IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BONNIE B. KIEL and HUBERT A. KIEL

Upon the Petition of	)	
BONNIE B. KIEL,	)	Filed January 28, 1977
Appellee,	)	
And Concerning	)	
HUBERT A. KIEL,	)	14 2-57976
Appellant.	)	

Appeal from Fayette District Court - Roger F. Peterson, Judge.

Appeal from the economic provisions of the dissolution decree by respondent-appellant; cross-appeal as to property settlement only by petitioner-appellee. - Affirmed, Modified and Remanded.

Lee H. Gaudineer and John G. Black, of Des Moines, for appellant.

R. L. Donohue, of West Union, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

FILED
JAN 28 1977
CLERK SUPREME COURT

OXBERGER, J.

Bonnie was 44 and Hubert was 49 at the time of the decree (September 27, 1974) which dissolved their marriage of 25 years. The trial court decreed the family farms were joint accumulations of the marriage, and effected roughly a two-thirds disposition to Hubert and one-third disposition to Bonnie. In addition, Bonnie was awarded alimony of $125 per month for eighteen years or until her remarriage. It is the opinion of this court that the alimony awarded is justified. The award of the 90 acre farm to Bonnie is modified to allow Hubert a first option to buy the farm.

The issues on this appeal are 1) the propriety of the trial court's designation of the full 240 acre farm as a family asset, 2) the propriety of the award of the 90 acre farm to Bonnie, and 3) the propriety of an award of periodic alimony in this case.

At trial Hubert testified that his father had given him 120 acres of the 240 acre farm as a gift of inheritance. The $24,000 purchase price paid for the remaining 120 acres was to be bequeathed to his sister as her share of inheritance. Hubert claims the trial court should have set off this inheritance amount before the distribution of family assets.

Consideration of the inheritance is somewhat simplified since the claimed gift occurred in 1966, approximately 17 years after the couple was married and began farming the land. Any cases dealing with premarital gifts or assets brought into the marriage are not, therefore, dispositive. Before the decision of *Beeh*, the case by case analysis made in the disposition of property, support, and alimony claims included a consideration of inheritance income only in hardship situations. In re Marriage of Beeh, 214 N.W.2d 170 (Iowa 1974). In *Beeh* the salaried income of the husband was $8,600. This amount was augmented to an amount in excess of $20,000 annually by income from various

family trusts and by income from management of family properties. The court in *Beeh* affirmed the child support award of $175 to $225 per month per child (depending upon the ages of the three children) and the award of the family home and furnishings without encumbrances to the wife.

In addition, the court ordered in *Beeh*, under the *Schantz* criteria, an additional lump sum award of $30,000 and periodic alimony of $350 per month until the youngest child reached majority. Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1969). Thereafter, the alimony increased for a year and a half to $450 per month and then stopped. Beeh, 214 N.W.2d at 175. The alimony was also to terminate upon the wife's death or remarriage. Payments did not cease at the husband's death.

In *Beeh*, the court increased the lump sum property award. The trial court had awarded the wife the family home valued at $45,000. The court increased the award to include a life insurance policy on the wife's life plus $30,000 cash. Almost all of the assets of the marriage were gifts from the husband's parents. The lifestyle of the parties was throughout the marriage higher than the husband's income due to the parent's gifts. The court rejected the wife's claim for one half of the husband's inheritance. Like the husband in the present case, Mr. Beeh had poorer health than his wife. The opinion does not detail the reasons for the portion of the husband's inheritance granted to the wife. We conclude the court in principle set off the husband's initial gift and made an equitable division of the increase in value accumulated during the marriage.

We agree with Hubert that the $24,000 inheritance amount should have been set off to him before any division of assets. However, we find no basis for reversal of the trial court as to the ultimate property settlement decreed. Although the trial

court did not be definition "set off" any inheritance amount, an analysis of the trial court's award drawn from the transcript, indicates Hubert was awarded $161,600 assets and ordered to pay $62,800 liabilities for a net award of $98,800. Bonnie, in contrast, was awarded $59,500 assets and was ordered to pay a $6,000 debt for a net award of $53,500. If the inheritance amount of $24,000 is set off, Hubert's net share is $74,800 and Bonnie's net amount remains at $53,500. Such a distribution of assets is well within the *Schantz* guidelines and the mandate of Section 598.21, The Code. The record indicates no reason why the husband's parents would give him more than the $24,000 his sister received except for the fact that he and his wife had worked the farm for the parents for 17 years. It appears the gift of the 120 acre farm and the low price for the remaining 120 acres was a reward to both their son and his wife for their 17 years of hard work.

Secondly, Hubert objects to the award of the 90 acre farm to Bonnie chiefly upon the grounds that it impairs the operation of the two farms as a unit. We find some merit to his claim and accordingly add a proviso to the trial court's award. The decree is hereby modified to grant Hubert an option to buy at current value the 90 acre farm within 60 days of the filing of this opinion. In the event the parties cannot agree on a price the trial court shall conduct a hearing to determine the present value of the farm which shall be the purchase price. In the event a hearing is conducted the 60 day period shall start after entry of the trial court's order setting value. If there is any income tax liability occasioned by the respondent exercising his option, it shall be borne equally by Hubert and Bonnie.

Lastly, Hubert objects to any award for periodic alimony to which Bonnie counters that her meager earnings and the pre-

sence of Pamela make alimony unquestionably necessary to her. Alimony, although not an absolute right, is awarded a spouse in need of support when the other spouse has the ability to assist in meeting those needs. Schantz, 163 N.W.2d at 405; Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966). Hubert living on the farm had from $10,000 to $12,000 adjusted gross income without regard for depreciation in 1972 and 1973. Bonnie at trial was working a 40 hour week at $1.70 per hour and living with their handicapped adult daughter, Pamela, in a housetrailor. Upon this record, the court finds the alimony proper and justified without reaching the issue of Pamela's presence in Bonnie's household.

Bonnie requests an allowance of fees for her attorney's services related to this appeal. Attorney fees are not allowed as a matter of right and any such award must depend upon the financial circumstances and earnings of both parties. Beeh, 214 N.W.2d at 176. We have subtracted time spent by her counsel prior to filing the notice of appeal on November 29, 1974. This is done without prejudice to the presentation of this issue to the trial judge, who sets the fees for work in the trial court.

We find Hubert should be ordered to pay an additional $2000 toward Bonnie's attorney fees on the appeal. By this finding we do not fix the amount to be charged by Bonnie's attorney, we only have decided what portion should be paid by Hubert. In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972). The balance of the costs on appeal shall be paid by Hubert.

The judgment of the trial court is in all other respects affirmed; this case is remanded for entry of decree in accord herewith.

AFFIRMED, MODIFIED AND REMANDED.