

IN THE COURT OF APPEALS OF IOWA

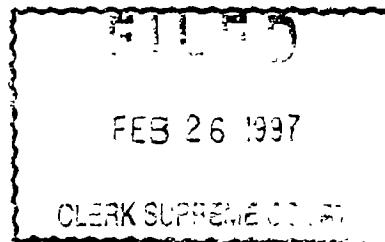
No. 6-756 / 95-1136

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IN RE THE MARRIAGE OF JEFF JOCHIMS AND CYNTHIA LEE JOCHIMS

Upon the Petition of
JEFF JOCHIMS,
Appellee/Cross-Appellant,

And Concerning
CYNTHIA LEE JOCHIMS,
Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Cynthia Jochims appeals the provisions of the dissolution decree. Jeff cross appeals. **AFFIRMED AS MODIFIED; REMANDED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

Thomas J. Jackowski of Elverson & Vasey, Des Moines, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Cynthia and Jeff Jochims, both high school graduates, were married on December 18, 1976, when Cynthia was eighteen years old and Jeff was twenty-three. They have two children, Jennifer Lee, born October 11, 1983, and Jayme Lynn, born June 15, 1989. After their marriage, they operated a motel in Carroll, Iowa, with Jeff's mother. They expanded the motel to include a bar. In March 1981, they closed the bar, and opened a religious bookstore and Christian nightclub, where both parties were involved in the daily operations.

Around 1986, Jeff began manufacturing quilting machines, and it grew into a successful business now known as American Professional Quilting Systems, Inc. (APQS). Cynthia brought her artistic talents to the business, making quilts and demonstrating the machines to potential buyers, along with participating in other business duties. Both parties were equal shareholders and the sole corporate officers. In 1990, they moved to Clive, but the business remained in Carroll. Cynthia's involvement in the business declined. She also experienced severe problems with alcohol, rendering her non-functioning for days at a time. She sought treatment and counseling, but her sobriety never lasted for any significant period of time. Her contributions to the family structure decreased over time.

In April 1993, Jeff filed a petition for separate maintenance. A string of temporary hearings and orders followed relating to custody, injunctions, and restraining orders. In 1994, Jeff amended his petition to a petition for dissolution.

At the time of trial in August and September 1994, Jeff was forty-one years old, and Cynthia was thirty-six. Jeff was in good health, while Cynthia was suffering from depression and extreme alcoholism. The parties stipulated to joint custody of the children, with primary physical care to Jeff. The disputes at trial were property division, alimony, and attorney fees.

Cynthia appeals. Jeff cross-appeals.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Russell*, 479 N.W.2d 592, 594 (Iowa App. 1991). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Property Division. The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App. 1994). The determining factor is what is fair and equitable to both parties under each circumstance. *Id.*; Iowa Code § 598.21 (1995). The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21 (1995). *Starcevic*, 522 N.W.2d at 857; *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

a. Corporation. The court determined the value of APQS was \$400,000, and Cynthia's interest was \$127,600 based upon a percentage of her contributions to the

business and the family unit since 1986. Jeff testified he solely operated the business for the past few years because of Cynthia's condition. Cynthia contends, among other things, the court penalized her for her alcoholism and depression in determining her interest in the APQS, and she believes she is entitled to one-half of its value, or \$200,000.

In situations similar to this, the Iowa courts have held it appropriate to divide the value of the corporate shares 50/50 as Cynthia has requested. *See In re Marriage of Dennis*, 467 N.W.2d 806, 809 (Iowa App. 1991). In *Dennis*, at issue was the division of a corporation of which each party was a fifty-percent shareholder. The husband argued that his former wife should only receive thirty-five percent of its value due to her alleged "misbehavior" in mishandling corporate tax obligations and misuse of corporate funds. *Id.* The appellate court agreed with the district court that the allegations should be disregarded and accordingly awarded a fifty-percent value to each party.

Similarly, Cynthia is a fifty-percent shareholder in this closely-held corporation and should be awarded half of its value despite her alcohol-related illness (or alleged misbehavior). Even if Jeff were the sole shareholder, we would assume Cynthia had made an equal contribution to the marriage to justify a near equal, and always equitable, distribution of marital assets. To award her anything less runs contrary to our rules of equitable property division. We assume both parties have contributed to the life of the marriage and family, but do not delve into their conduct

during the marriage to reward or punish either party. We thus modify the decree to award Cynthia one-half the corporation's value, \$200,000.

b. Pension and profit-sharing. Prior to receiving testimony, this stipulation was offered by Jeff's attorney (along with several other points):

"The parties agree that the securities in the form of the retirement plans in the amount of \$49,323 and \$7,700 will be equally divided between the parties pursuant to a Qualified Domestic Relations Order."

In response, Cynthia's attorney stated:

"We agree that there will be a QDRO dividing their retirement benefits equally."

Testimony was presented that the 1993 contribution to the parties' retirement plans was projected at \$26,657. The court, in its ruling, ordered:

"One-half of the retirement/profit sharing plans in both petitioner and respondent's names. These halves shall be divided pursuant to a Qualified Domestic Relations Order and be effective as of December 31, 1994."

Cynthia later filed a Motion to Reconsider, raising several issues. One point was,

"... said provision should be reconsidered and amended to grant each party one-half of the other party's pension and profit sharing account after the corporation makes contributions for the calendar year 1993. To the best of [Cynthia's] information and belief, [Jeff], by and through APQS, Inc., has failed to make the 1993 contributions to effectively lessen [Cynthia's] one-half share of the parties' retirement benefits."

The court entered this order:

"... the Decree may be amended to provide that each party is granted one-half of the other party's pension and profit sharing account after the corporation makes contributions for the calendar year 1993, if there is any money to make said contributions."

The proposed 1993 corporate tax returns were made part of the record and indicated a retirement plan contribution of \$26,657 for 1993. Cynthia argues it was the parties' intentions to divide the retirement plans after that contribution was made. We find merit in Cynthia's argument. If it were not made, the lack of contribution would be reflected in the value of the corporation. We therefore deem the \$26,657 contribution to have been made and divide the retirement/profit sharing plans accordingly.

II. Alimony. At the time of trial, Jeff was earning a gross income of approximately \$200,000 per year from APQS and rental income, and Cynthia earned approximately \$18,200 from APQS. The trial court awarded Cynthia monthly alimony decreasing over time: \$2000 per month for two years commencing March 1995, \$1000 per month for the next three years, and \$500 per month for three years thereafter.

Cynthia presented testimony of her inability to work on a full-time basis due to her depression and alcoholism. She argues the alimony award should be increased to \$4000 per month for eighteen years (the length of the marriage). Jeff presented evidence of Cynthia's employability, and that her earning potential was \$50,000 to \$75,000 in the quilting business. He argues the alimony award should be reduced by fifty percent, and the time period shortened to six years.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995); *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute

right; an award depends upon the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). We consider property division and alimony together in evaluating their individual sufficiency. *Id.* The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995).

This is an eighteen year marriage and Jeff leaves it with a highly successful business to continue operating. Cynthia leaves with substantial assets but little education, no employment, as Cynthia would no longer receive a salary from the company, and severe health problems. The trial court found Cynthia was presently unable to become employed full time and accordingly set alimony. On balance, we find the award of alimony appropriate and affirm.

III. Child Support. The trial court did not order Cynthia to pay child support, as Jeff “indicated an agreement to waive child support, ” and Cynthia “had demonstrated a reluctance or inability to pay.” Jeff argues he did not waive child support because the court did not adopt his proposed property division and alimony which was the “agreement” referred to in the court’s finding of facts. This court has previously held:

. . . [We cannot] permit a custodial parent to lightly bargain away his child’s right to support. The child’s interest is paramount here also Public interests are also involved. Parents are legally obligated to support their children We recognize that some agreements involving waiver of child support have been held valid between the parties . . . [h]owever, we believe that an agreement which is injurious to the best interest of a child is invalid for any purpose.

Webb v. District Court for Johnson Co., 416 N.W.2d 95, 98 (Iowa App. 1987) (citing *Anthony v. Anthony*, 204 N.W.2d 829, 833-34 (Iowa 1973)).

We find the trial court was incorrect in failing to order Cynthia to pay child support and remand for the court to fix an appropriate amount of child support for Cynthia to pay.

IV. Attorney Fees. We review an award of attorneys for an abuse of discretion. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). The trial court awarded Cynthia \$15,000 in attorney fees and an additional \$5,000 toward expert witness fees, for a total of \$20,000. She requests that Jeff pay an additional \$10,000 in attorney fees. Jeff argues her award of attorney's fees was too high and resists awarding Cynthia attorney fees on appeal.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We also look to other factors such as property division among the parties in determining attorney fee awards. *In re Marriage of McFarland*, 239 N.W.2d 175, 180 (Iowa 1976). We find the trial court did not abuse its discretion in the award of attorneys fees to Cynthia. We further find each party shall pay his or her own attorneys fees on appeal. Costs are taxed one-half to each party.

Having considered all other issues on appeal, we affirm as modified and remand to the trial court. We do not retain jurisdiction.

AFFIRMED AS MODIFIED; REMANDED.