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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF BLAINE HAROLD LYTLE AND BEVERLY DAUN LYTLE

Upon the Petition of	)	
BLAINE HAROLD LYTLE,	)	108
Petitioner-Appellee/ Cross-Appellant,	)	
And Concerning	)	8-554 / 87-1795
BEVERLY DAUN LYTLE,	)	
Respondent-Appellant/ Cross-Appellee.	)	

Appeal from the Iowa District Court for Dallas County (2521), Ray A. Fenton, Judge.

Respondent wife appeals and petitioner husband cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Patrick H. Payton, Des Moines, for respondent-appellant/cross-appellee.

Jill S. Rolek, Des Moines, for petitioner-appellee/ cross-appellant.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J. 109

Respondent wife, Beverly Daun Lytle, appeals and petitioner husband cross-appeals from the decree dissolving the parties' marriage. On appeal, respondent wife asserts: (1) the district court should have awarded her permanent alimony; (2) her attorney fee award is inadequate; (3) the properly division is inequitable; and (4) the district court should not have treated the parties' interest in two farms as inheritances or gifts to petitioner husband and set them aside to him. On cross-appeal, petitioner husband, Blaine Harold Lytle, asserts: (1) respondent wife's rehabilitative alimony award is excessive in amount; and (2) the district court should not have awarded respondent wife attorney fees. Respondent wife requests attorney fees on appeal.

In its dissolution decree, the district court found that the parties' interests in the farms were life estates inherited by Blaine. The district court awarded Blaine the farms; an apartment complex; a pickup truck; the personal property in his possession; his TSA, IPERS, and IRA accounts; and the bank accounts in his name. The district court awarded Beverly her stocks, her IRA account, her interest in the Bejo Corporation, a real estate contract, the bank accounts in her name, and the personal property in her possession. The parties' house was ordered sold and the net proceeds equally divided. Blaine was directed to

pay Beverly $5, 000 toward her attorney fees and alimony of $1,200 per month for two years, then $700 per month for three years, then $500 per month for five years. Beverly has appealed and Blaine has cross-appealed from the dissolution decree.

Our scope of review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Property Division and Alimony.** Property division and alimony must be considered together in evaluating their individual sufficiency; they are neither made nor subject to evaluation in isolation from one another. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

A. **Alimony.** When we look to the amount of alimony a payee spouse should receive, if any, we must consider not simply present income, but his or her earning capacity as directed by Iowa Code section 598.21(3). That section states in part:

> Upon every judgment of . . . dissolution . . ., the court may grant an order requiring support payments to either party for a limited or indefinite length of time after considering all the following:
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> * * *

e. **The earning capacity of the party seeking maintenance**, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

f. **The feasibility of the party seeking maintenance becoming self-supporting** at a standard of living reasonably compared to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

Iowa Code § 598.21(3)(e), (f) (1987) (emphasis added).

Beverly contends that the court erred in failing to award her permanent alimony of $1,200 per month. Blaine responded to this argument in his cross-appeal by claiming that the court's alimony award is excessive and should be reduced to $400 per month for ten years. At the time of trial, Blaine and Beverly, both 55, had been married for 32 years. Both parties were in reasonably good health. Both parties contributed significantly to the marriage. Blaine holds a doctorate in education, which he received during the marriage, and has been employed as superintendent of schools in Perry, Iowa, for approximately twenty years. In 1986 he received a salary of $50,469 and was to receive an increase in the 1987-88 school year of approximately five percent. At the time of trial he intended to resign this position effective June 1988. Beverly holds a teaching degree and did substitute teaching during the early part of the parties' marriage, but she apparently has not taught

for quite some time. She was also employed as an Avon representative during the marriage and became a district sales manager, earning approximately $19,500 per year. Although she lost that job in 1982, she currently holds a license to sell real estate and received $9,100 from this job in 1986. The record indicates that she received very little income from real estate sales in 1987.

Based upon the record before us, we find the trial court's award of temporary rehabilitative alimony to be in error. Our concern in this case is that Beverly, who was 55 at the time of trial in 1987, has limited earning potential, and the chances of her becoming self supporting at a standard of living comparable to that enjoyed during the marriage are slim, given her age and employment history. Since Beverly filed the petition for dissolution in June of 1986, it is not inconceivable that Beverly voluntarily reduced her income in 1986 and 1987 in anticipation of these dissolution proceedings. Despite this, and despite the fact that Beverly is in reasonably good health, we cannot ignore the fact that Beverly's age will make it difficult for her to find and maintain a suitable standard of living for herself, especially as she gets older. Although she has demonstrated that she can support herself, she has not demonstrated such an ability in her current job, or in the five to six years prior to trial.

In view of the foregoing, we modify Beverly's alimony award to $850 per month until Beverly remarries or until the death of either party. In making this modification of the alimony award, we are mindful of the supreme court's recent pronouncement that "both parties [in a dissolution action], if they are in reasonable health, need to earn up to their capacities . . . and not lean unduly on the other party for permanent support." In re Marriage of Wegner, 434 N.W.2d 397, 399 (Iowa 1988). We believe the result reached here takes this concern into account, while satisfying the equitable requirements set forth in Iowa Code section 598.21(3)(e), (f) (1987).

B. **Property Division.** Beverly also contends that the trial court erred in not awarding her one-half of the farms or, in the alternative, one-half the value of the farms. As a general rule, the distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1) (1987). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Under this statute, the ultimate question is whether the distribution of the property is equitable; there is no rule based upon percentage division of assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). Division of property is based on each marital partner's right to a just and equitable share of the property accumulated as the result

of their joint efforts. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). In cases such as this involving inherited and gifted property received by one spouse during the course of the marriage, Iowa Code section 598.21(2) requires that such inherited or gifted property ordinarily is to be considered the property of the party. This section does not impose an absolute requirement that property acquired by gift or inheritance must always be set aside to the donee and omitted altogether from consideration in the division of property. To avoid injustice, property inherited by or given to one party may be divided. In re Marriage of Muelhaupt, No. 87-1336, slip op. at 5 (April 19, 1989). The court must weigh a variety of factors in determining how to treat this property. See In re Marriage of Vrban, 359 N.W.2d 420 (Iowa 1984).

In the case at bar, the record shows that in 1964, Blaine received a contingent life estate in 80 acres of Missouri real estate from his parents. The life estate did not vest in Blaine until his father's death, some twenty years later. The document transferring the contingent life estate indicates the property was subject to a $16,000 mortgage. In 1969, Blaine received yet another contingent life estate in 150 acres of Missouri farm land from his parents which also did not vest in Blaine until his father's death. The document transferring the contingent life estate to Blaine indicates that the property was

subject to a $20,000 mortgage. In addition, in March 1984, Blaine received a life estate in an additional 80 acres of Missouri land under his father's will. In order to receive this life estate, Blaine was required to pay his mother $8,000 in cash and $2,500 to his mother every year until her death. After his father's death, Blaine entered into a tax-free exchange of land in which his 150-acre Missouri farm was traded for 160 acres of Iowa farm land. Blaine had to pay an additional $86,000 as boot in the trade.

From our de novo review of the record here, we are convinced that the trial court's award was correct. The record contains no indication that the parties jointly contributed to the payment, care, preservation, or improvement of the 310 acres of Missouri land prior to 1984. The contingent life estates and the life estate by will were given solely to Blaine, with the remainder passing to his children. The record indicates that after Blaine's father's death in 1984, income from the farms and gift money maintained the properties, not contributions from joint funds. We therefore affirm the trial court's award of both the Missouri and Iowa farms to Blaine.

Beverly further claims that the trial court's property settlement was inequitable because the court failed to award her the entire proceeds from the homestead and required her to pay Blaine's debt for a furnace in a five-plex owned by Blaine, but which she received in the dissolution proceeding. We find no merit to this claim.

II. **Attorney Fees.** Beverly last claims that the trial court erred in not requiring Blaine to pay a greater amount of her attorney fees, and Blaine responds to this argument in his cross-appeal by asking the court to reverse its order requiring him to pay $5,000 towards her attorney fees incurred at trial. In evaluating a request for attorney fees, the court must evaluate the needs of the party making the request against the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We affirm the trial court's award of attorney fees to Beverly and deny Beverly's request for attorney fees on appeal. Each party is to pay one-half of the costs on appeal.

AFFIRMED AS MODIFIED.