IN THE COURT OF APPEALS OF IOWA

No. 5-132 / 94-351

IN RE THE MARRIAGE OF BRAD THOMAS BORNHOLTZ AND MARCIA JEAN BORNHOLTZ

Upon the Petition of
BRAD THOMAS BORNHOLTZ,

Petitioner-Appellee,

And Concerning
MARCIA JEAN BORNHOLTZ,

Respondent-Appellant.

FILED
AUG 17 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Respondent appeals from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

W.J. Giles, III, of Giles & Giles, Sioux City, for appellee.

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

CADY, J.

Brad and Marcia Bornholtz were married on September 14, 1983. No children were born during the marriage. Marcia's child from a previous marriage, James, lived with the parties for about three years.

Marcia was forty-two years old at the time of the dissolution hearing. She has a B.A. degree in art and had a teaching certificate. However, she has never taught art. Since 1977 Marcia has been employed as a custodian for the Sioux City public school system. In 1993 her annual income was $21,633. During the marriage she inherited $8,625 from her father. This money was used for family debts.

Brad was thirty-six years old at the time of the dissolution hearing. He began working for the family business, Sioux Sales/Sioux City Night Patrol, Inc., after he graduated from high school. The company has two divisions. Sioux Sales is involved in the sale of uniforms to police officers and security personnel. Sioux City Night Patrol provides security for various business. At the time of trial, Brad's annual income was $26,610.

Brad filed a petition for dissolution of marriage on July 12, 1993. While the action was pending his mother, Betty, died. In her will she left Brad one-half of the family business and one-third of her other assets. Because the probate inventory had not been completed at the time of the dissolution hearing in January 1994, it was unclear how much Brad would be inheriting. The parties agreed to submit the probate inventory when it was completed. After the hearing, the district court informed the parties it would not be necessary to submit the probate inventory because it did not intend to award Marcia any of Brad's inheritance.

The district court issued a dissolution decree for the parties on February 1, 1994. The court awarded Brad assets worth $38,249 and Marcia assets worth $45,595. The court stated it was awarding approximately $8,625 more in assets to Marcia in

recognition of the inheritance she received during the marriage. Brad was ordered to pay debts of $800 and Marcia was ordered to pay debts of $4,800. Brad was ordered to pay $1,500 toward Marcia's attorney fees. Marcia appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. Marcia claims the district court abused its discretion by not permitting her to submit the probate inventory into the record. She points out the parties had stipulated the probate inventory could be submitted once it was completed. She asks us to remand this case to the district court for consideration of the scope and extent of Brad's inheritance.

We believe the better course of action here would have been to allow the probate inventory to be admitted into evidence, which would have made the information available to us for consideration on appeal. However, we find no need to remand the action because we agree, as will be discussed below, that Marcia is not entitled to a portion of Brad's inheritance from his mother.

III. Marcia contends the property division is inequitable to her. She asks to be awarded a portion of Brad's inheritance from his mother. She states that Brad shared in the use of her inheritance during the marriage. She also states the parties anticipated receiving the inheritance, and that Brad accepted a minimal income from the family business due to the anticipated inheritance.

Iowa Code section 598.21(2) provides:

> 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 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.

The intent of the donor and the circumstances of the gift or inheritance control whether the gift or inheritance is to be set off in the dissolution. *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). We no longer look at whether the asset had been placed in joint ownership. *Id.*

Pertinent factors when deciding whether inherited property is subject to division in marriage dissolution proceedings include the length of the marriage; contributions of the other party toward the property's care, preservation or improvement; and the impact of the division on the parties' standard of living. *In re Marriage of Geil*, 509 N.W.2d 738, 741 (Iowa 1993).

We find the intent of the donor, Betty, in the present case was to benefit Brad, not Brad and Marcia. The evidence showed Betty and Marcia did not have a close relationship. Furthermore, we find the situation is similar to that found in *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993), in which we found that a gift of stock in a family corporation was made to the husband alone where the husband was an officer in the corporation. Here, the inheritance consists largely of an interest in the family business, in which Brad has worked for many years.

We note the parties were married for ten years. At the time of the dissolution hearing, Brad had not yet received the inheritance, and thus, Marcia could not have contributed to the care, preservation, or improvement of the property. Additionally, the property distribution leaves Marcia with a standard of living similar to that which she had during the marriage.

We conclude Marcia has not presented any sufficient reason to show that a refusal to divide the inherited property would be inequitable to her. We affirm the district court's decision to set aside to Brad his inherited property.

IV. In the alternative to her request for a share of Brad's inheritance, Marcia asks to be awarded a greater share of the parties' marital assets. She states that due to his significant inheritance, Brad does not have as great a need for the marital assets. In particular, Marcia asks to be awarded the parties' 1972 Corvette.

The parties in a 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). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*

We conclude the trial court accomplished an equitable and fair distribution of the parties' property. Marcia was awarded net assets worth $40,759. Brad was awarded net assets valued at $37,449. Considering all the circumstances, we affirm the trial court.

V. Marcia asks to be awarded alimony. At trial, Marcia recognized the parties had similar incomes at that time. She requested a nominal award of alimony, which could then be increased if Brad's income increased in the future. She points out that Brad was formerly an employee of the family business and he is now an owner.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. *In re Marriage of Oler*, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. *Id.* We consider property division and alimony together in evaluating their individual sufficiency. *Whelchel*, 476 N.W.2d at 110.

We agree with the district court conclusion that under the facts of this case alimony is not appropriate. At the time of the dissolution hearing the parties had similar incomes. Throughout most of the marriage, Marcia earned more income than Brad. Marcia also has the ability to increase her income by using her college degree in art.

VI. Marcia seeks attorney fees for this appeal. 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 Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine the parties should be responsible for their own attorney fees on appeal.

We affirm the district court on all other issues presented in this appeal.

AFFIRMED.