

IN THE COURT OF APPEALS OF IOWA

No. 6-850 / 06-0442
Filed December 13, 2006

**IN RE THE MARRIAGE OF CAROL ANN MACK
AND PAUL WILLIAM MACK II**

**Upon the Petition of
CAROL ANN MACK,**
Petitioner-Appellee,

**And Concerning
PAUL WILLIAM MACK II,**
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn,
Judge.

Respondent appeals from provisions of the decree dissolving his marriage
to petitioner. **AFFIRMED AS MODIFIED.**

Jane White of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook,
L.L.P., Des Moines, for appellant.

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines,
for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Paul Mack appeals from the economic provisions of the decree dissolving his marriage to Carol Mack. We affirm as modified.

I. Background Facts and Proceedings

Paul and Carol were married in 1972. The parties' three children are all at least eighteen years of age. Issues related to postsecondary education expenses were resolved by way of stipulation approved by the trial court.

Carol was fifty-four years old at the time of trial and in good health. She attended a two-year technical school before the marriage and became a registered medical technologist. She has worked full-time at the Iowa State University Ames Laboratory for thirty-three years. In her current position, medical administrator of occupational medicine, she earns \$53,500 annually. Her employment offers no further advancement, due primarily to her lack of an advanced degree. She has a TIAA-CREF retirement account through her employer, worth approximately \$487,300 at the time of trial.

Paul earned a bachelor's degree in industrial engineering prior to the marriage. He worked full-time as an industrial engineer for the first few years of the marriage. After two to four years, Paul voluntarily quit his employment and began working at a series of jobs, primarily in sales. He contributed little income to the family during this time, but did share in household responsibilities. His jobs during this time often allowed him to deduct many of his expenses and housing costs.

In 1990 Paul went back to Iowa State; he earned a second bachelor's degree, in computer science, in 1994. His school loans were paid off using

marital funds. Paul has been employed with an insurance company since 1995, and currently earns \$64,000 per year as a technical analyst. At trial Paul testified that he has reached the top of his pay scale with his current employer. He has interviewed for positions outside the company, but all would have offered comparable salaries. Paul's retirement account through his employer had accumulated approximately \$162,000 at the time of trial.

Paul was fifty-eight at the time of trial. He has asthma and sinus problems, which cause him to miss several days of work each year. He has been diagnosed with chronic leukemia, a condition that requires monitoring, but has not affected him to date.

Both parties received gifts and inheritance during the marriage. Carol received \$175,000 over the course of seventeen years, from the sale on contract of land she and her brother inherited from their parents.¹ The money received was used to pay family expenses. Paul received \$30,000 from his parents during the marriage; the money also went to pay family expenses.²

Carol filed a petition for dissolution of marriage in June 2005. Prior to trial the parties entered into a stipulated agreement dividing most of the parties' property. Under the parties' stipulation, approved by the court, Carol received \$63,200 in assets and Paul received \$69,432 in assets. The issues before the court at trial were the division of retirement assets, valued at \$492,519.59 (Carol)

¹ She received an initial \$12,000 down payment in 1983 and \$9590 annually through 2000.

² An additional gift of \$10,000 from Paul's parents had been invested and was valued at \$44,000 at the time of trial. It was divided between the parties, with Paul receiving the bulk of the funds.

and \$192,583.65 (Paul), and attorney fees. Paul requested that the court equally divide the parties' retirement accounts by awarding \$144,000 of Carol's TIAA-CREF account to him. The trial court entered its decree of dissolution on February 22, 2006. In relevant part, the court awarded Carol all of her TIAA-CREF account, explaining:

The court does this because it is "equitable" in terms of the facts of this marriage, including: (1) because this is a relatively long-term marriage and in view of the disparity in their current income and future earning capacity, Carol would be entitled to receive permanent alimony from Paul if she requests it but she waives any alimony claim provided her pension not be divided; (2) Paul has obtained a second college degree during the course of the marriage; (3) as a result of this additional degree, Paul has a higher earning capacity than Carol does; (4) the loans used to finance this second degree for Paul were paid off with joint assets; (5) Carol was the primary income provider for the family when Paul went back to college; and (6) Carol used all of the \$175,000 she inherited from her family to help support Paul and the children and has nothing to show for it, while Paul's family gifts remain largely intact and he is likely (although not certain) to inherit more from his eighty-five year old parents when they die.

The court further ordered Paul to pay \$2500 of Carol's attorney fees.

Paul appeals, arguing the district court erred in (1) assessing the distribution of inherited property in dividing the retirement funds, and (2) determining Carol would have been entitled to permanent alimony. Further, Paul contends the district court abused its discretion in awarding attorney fees. Both parties request an award of appellate attorney fees.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R.

App. P. 6.14(6)(g). We accord the trial court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

III. Property Division

The parties in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.* The court considers a number of factors in dividing the parties' property, including the length of the marriage, property brought to the marriage by either party, each party's contribution to the marriage, and the parties' ages, physical health, and earning capacities. Iowa Code § 598.21(1) (2005). We approach the issue of property division from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002).

On appeal, Paul asks for "the recognition that the inheritance is no longer available to be set aside or awarded to Carol so giving her credit for the inheritance is inequitable." He contends he should have been awarded \$149,967.97 of Carol's TIAA-CREF account to equalize the retirement funds of the parties at \$342,551.62.

Property inherited or gifts received by either party during the marriage are generally the property of that party and not subject to division upon dissolution, "except upon a finding that refusal to divide the property is inequitable to the

other party or to the children of the marriage.” Iowa Code § 598.21(2). Placing an inheritance received by one spouse into joint ownership or commingling it with other assets is not controlling in deciding whether the property should be divided. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996).

Factors to consider in determining whether inherited property should be divided include:

- (1) contributions of the parties toward the property, its care, preservation or improvement;
- (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
- (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
- (4) any special needs of either party;
- (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982). The length of the marriage or the length of time the property was held after it was devised, though not independent factors, “may indirectly bear on the question for their effect on the listed factors,” and still other matters “might tend to negative or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception.” *Id.*

Because none of the first four factors are present in this case, equity does not strongly favor division of the inherited property. Further, we do not find “any other matter which would render it plainly unfair” to Paul to have the property credited to Carol. The parties had been married thirty-four years at the time of dissolution. Carol received the inheritance between 1983 and 2000, a period that

lasted half the parties' marriage. For approximately eleven of those seventeen years, Paul was either not employed in the field for which he had been trained, and therefore earning far below his earning capacity, or he was in school studying for a second bachelor's degree, a degree paid for with marital funds. Thus, it was necessary for Carol to use her \$175,000 inheritance to support the family during those years. We conclude the district court's decision to award Carol the entirety of her retirement account was equitable under the circumstances.³

IV. Attorney Fees

A. Trial Attorney Fees

As mentioned, the trial court ordered Paul to pay \$2500 of Carol's attorney fees. An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997).

It appears from the court's findings of fact that it based the award of attorney fees on Carol's waiver of an alimony award, to which the court determined she would have been entitled had she requested it. Because we conclude the record does not support an alimony award, and because the parties' have the ability and means to pay their own attorney fees, we conclude

³ We note, however, that two of the reasons cited by the district court in its decision to award Carol the entirety of her retirement account are *not* reasons upon which we base our decision on appeal. First, it does not appear from the record that Carol would be entitled to permanent, or traditional, alimony. See *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998) ("Traditional alimony is payable for life or for so long as a dependent spouse is *incapable of self-support*." (emphasis added)). Second, Paul's likely inheritance is not to be considered in dividing the parties' property. See *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984) ("We do not make property divisions based upon speculation of future inheritances.").

the district court abused its discretion in awarding attorney fees. Accordingly, we modify the decree to eliminate the provision requiring Paul to pay a portion of Carol's trial attorney fees.

B. Appellate Attorney Fees

An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We 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 district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny the parties' request for appellate attorney fees. Costs shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.