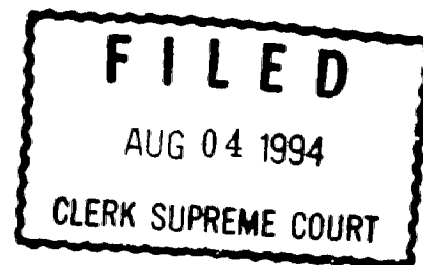


IN THE COURT OF APPEALS OF IOWA

No. 4-009 / 92-2051



IN RE THE MARRIAGE OF DAVID A. SWINK AND NANCY M. SWINK

Upon the Petition of
DAVID A. SWINK,

Appellant,

And Concerning
NANCY M. SWINK,

Appellee.

Appeal from the Iowa District Court for Polk County,
George W. Bergeson, Judge.

Petitioner appeals various economic provisions of the
district court's decree dissolving the parties' marriage.
AFFIRMED AS MODIFIED.

Larry L. Miller, Des Moines, for appellant.

Roger L. Hudson and Michael E. Marshall of Smith,
Schneider, Stiles, Wimer, Hudson, Serangeli, Robinson,
Mallaney, Shindler & Scalise, P.C., Des Moines, for
appellee.

Considered by Donielson, C.J., and Habhab and Huitink,
JJ.

HUITINK, J.

David and Nancy were married in June 1985. Both have been married before and have children from their previous marriages. There were no children born during this marriage.

David is fifty-two years old. He has been employed by John Deere Corp. throughout the marriage. His gross income is \$55,800 per year. Nancy is fifty-one years old. Nancy was also employed throughout the marriage. She is presently employed at Wesley Acres and earns \$16,000 annually.

Nancy also received child support payments of \$530 a month from her former husband. Almost all of the \$37,000 of child support she received during this marriage was deposited in a joint checking account. These funds were used for family expenses including David's child support obligations. David's child support payments exceeded Nancy's child support receipts by more than \$25,000.

David's premarital assets included John Deere stock valued at \$5697. He also owned a 401(k) account worth \$4000 and a \$7000 automobile he gave to Nancy before they married.

Nancy's premarital assets included the automobile, \$500 in savings bonds, \$587 in a Norwest account, and \$14,561 as her share of the sale of her prior residence. David and Nancy used Nancy's share of these proceeds to acquire their marital residence.

David continued to purchase John Deere stock and contribute to his 401(k) plan during this marriage. At the time of trial the value of his stock had increased by \$12,531. His 401(k) balance had also increased to \$65,918.

In December 1989 David received an initial \$40,000 distribution of the \$58,000 he inherited from his mother's estate. The first \$40,000 was placed in a joint investment account with Nancy. An additional \$10,000 of the inheritance was used to reduce the mortgage on the parties' home. David gave Nancy \$5000 for investment in her Templeton fund account.

David received \$19,500 in July 1991 as his share of the sale proceeds derived from the sale of a home he owned with his former spouse. These funds were received after the parties separated and were placed in a separate account. The account balance as of the date of trial was \$28,532. This balance included a portion of the proceeds derived from the sale of David's John Deere stock.

Although Nancy was employed during the marriage, she did not accumulate any retirement benefits other than social security. David, in addition to his stock and 401(k) plan, continued to accumulate vested pension benefits with John Deere. If David left John Deere as of the date of the decree, he would receive \$1221 per month at age sixty-five. There are no other terms of David's pension found in the record.

The trial court concluded the money David inherited was placed in joint tenancy for the parties' mutual retirement benefit. David and Nancy were each awarded one-half of their Dain Bosworth and Templeton accounts. The 401(k) plan was also equally divided after allowing David credit for the \$4017 premarital contribution. The trial court also equally divided the checking and savings accounts including the account containing the John Deere stock sale proceeds and the proceeds from the sale of David's former residence. David's pension benefits were not divided, and neither party received any alimony.

David appeals, contending the district court should have set aside his inheritance and should not have divided those accounts containing premarital accumulation or funds to which Nancy did not contribute. He also argues the district court's division of postseparation accumulations was inequitable.

Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact but are not bound by them. Iowa R. App. P. 14(f)(7).

The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution should be made in consideration of

the criteria codified in section 498.21(c) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). We consider alimony and property division together to determine their individual sufficiency. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

Generally, inherited property is set aside to the recipient unless a refusal to divide the property would be inequitable. Iowa Code § 598.21(2) (1991). The court is guided by the following factors in making this determination: (1) the separate contributions made by the parties to their joint economic welfare, to the extent these contributions preserved the property inherited; and (2) the special needs of either party, and any other matter which would render it plainly unfair to the other spouse to set aside inherited property for the exclusive use of the recipient. In re Marriage of Dahl, 418 N.W.2d 358, 360-61 (Iowa App. 1987) (citing In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982)). The fact the inherited property has been placed in joint tenancy is not controlling. In re Marriage of Wertz, 492 N.W.2d 711 (Iowa App. 1992).

We, based on our de novo review, agree with the district court's finding that the portion of David's inheritance placed in the joint account at Dain Bosworth was intended for the parties' mutual benefit. We also find Nancy's use of her income and child support for family expenses as well as her attention to domestic details

contributed substantially to the preservation of David's inheritance. Moreover, Nancy's inability to fund supplemental retirement options during the marriage and her limited earning capacity are factors that support division of David's inheritance. We therefore determine equity requires a division of the Dain Bosworth and Templeton accounts and affirm the district court's division of these two assets.

David also argues that it was inequitable to equally divide the "J.D. Special Savings account" containing the proceeds from the sale of John Deere stock and his former home. The equity in David's former home was an asset David brought to the marriage. It was not received until after the parties separated. The same, however, cannot be said for the stock sale proceeds. These proceeds represent the sale of assets owned during the marriage. Nancy contributed to the preservation of the value of this stock in the same manner as she did for David's inheritance. We therefore modify the decree by awarding David \$19,500 of this account plus the interest on that amount from the date of its deposit. The remainder of the district court's distribution of this account is affirmed.

David also takes issue with the district court's division of his 401(k) plan. The increase in the value of this account resulted from David's ability to contribute the maximum amount allowed during the marriage. His ability to do so is substantially attributable to Nancy's

earlier described contributions to this marriage. Moreover, David was awarded all of his pension benefits. We therefore conclude the division of this account was equitable and affirm the district court on this issue. The division of this account shall be based on the balance as of June 28, 1991.

David's last contention is that the property division should not include amounts accumulated following their separation of June 28, 1991. We agree.

The record indicates separate checking and savings accounts were established when the parties separated. It would not be equitable to divide assets accumulated after the parties separated. In re Marriage of Oakes, 462 N.W.2d 730, 732 (Iowa App. 1990). The parties are therefore awarded the checking and savings accounts each established on or after June 28, 1991.

Finally, we consider Nancy's request for appellate attorney's fees. 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). After considering the parties' respective incomes and assets, we determine each party shall pay his or her own attorney's fees. The costs shall be assessed equally.

AFFIRMED AS MODIFIED.