

IN THE COURT OF APPEALS OF IOWA

No. 8-722 / 98-301

Filed July 23, 1999

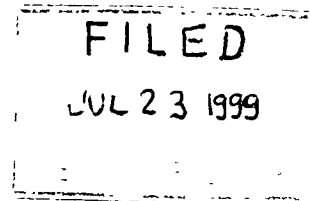
**IN RE THE MARRIAGE OF DIANE KAY BLAND
AND KENNETH WAYNE BLAND**

Upon the Petition of
DIANE KAY BLAND,

Petitioner-Appellee/Cross-Appellant,

And Concerning,
KENNETH WAYNE BLAND,

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Cedar County, Mark J. Smith, Judge.

Respondent appeals the property and alimony provisions of the parties' dissolution decree. **AFFIRMED.**

John C. Stevens of Lewis and Stevens, P.C., Muscatine, for appellant.

Bradley L. Norton and Brian T. Fairfield of Norton & Norton, Attorneys at Law, P.C., Lowden, for appellee.

Considered by Sackett, C.J., Streit, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HAYDEN, S.J.

The respondent, Kenneth Bland and the petitioner, Diane Bland were married on October 21, 1972. The couple moved into a home in Tipton, Iowa that was owned by Diane's parents and is the same home the couple lived in throughout their marriage. After the parties were married, Diane, who had only a high school diploma and one semester of community college, worked as a waitress and later as a cashier. Kenneth began working for Farm Equipment Company of Durant, where he still worked at the time of the trial. When the couple's daughter, Laura, was born in 1975, Diane quit her job to stay home with Laura. While Laura was growing up Diane did most of the child rearing and running of the home while Kenneth worked outside of the home.

In 1985, Diane started a cleaning business. This offered her flexible hours to still be at home when Laura needed her. In 1986, 1987, and 1988, Diane's father deeded portions of the couple's home to Diane as a gift. From 1992 through 1995, Diane inherited more than \$62,000 from her grandfather. Over the next few years, Diane and Kenneth used the money to pay off a debt on Kenneth's truck, pay taxes and home repairs, take vacations, purchase a new car, and have dental work done for Kenneth. In February 1993, Diane began working at the Sycamore Learning Center, the same facility as her daughter worked. In June 1995, Laura died of a brain tumor. The remaining portion of Diane's inheritance was spent on Laura's funeral expenses. The tragic loss appears to have deeply affected the family. After Laura's death, Diane suffered from depression and missed two months of work. Kenneth, dealing with his

own grief, moved out of the family home in August 1996, which intensified Diane's depression. After a short period of counseling, Kenneth and Diane were unable to reconcile their differences, and Diane filed for divorce in November 1996.

The trial was held in December 1997, with the trial court ordering Kenneth to pay Diane \$600 per month for a period of eighteen months and at the conclusion of eighteen months, Kenneth was ordered to pay \$750 per month for a period of five and a half years. The court also granted each party their respective personal property. Diane received the home, while paying a portion of the equity to Kenneth. The court divided the remaining personal property between the two parties. Kenneth was also required to pay Diane's attorney fees. Kenneth appeals the trial court's distribution of property and its award of alimony. Diane cross-appeals contending the trial court erred in not awarding permanent alimony. Diane is also seeking appellate attorney fees.

Our review of an equity action is de novo. *In re Marriage of Vrbanc*, 359 N.W.2d 420, 423 (Iowa 1984). We will give weight to the fact findings of the trial. *In re Marriage of Liebich*, 547 N.W.2d 844, 847-848 (Iowa App. 1996).

Kenneth contends there is not a scintilla of evidence to justify the trial court's finding that shortly after Laura's death Diane was diagnosed with situational depression and then with major depression after his departure. At trial Diane testified as to her health stating she has seen several doctors since her daughter's death and that at the time of the trial she was still seeing a psychiatrist and was taking two different prescription drugs to manage her depression. She also testified she has had

troubles in dealing with work and at times it was too much for her and she was unable to work. Also, presented at trial was a portion of her medical records with doctors' comments on her depression. Kenneth asserts there was no showing of depression at the time of the trial and that we should take judicial notice of a medical treatise on the subject of psychiatric diagnosis ("Diagnostic and Statistical Manual of Mental Disorders"). Even if we were to take judicial notice of the treatise, we would still be left with Diane's testimony as to her depression and the medical records and prescription medicine for the depression. We are inclined to follow the trial court's finding of depression. Whether Diane is suffering from "situational depression," "major depression," or simple depression we are left with the fact her illness is playing a role in her work and life. There is no dispute from Kenneth that Diane's illness has interfered with her job. Kenneth contends the trial court used the finding of major depression as the sole reason in its dissolution decree. We do not accept this argument. The issue of depression was only used in the determination of the alimony and it was only a factor in awarding alimony. The court used the factors defined in Iowa Code section 598.21(3) to determine alimony¹. Diane and Kenneth were married for twenty-five years, during which time Diane worked outside of the home for only three or four years. During the marriage, Diane stayed at home and cared for

¹Factors listed in Iowa Code section 598.21(3): length of marriage, the age and physical and emotional health of the parties, the educational level of each party at the time of the marriage and at the time the action is commenced, the earning capacity of each party, the feasibility of the party seeking maintenance to become self-supporting and the length of time necessary to achieve this goal, the length of absence of the party from the job market, the responsibility of raising a child during the marriage and time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

Laura and took care of the majority of the household and family duties. Diane was 44 years old at the time of the trial and due to her recent illness it is highly unlikely she will be seeking higher education any time soon. She has only a high school diploma and one semester of college, while working at a day care making approximately \$6.00 an hour with no benefits. Kenneth was 45 years old at the time of the trial and had been employed by the same business for more than 20 years and had his own smaller business on the side. The trial court did not err in finding Diane suffered from depression. Diane's illness was not the court's only consideration in awarding Diane alimony. Given the totality of the circumstances, an award of alimony was appropriate.

Kenneth also contends the seven years of alimony was excessive. When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996). Diane will need financial support under traditional alimony for a period of time to become self-supportive. She is dealing with the loss of her marriage and daughter and her father's serious illness. In light of the circumstances, seven years is not an excessively long time for Kenneth to pay alimony.

Kenneth next contends the amount of alimony was excessive. However, in reviewing the record, we cannot accept Kenneth's argument. He claims the trial court based its findings on the fact that Diane would be unable to work. Kenneth is mistaken in his reading of the order. There is no part of the order that states Diane

is unable to work. It merely points out the differences in the parties' income. Also, Kenneth contends the court included an incorrect amount of income from his tire business into his monthly income. However, it is clear from the court's ruling on Kenneth's Rule 179(b) motion that it based its decision on alimony on Kenneth's stated income on his tax returns and not from the income from the tire business. Kenneth also contends he is going to be forced to continue to work excessive overtime to meet the demands established by the court. We do not see this as a harmful demand on Kenneth. He testified that he has worked overtime as long as he could remember. Kenneth's overtime income has been a regular part of his income throughout his employment. Kenneth claims he worked overtime to satisfy his wife and daughter. However, he does not show he has stopped working overtime since his daughter's death or his separation from Diane. Taken in light of the factors under section 598.21(3), the amount of alimony was proper.

Kenneth also contends the trial court's award of attorney fees to Diane was erroneous. The controlling factor in awarding attorney fees in a dissolution is the ability to pay. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 663 (Iowa 1989). Kenneth's income was three times Diane's income. The trial court did not err in awarding attorney fees to Diane.

Kenneth also contends the division of marital assets was inequitable and at first glance it would appear he is correct. Diane received the home, which was free of encumbrances, she received all of the furniture and the two cars, while Kenneth received very little. However, taking a closer look, we are able to see the majority of

the assets were purchased with the inheritance received by Diane from her grandfather and through the gifts from her father. Inherited property and gifts received by either party prior to or during the course of the marriage are not marital properties and are not subject to division under section 598 of the Iowa Code. *In re Marriage of Steel*, 502 N.W.2d 18, 20 (Iowa App.1993). This money was placed into the joint account for the couple and Kenneth contends that a great majority of judges hold that once monies go into a joint account they lose their identity. However, he offers no support for this argument and we decline to accept his unsupported statement. In fact, the rule that gifts or inheritances are not subject to property division also applies when the gifted or inherited assets are placed in joint ownership. See *In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa App. 1995); *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). The evidence was sufficient to show that the vast majority of assets Diane retained were from Diane's inheritance and gifts from her father. The trial court did not err in the division of marital assets.

DIANE'S CROSS-APPEAL

Diane contends the court erred by not awarding her permanent alimony. She claims that her limited education and health limitations create a need for permanent alimony. She contends without a retirement plan and with limited other benefits while faced with the possibility of escalating health costs, she will have a difficult time paying her expenses. Most cases with the award of permanent alimony involve a spouse who either is severely disabled or has no possible source of income. See *In*

re Marriage of Bell, 576 N.W.2d 618 (Iowa App. 1998) (Permanent alimony was awarded to a wife who was severely disabled because of a stroke which precluded her from future employment); *In re Marriage of Hayne*, 334 N.W.2d 347 (Iowa App. 1983) (Permanent alimony was awarded to a fifty-seven year old wife with no other source of income after a thirty-four year marriage). Presently Diane may be experiencing some financial hardship, but she does have a regular source of income. In fact, she testified she has a job which she enjoys and experiences great emotional rewards through her job. Kenneth will be paying alimony for seven years, giving Diane time to reestablish her life. We affirm the trial court on this issue.

Diane requests attorney fees on this appeal. In light of the circumstances of this case and with the difference in the incomes, we award \$1,000 to apply upon Diane's appellate attorney fees. Diane's liquid assets are limited and she has no additional income to pay her attorney. Kenneth is ordered to pay \$1,000 to apply on Diane's appellate attorney fees.

We affirm the trial court's decision to award Diane seven years of alimony. The factors of this case justify the award of alimony and seven years will allow Diane to become self-supportive. Diane is able to generate income and at this point her illness can be controlled by medicine; therefore, permanent alimony is not appropriate. We affirm the trial court's division of property. A majority of the property in this marriage was a result of Diane's inheritance and gifts to her from her family. The trial court correctly set these items aside in dividing the property. Due

to the disparity in incomes, we order Kenneth to pay \$1,000 of Diane's appellate attorney fees. Costs on appeal are assessed against Kenneth.

AFFIRMED.

Streit, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part; dissenting in part)

I concur in part and dissent in part.

Diane and Kenneth Bland appeal and cross-appeal challenging the economic provisions of the decree dissolving their long-term marriage. The parties married in 1972 and had one child, Laura, born in 1975. In 1995, Laura died of a brain tumor. The grief the parties suffered following her death contributed to the parties' break-up and this dissolution.

Kenneth, forty-five years old at the time of the dissolution, was employed at all times outside the home. At the time of the dissolution, he had an annual income of \$34,086, which included substantial overtime pay.

Diane, forty-three years old at the time of the dissolution, quit her outside job when Laura was born and did not again become employed outside the home until 1973 when she began working at Sycamore Learning Center. So employed at the time of dissolution, she was earning \$6 an hour. Her annual income was about \$15,800. She inherited \$62,000 from her grandfather which was paid between 1992 and 1995. The money was used for various family purposes. Her parents also made gifts.

To assess the challenge, I first look to the provisions made by the district court.

	Diane	Kenneth
House	\$ 70,000	
Equity in house	\$ (2,327)	\$ 2,327
Personal Property	\$ 15,615	\$ 23,961
'92 Chevy Cavalier	\$ 5,375	
'95 Olds	\$ 15,325	
Dodge Ram		\$ 15,950
½ equity in Dodge Ram	\$ 7,975	\$ (7,975)
½ witness expense	\$ (75)	\$ (75)
Diane's attorney fees		<u>\$ (2,500)</u>
	\$111,888	\$ 31,688

Diane was awarded alimony of \$600 for eighteen months and \$750 a month for five-and-one-half years thereafter. The court found Diane needed alimony for this period of time to rehabilitate her ability to earn an income. Kenneth was ordered to pay \$2500 in attorney fees.

Kenneth challenges the district court's division of property as well as the amount and duration of alimony awarded.

In determining the appropriateness of alimony, we consider the economic provisions of the decree as a whole. *In re Marriage of Allen*, 493 N.W.2d 273, 275 (Iowa App. 1992).

When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). *See In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Hayne*, 334 N.W.2d 347 (Iowa App. 1983).

Kenneth devotes a substantial portion of his brief to challenge the district court's finding Diane needs rehabilitative alimony to recover from her depression and

rehabilitate her income. He contends the record does not support this finding.

My review of the record convinces me the lives of both parties have been substantially impacted by their daughter's death and both are depressed because of it. I consider this in my assessment of the alimony award. I also recognize prior to the dissolution Kenneth enhanced his income by working overtime and to continue to do so may not be possible.

I further consider the fact Diane absented herself from the work force to care for the home and Laura. She has one-and-one-half years of post-high school education and limited work experience. There is no evidence she will experience substantial growth in her wages. Kenneth's income is more substantial, as is his experience in the job market.

Though Kenneth has challenged the property award as inequitable, I would affirm it finding Diane's parents gave her substantial property. However, I look at the fact Diane leaves the marriage with substantially more property than Kenneth in assessing the award of alimony. Inherited and gifted property can be considered on the issue of alimony. *See In re Marriage of Voss*, 396 N.W.2d 801, 804 (Iowa App. 1986).

With the property Diane has available to her, I find the award of alimony inequitable and would affirm the property award but omit the award of alimony.

I would award no appellate attorney fees and tax costs one-half to each party.

I would affirm as modified.