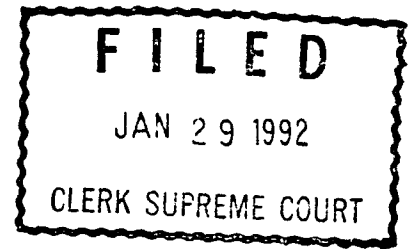


IN THE COURT OF APPEALS OF IOWA

No. 1-351 / 90-1595



IN RE THE MARRIAGE OF DONNA MARIE LONG AND
CHARLES EDWARD LONG, JR.

Upon the Petition of

DONNA MARIE LONG,

Appellee/Cross-Appellant,

And Concerning

CHARLES EDWARD LONG, JR.,

Appellant/Cross-Appellee.

391

Appeal from the Iowa District Court for Des Moines
County, D. B. Hendrickson, Judge.

Both parties appeal various economic provisions of the
dissolution decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Michael G. Dieterich of Cahill, Dieterich & Schilling,
Burlington, for appellant.

Betty J. Ratekin of Aspelmeier, Fisch, Power, Warner &
Engberg, Burlington, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ., but decided en banc.

HABHAB, J.

Donna and Charles Long were married in April 1955. Both parties brought two young children into the marriage, and the parties have one child of their own. All five children are now adults and not subjects of this appeal. The parties lived in Burlington, Iowa, during their marriage.

At the time of trial Charles was sixty-five years of age and had retired in 1987 from his job as a machine operator at J. I. Case Company. Donna was fifty-eight years old at the time of trial. She was primarily a homemaker during the marriage. Both parties have eighth grade educations. Each has health problems which make them currently incapable of maintaining employment.

Charles receives Social Security benefits of \$709 per month. He also receives \$769.17 in pension benefits from Case. The parties had income of \$372 per month from two real estate contracts. They have a total gross income of \$1,850.17, or total net income of \$1,749.22 per month.

In 1981, Charles suffered serious injuries from a motorcycle accident. As a result of these injuries, he received a settlement check in the amount of \$25,500. Charles applied \$14,413.72 of the settlement towards the mortgage on the homestead, and the rest was placed in the family checking account or savings account.

In 1985, Charles's father died, with Charles inheriting approximately \$4,000. In 1988 Charles received another

inheritance from his brother Donald. Charles testified he received \$68,960.77, consisting of cash, insurance proceeds, and a house. Donna and Charles did extensive renovations on the inherited house, spending approximately \$10,619 on improvements. The house was ultimately sold to their daughter, Jean, for \$25,000.

The district court entered its decree on October 4, 1990. The court awarded Donna property, cash, and investments worth \$93,602.21. She was awarded the two real estate contracts which generate income of \$372 per month. In addition, she was awarded \$294.36 per month in Charles's pension and was also granted \$200 per month alimony, such alimony payable for the rest of her life, and chargeable to Charles' estate should he predecease her. The alimony would, however, cease upon Donna's remarriage. Charles received property with a total value of \$104,339. Charles appealed and Donna cross-appealed.

I. Our scope of review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Id.

II. Charles claims the property division was not equitable. He states his inheritances and the personal injury settlement should have been set off to him. He also claims the court improperly valued the parties' personal

property and homestead. He asks for an additional \$36,602 in property.

We first note that Iowa courts do not require an equal division or percentage distribution of property. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The determining factor is what is fair and equitable in each particular circumstance. Id.

Generally, gifts or inheritances received by a party during the marriage are not subject to a property division unless the failure to do so would be inequitable to the other party. In re Marriage of Oler, 451 N.W.2d 9, 10-11 (Iowa App. 1989). Exceptions to the general rule may be based upon unfairness to a spouse and children, length of the marriage, and matters which tend to negative or mitigate against the appropriateness of setting aside the property to one spouse. In re Marriage of Mentel, 359 N.W.2d 505, 506 (Iowa App. 1984).

We find Charles's inheritance from his father should not be set off to him. The \$4,000 he received in 1985 has been used by the family and should be considered part of the marital assets.

On the other hand, we find that a part of Charles's inheritance from his brother should be set aside to him. Charles received this inheritance in 1988, which is closer to the time the petition for dissolution was filed. Donna has not shown sufficient reason to depart from the general rule. We have searched the record in an effort to

determine the existing traceable inherited property. Our findings in this respect do not necessarily agree with those asserted by either the appellant or appellee. We conclude, after taking into consideration Donna's efforts in improving part of the inherited property and the court's division of property, that Charles should be awarded an additional \$25,000. We thus award him the Sunnyside real estate contract with directions that Donna is to pay him in cash the difference between the balance due on the contract and \$25,000.

We next address Charles's personal injury settlement. In Iowa, settlement proceeds do not automatically belong to either party; a trial court may equitably divide such proceeds. In re Marriage of McNerney, 417 N.W.2d 205, 208 (Iowa 1987).

Charles used a portion of the personal injury settlement proceeds to pay off the mortgage on the family home, and the rest was placed in the family checking account or savings account. The separate property of one spouse is transformed into marital property when it is placed in some form of joint ownership. In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). We find no error in the district court's failure to set aside to Charles a sum equal to his settlement.

Charles also disputes the values placed by the district court on a Star camper and trailer, the personal property owned by the parties, and the marital residence. Donna

agrees the parties did not own a Star camper and trailer worth \$12,524.50. However, this asset was to be sold at an auction and the proceeds divided equally. Thus, there is no material change in the property division.

As to the other assets, we find the value placed on these assets by the trial court to be well within the permissible range of evidence, and we will not disturb it on appeal. See In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991).

We affirm the property settlement as set forth by the district court except for the modification set forth above.

III. Charles next challenges the alimony award to Donna. He asks that Donna's alimony be reduced to \$100 per month. He also believes the award of alimony should cease if he predeceases Donna. In her cross-appeal, Donna seeks an additional award of alimony of \$300 per month. We will consider both parties' arguments together.

Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. In re Marriage of Cooper, 451 N.W.2d 507, 508 (Iowa App. 1989). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. Id. Iowa Code section 598.21(3) may be interpreted as giving a court authority to require payments of alimony after death. In re Marriage of Debler, 459 N.W.2d 267, 270 (Iowa 1990). However, after considering the facts in this case, we find the award of alimony to Donna should cease on the death of

either party or her remarriage. In addition, alimony shall terminate on the date she is entitled to social security payments. We eliminate the provision that made Donna's alimony a lien upon Charles's estate. We modify the dissolution decree to make these changes.

IV. Donna also asks for attorney fees for this appeal. In determining whether appellate attorney fees should be awarded, 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 Imhoff, 461 N.W.2d 343, 345-346 (Iowa App. 1990). We find the parties should be responsible for their own attorney fees for this appeal. Costs are assessed one-half to each party.

In summary, we have modified the decree to set aside the amount of \$25,000 to Charles as part of the property division. We have also modified the decree to make the award of alimony to Donna terminate on the death of either party or her remarriage. In addition, it shall terminate on the date she is entitled to social security benefits.

The decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, J., and Oxberger, C.J., who concur in part and dissent in part.

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

I concur with the majority in all respects except I do not agree with the majority's decision to include a provision Donna's alimony automatically terminate on her remarriage. There already exists a common law presumption it does terminate. The general rule in Iowa, and elsewhere, is that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show that extraordinary circumstances exist which require the continuation of the alimony payments. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). Should Donna remarry, there might be extraordinary circumstances that would justify continuing her alimony. See id. at 829. The majority has prejudged the circumstances that might exist should Donna remarry. I find no equity in this position.

Oxberger, C.J., joins this partial dissent.