

IN THE COURT OF APPEALS OF IOWA

No. 7-306 / 96-1320

**IN RE THE MARRIAGE OF SUSAN M. GAST
AND G. GARY GAST**

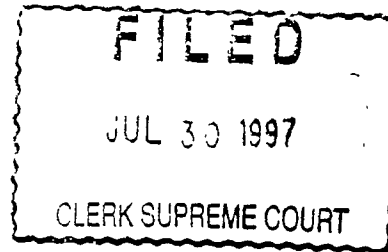
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Upon the Petition of
SUSAN M. GAST,

Appellee,

And Concerning
G. GARY GAST,

Appellant.



Appeal from the Iowa District Court for Mitchell County, Bryan H. McKinley,
Judge.

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

Russell H. Schroeder, Jr. of Schroeder Law Office, Charles City, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

Considered by Sackett, P.J., Huitink, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

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HAYDEN, S.J.

G. Gary Gast (Gary) appeals the property division and child support provisions of the decree dissolving his marriage to Susan Gast. We affirm and modify.

Gary and Susan were married on June 25, 1977. They have two children: Luke, born July 7, 1983, and Amber, born September 17, 1985. The parties stipulated to provisions addressing custody and visitation. The court incorporated these provisions into its decree.

At the time of trial, Susan had been working part-time at Jakobson Drug, a position she held for nineteen years. Gary was self-employed, running Osage Feed and Seed, a business he was buying on contract from his father.

The district court valued the marital property at \$327,270. Of this amount, retirement accounts accounted for \$78,000. To maximize favorable tax consequences, the district court ruled Gary and Susan should each receive \$39,000. Because Gary's IRA was worth \$66,192, the court ordered him to transfer \$27,192 to Susan. The court divided the remaining marital property equally between the parties. Susan currently possessed property worth \$81,240. The court ordered Gary to transfer CDs and money market funds to Susan. The court gave Gary the option of paying the remaining balance of \$14,514 in full or in annual installments of \$3000.

The court set Gary's monthly child support obligation at \$602. In determining his annual income, the court included a rate of return Gary could receive if he reinvested a stock portfolio worth \$52,000.

I. Scope of Review

Our review of this case is de novo. Iowa R. App. P. 4; *In re Marriage of Shivers*, 557 N.W.2d 532, 534 (Iowa App. 1996). The district court's findings of fact are entitled to weight, but they are not binding upon us. *Id.*

II. Property Division

Gary challenges the district court's valuation of the Osage Feed and Seed business, the marital home, and furniture, appliances, and other assets. He argues the property division is inequitable because the court included in its division a college fund he established for the children. He argues the court's treatment of real estate taxes and dependency exemptions is inequitable.

We hold the property division is fair and equitable. The values set by the court were within the permissible range of evidence and we will not disturb them on appeal. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). The district court found Gary put \$20,000 into the children's names immediately upon his separation from Susan. The court found he did so with the intent to keep assets away from Susan. We make a like determination. Gary's argument is, because the money was placed in an irrevocable trust, he does not have access to it and the property division is therefore not equal.

Marital property should be distributed fairly and equitably under the circumstances, rather than equally or according to a percentage distribution. *In re Marriage of Hardy*, 539 N.W.2d 729, 731 (Iowa App. 1995). The trial court divided

the property equally. If Gary does not have access to the money placed in trust for the children, that is due to his unilateral action of establishing the trust without Susan's knowledge or consent.

The court ordered Gary to pay the real estate taxes on the homestead for the period from January to June of 1995. The court determined if the parties filed a joint income tax return for 1995, they would receive a refund of \$2535. The court ordered that if the parties filed a joint return, Gary would pay \$1250 to Susan. Gary challenges the equity of these orders but offers no argument why they are inequitable. We determine under these circumstances the property division is fair and equitable. We affirm on this issue.

III. Child Support

The district court determined Gary could reinvest his stock portfolio, worth \$52,000, in a bank and earn a five percent return. The court included this potential annual return of \$2600 in determining Gary's income. The court provided Gary would be entitled to the dependency exemption for both children, provided he was current in his child support obligation at the end of the calendar year. The court provided, however, if Susan's gross annual income exceeded \$15,000, she would be entitled to the exemption for the oldest child.

Gary contends his stock portfolio will be drastically reduced to satisfy the remaining balance of the property division. Gary has the choice, however, to pay the

\$14,514 in annual installments of \$3000. His portfolio would not be reduced or significantly reduced if he chooses this option.

The court's award of both dependency exemptions to Gary, provided he is current in his support, gives Gary a strong incentive for him to be current in his support obligation. The court's order providing he will lose one of the exemptions if Susan's income increases beyond the set amount weakens this incentive. We may award the exemptions to Gary, as a noncustodial parent, provided he is current in his support. *In re Marriage of Pothast*, 539 N.W.2d 199, 203 (Iowa App. 1995). Gary is paying substantial child support and the exemptions are of minimal value to Susan. We modify the decree to provide Gary is entitled to claim both children as exemptions on his federal and state income tax returns if he is current in his child support at the end of each calendar year. He is entitled to the exemptions irrespective of any increases in Susan's income.

We order Gary pay \$1000 toward Susan's appellate attorney fees. Costs on appeal are taxed to Gary.

AFFIRMED AS MODIFIED.