

IN THE COURT OF APPEALS OF IOWA

No. 1-268 / 90-1499

FILED

SEP 24 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHARON DUMONT and DOUGLAS DUMONT

Upon the Petition of

SHARON DUMONT,

91

Petitioner-Appellee,

And Concerning

DOUGLAS DUMONT,

Respondent-Appellant.

Appeal from the Iowa District Court for Keokuk County,
Phillip R. Collett, Judge.

Douglas Dumont appeals the economic provisions of a
dissolution decree. **AFFIRMED AS MODIFIED.**

Tom Hyland of Hyland, Laden & Pearson, P.C., Des
Moines, for appellant.

Michael J. Elwood of Elwood & Elwood, North English,
for appellee.

Considered by Schlegel, P.J., Hayden and Sackett, JJ.

SACKETT, J.

Respondent-appellant Douglas Dumont appeals challenging the economic provisions of his dissolution decree. We affirm as modified.

Douglas and petitioner-appellee Sharon Dumont were married in 1966. They have one daughter who at the time of the dissolution was nineteen and a student at Central College in Pella, Iowa. When the parties married, Douglas was a farmer. Following the marriage, he and Sharon farmed with Douglas's family. In 1983 Sharon took outside employment.

The trial court concluded the parties had a net worth of \$166,000. The trial court awarded rural property to Douglas and a house in town to Sharon. The trial court divided the personal property and allocated the debt. Finally, the trial court ordered Douglas to pay Sharon \$64,965.65 in cash within ninety days. The trial court determined the net result of its decision was to allocate a net worth of \$83,765 to Sharon, and a net worth of \$83,765 to Douglas. Neither party was ordered to pay alimony. Douglas was ordered to pay \$3,000 to Sharon's attorney.

Douglas was ordered to pay child support for Kimberly of \$350 per month until she reaches twenty-two years of age. He was to furnish her health insurance and pay one-half of her college expenses which were not paid by scholarship.

The first issue we need to address is Sharon's contention Douglas acquiesced in the terms of the judgment on the property division and in doing so has waived his right to challenge the property division on appeal.

Generally, a party who accepts the benefits of a judgment or decree may not appeal the provisions under which the benefits are awarded. See Hense v. G.D. Searle & Co., 452 N.W.2d 440, 444 (Iowa 1990); Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987); Johnson v. Johnson, 301 N.W.2d 750, 752 (Iowa 1981); In re Marriage of Abild, 243 N.W.2d 541, 542-43 (Iowa 1976). A party relying on appellate waiver based on the acceptance of a decree's benefits must prove the waiver was knowing and voluntary. Hense, 452 N.W.2d at 444, Neylan, 400 N.W.2d at 541. Sharon has included in her appellate brief a copy of two quit claim deeds; one is from Douglas to Sharon for property in Sigourney, Iowa, and the second is from Sharon to Douglas for rural property in Keokuk County, Iowa. Also included is a letter (one attorney to the other) showing the deeds were exchanged. There is no record of the circumstances surrounding the exchange and no showing there was a voluntary and knowing waiver of the right to appeal by Douglas. Sharon has not shown the necessary evidence to support a finding of a voluntary and knowing waiver by Douglas of his right to appeal. See Neylan, 400 N.W.2d at 541; Johnson, 301 N.W.2d at 753. We have jurisdiction to decide this appeal.

Douglas challenges the property allocation. He contends (1) the trial court overvalued the rural real estate he received, (2) the trial court failed to consider a debt owed to his mother, (3) the trial court should have set aside to him property that was gifted and inherited, and (4) he should not have been ordered to make an immediate cash payment to Sharon in the amount ordered.

Douglas was awarded two pieces of real estate. One was a forty-acre tract of farmland where the parties built a home in 1984. At the time of separation, it was their personal residence. Both parties hired appraisers to testify to real estate values. Douglas's appraiser valued the home and acreage at \$78,000. Sharon's appraiser valued it at \$110,000. The trial court valued the property at \$90,000. Douglas contends the value fixed by the trial court was merely an average of the two appraisals. Douglas contends this is not correct, and the evidence of his appraiser was more credible and should have been accepted.

In assessing an appraiser's evidence, we look to the qualifications of the appraiser, and we assess how thorough and careful he or she has been in arriving at a valuation. See In re Marriage of Martin, 436 N.W.2d 374, 375 (Iowa App. 1988). When the trial court's valuation is within a permissible range of evidence, we generally do not disturb it on appeal. In re Marriage of Hoak, 364 N.W.2d 185, 192-93 (Iowa 1985); In re Marriage of Bare, 203 N.W.2d

551, 554 (Iowa 1973). The experts called by both parties are qualified appraisers. They used different approaches to the appraisal, but both were credible. We find no valid reason to modify the value of the forty acres established by the trial court. Douglas makes the same argument as to the value allocated to a 330-acre farm tract in which Douglas has a one-fourth remainder interest. The trial court values the one-fourth interest at \$70,000, and allocated \$17,500 of that value to his mother's life estate, resulting in Douglas's remainder interest being valued at \$52,500. We agree with Douglas this valuation is high.

We next look to Douglas's argument the trial court should have considered his gifts and inheritances, and the amount he claims is a debt to his mother. The forty acres was given to the parties by Douglas's father. In 1984, some time after the gift, a house was built on the forty acres. Douglas inherited the 330-acre tract in which he has a one-fourth remainder interest subject to his seventy-seven-year-old mother's life estate. He inherited the property from his father in 1983. Douglas also received from his mother \$40,000. Douglas claims the \$40,000 was a loan that must be repaid. Sharon claims it was a gift. The trial court's division did not set aside any inherited or gifted property to Douglas, and no adjustment for the loan or gift from Douglas's mother.

Douglas contends this was not equitable. The trial court considered its division fair because it determined Sharon had helped care for and preserve the assets. Property inherited by or gifted to a party prior to or during a marriage is not subject to division in a dissolution unless the refusal to divide is not equitable to the other party or to the children of the marriage. See Iowa Code § 598.21(2); In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989).

Factors that are considered in deciding whether to invoke the exception to avoid injustice include contribution by the other spouse to the property. See In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982). We consider the trial court's refusal to set aside to Douglas the forty-acre tract where they built their home to be equitable. Sharon made significant contributions to the property. We do not, however, agree with the trial court's refusal to set aside to Douglas the remainder interest he inherited from his father. The interest is subject to his mother's life estate. He has no current right to a possession. He receives no income from the property. The parties during the marriage had no right of possession or to income from the property. Sharon has made no contribution to that property. There is no assurance Douglas will in fact outlive his mother and inherit the property. The trial court valued the property at market

value despite the fact it is a remainder interest subject to a life estate, making it difficult to market. The trial court has required Douglas to make an immediate cash payment to Sharon, based at least in part on considering this asset. We determine the remainder interest should be set aside to Douglas. We therefore reduce the total value to be divided by \$57,500.

We next address Douglas's claim the court should have considered the debt to his mother. Sharon does not deny the money came to Douglas from his family. She argues, however, it was a gift, not a loan. We recognize Douglas is not under current pressure to repay the money. We also recognize for a course of time Sharon assisted with the farm operations. These are factors we considered in determining the forty-acre tract should not be set aside to Douglas. We do not find factors to justify ignoring in total this debt or gift. We consider it. The trial court ordered Sharon to be paid \$64,965. We modify the payment to \$30,000. We reject Douglas's argument that he should be allowed to make the payment over the course of time. We also reject Sharon's argument that we should consider possible future inheritances of Douglas's.

Douglas next challenges the award made for Kim. Douglas was ordered to pay child support of \$350 per month in addition to one-half of Kim's college expenses. He contends this is excessive. We agree. A divorced parent's

obligation to support his or her child past the age of eighteen years is determined by Iowa Code section 598.1(2). This section imposes an obligation on divorced parents toward their adult offsprings who are students. There is no corresponding statutory obligation imposed on married parents of adult students. See In re Marriage of Linberg, 462 N.W.2d 698, 701 (Iowa App. 1990); In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984); In re Marriage of Lieberman, 426 N.W.2d 683, 685 (Iowa App. 1988). We assess the responsibility to both parties in accordance with their ability to pay. See Byall, 353 N.W.2d at 107. The statute does not require support in all cases, but allows the trial court in its discretion to award support to children through college under the proper circumstances. In re Marriage of Vrbanc, 293 N.W.2d 198, 203 (Iowa 1980). Douglas and Sharon have annual incomes of between \$15,000 and \$20,000. In cases of parents of modest means, there is no need to obligate them for college expenses beyond those of attending a state supported institution in their state of residence. Linberg, 462 N.W.2d at 702; Lieberman, 426 N.W.2d at 686; In re Marriage of Frink, 409 N.W.2d 477, 481 (Iowa App. 1987). Current expenses for room, board, and tuition at our state universities are about \$5,000 annually. Kim will incur other expenses, including those for health insurance. We project these costs to be another \$2,500. The

responsibility for Kim's educational expenses are both her father's and her mother's. See Byall, 353 N.W.2d at 108. Kim lives at college. Therefore, there is no basis to order child support paid to Sharon in addition to an order for college expenses. See id. We modify to eliminate the obligation imposed by the trial court that Douglas pay one-half Kim's college costs. Douglas shall pay the \$350 a month toward Kim's college expenses. This payment shall continue until Kim is no longer a full-time student, marries, becomes self-supporting, or reaches twenty-two years of age, whichever event occurs sooner. See Linberg, 462 N.W.2d at 702; In re Marriage of Richards, 439 N.W.2d 876, 879 (Iowa App. 1989); Byall, 353 N.W.2d at 108. Additionally, Douglas shall pay one-half the cost of Kim's medical insurance.

Douglas contends he should not be required to pay \$5,000 toward Sharon's attorney fees. The trial court is granted considerable discretion in awarding attorney fees. In re Marriage of Fidone, 462 N.W.2d 710, 712 (Iowa App. 1990); In re Marriage of Dahl, 418 N.W.2d 358, 361 (Iowa App. 1987). We find no abuse of discretion. We affirm the attorney fee award made by the trial court.

Each party shall pay his or her own attorney fees on appeal, and one-half of the costs.

AFFIRMED AS MODIFIED.

Schlegel, P.J., concurs; Hayden, J., partially concurs.

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

I respectfully dissent in part to the majority's opinion.

There is no compelling reason shown in this record to include the value of Douglas's inherited or gifted property in the division of assets of the parties. Therefore, I would first set off unto Douglas his gifted and inherited property and then make an equitable division of the remaining property.

I also determine it a better practice for Douglas to be responsible for one-half of Kim's college tuition, room and board and text books, rather than pay \$350 per month. It is equitable for both parents to furnish financial assistance for higher education in such an amount as their financial conditions will permit. In re Marriage of Richards, 439 N.W.2d 876, 879 (Iowa App. 1989).

I would modify the decree accordingly.