Larry was born in May 1948. For twenty-one years, Larry has worked for Quantum Chemical Corporation. His average net income is $2897.77 per month. He has full health benefits and is fully vested in a pension plan. He also has a vested interest in the Quantum Chemical Company stock ownership plan worth approximately $40,866.

Mary was born in August 1947. She is a high school graduate. Mary worked in a variety of different jobs but she primarily cared for the home and children. She is now employed full-time at a convenience store. She earns $6.25 per hour. Her average net income is $800 per month.

During the marriage, Larry inherited approximately $40,000 from his parents. The proceeds from this inheritance were divided among the children for college expenses, improvements to the family home, a pontoon boat and motor, an automobile, and family vacations. Also, slightly over $10,000 was placed in a joint account.

On November 1, 1991, Mary filed a petition for dissolution of marriage. In its decree, the court divided the property equally between the parties. The court

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awarded Mary alimony for fifteen years: $400 per month for the first ten years and $300 per month for the next five years. The court ordered the alimony reduced to $150 per month if Mary remarried. The court ordered Larry to pay child support for Brad. The court ordered each party to pay his or her own attorney fees and split the costs equally.

Larry appeals and Mary cross-appeals.

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).

I. Distribution of Inherited Property.

Larry appeals the trial court's treatment and distribution of his inheritance. He contends the district court erred in determining his inheritance had been converted into a marital asset.

Iowa Code section 598.21(2) (1991) governs the distribution of inherited property in dissolution actions. The section provides:

> 2. Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that

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> party and is not subject to a property division under this section 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).

In this case, it is inequitable to refuse to divide the property. This was a twenty-four year marriage. Upon agreement between the parties, Mary assumed primary care responsibilities for the children while Larry pursued career goals. While Mary was often employed throughout the marriage, her career was second to the needs of her family. She frequently left positions in order to change her schedule to have more time with her children. When Mary was employed, her salary was used for household expenses and meeting the boys' needs. Mary's flexibility and ability to care for the needs of her family allowed Larry to maintain stable employment. Larry has much greater employment, financial and retirement security than Mary. Based on this, we conclude the trial court correctly applied the principles of equity in determining the inherited property was partially a joint asset.

II. Alimony Award.

Larry appeals the duration and amount of the alimony award. He contends Mary should be encouraged to become self-sufficient. On cross-appeal, Mary contends the amount and duration are insufficient.

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When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981).

Throughout this marriage, Mary has been the primary homemaker. She has placed her career and earning capacity beneath the needs of her family. She worked positions which allowed her maximum flexibility to participate in her childrens' activities. She does not have a substantial earning capacity nor does she have independent retirement assets. We agree with the alimony award. We also agree with the continuation of alimony at a decreased amount in the event of Mary's remarriage.

Finally, we agree with the trial court's refusal to grant permanent alimony. Mary is employed and is able to work full-time. She is also entitled to a portion of Larry's retirement benefits. We affirm the trial court's award of alimony on Mary's cross-appeal.

III. Child Support.

Larry next contends the trial court should not have applied the child support guidelines in determining child

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support for his youngest child Brad, age 18. Larry claims he is willing to pay for Brad's college education, but does not believe the full amount required under the guidelines is necessary.

It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). Iowa Code section 598.1(2) (1991) permits the trial court to impose financial obligations on either parent for the support of a child. The statute permits, but does not require, support obligations to include college expenses. Id. Among the factors to be considered are the financial condition of the parent, ability of the child for college work, age of the child, and whether the child is self-sustaining or not. In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980). When divorced parents are of limited financial means, there is no need to obligate them for college expenses beyond those of attending state-supported institution in the state of the student child's residence. In re Marriage of Linberg, 462 N.W.2d 698, 702 (Iowa App. 1990). The key in determining the amount of college support to be paid is the actual tuition expenses and the parents' financial resources and abilities to pay. Id. We therefore, remand this issue to the district court for a determination of reasonable college expenses and the parents' ability to pay.

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IV. Attorney Fees.

On cross-appeal, Mary contends she should have been awarded attorney fees at the trial court level. She also requests appellate attorney fees.

Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974).

In its refusal to award attorney fees, the trial court noted Mary's income, property award, and alimony provide her with sufficient income to pay her trial attorney fees. We find no abuse of the trial court's discretion and affirm the refusal to grant attorney fees.

We now turn to Mary's request for appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

In balancing the parties' financial resources with Mary's obligation to defend this action on appeal, we award Mary $750.00 in appellate attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.

All judges concur, except Hayden and Sackett, JJ., who concur in part and dissent in part.

HAYDEN, J. (concurring in part and dissenting in part)

I concur with the majority's decision regarding the issues of alimony, child support, and attorney fees.

I respectfully dissent to the majority's distribution of the inherited property. During the marriage Larry inherited money upon the death of his mother and father. In 1982 Larry inherited $9500. This inheritance was placed into savings for the children's college expenses. Larry does not claim any portion of this $9500. In 1984 Larry inherited $30,000. At the time of the dissolution approximately $10,000 of this second inheritance remained in a Merrill Lynch CMA account. The other $20,000 had been spent on the following items: $10,000 for the children's college expenses, vacations, $6000 for improvements to the family home, a 1963 Pontiac automobile which the district court awarded to Larry, and a pontoon boat and motor which the district court awarded to Mary.

When either party inherits property during the marriage, the controlling factors in determining whether the property constitutes marital property for purposes of dividing the property at dissolution include: (1) the intent of the donor and (2) the circumstances surrounding the inheritance. In re Marriage of Hoffman, 493 N.W.2d 84, 89 (Iowa App. 1992); In re Marriage of Wertz, 492 N.W.2d 711, 714 (Iowa App. 1992) (court overruled In re Marriage of Butler, 346 N.W.2d 45 (Iowa App. 1984), and In re Marriage of Havran, 406 N.W.2d 450 (Iowa App. 1987)).

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Whether an inheritance is placed in joint ownership is not controlling. Hoffman, 493 N.W.2d at 89; Wertz, 492 N.W.2d at 714.

The placement of some of Larry's inheritance into a jointly owned Merrill Lynch account does not deem the funds a marital asset subject to division. In re Marriage of Higgins, No. 3-334/93-65, ___ N.W.2d ___ (Iowa App. Sept. 2, 1993) (citing Hoffman, 493 N.W.2d 84; Wertz, 492 N.W.2d 711). In In re Marriage of Hoffman and In re Marriage of Wertz we expressly rejected the principle a gift specifically given to one spouse and subsequently placed in joint ownership becomes a marital asset. Hoffman, 493 N.W.2d at 89; Wertz, 492 N.W.2d at 714. In Hoffman we noted the inheritor intended some of the gifts he received from his parents during the marriage to be made available to the marital unit for its use and benefit. Hoffman, 493 N.W.2d 89. We stated, however, the fact the gifts were placed into joint ownership was not controlling. Id. Larry used his inheritance to purchase a 1963 Pontiac automobile and a pontoon boat and motor. He placed the remaining amount of his inheritance in a Merrill Lynch CMA account. This property is not subject to a property division. I would award the automobile, boat and motor, and Merrill Lynch CMA account to Larry. I would also increase his interest in the proceeds which remain from the sale of the marital home by $6,000. The resulting property distribution in not inequitable.

Sackett, J., joins this concurrence in part and dissent in part.