

IN THE COURT OF APPEALS OF IOWA

No. 7-651 / 06-2085
Filed October 12, 2007

**IN RE THE MARRIAGE OF JEAN LYNNETTE BRINKERHOFF AND CALVIN
JAY BRINKERHOFF**

Upon the Petition of

JEAN LYNNETTE BRINKERHOFF,
Petitioner-Appellee,

And Concerning

CALVIN JAY BRINKERHOFF,
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S.
Walsh, Judge.

Calvin Brinkerhoff appeals the district court's award of traditional alimony
and the court's decision to set aside inherited assets. **AFFIRMED.**

Craig Lane of Craig H. Lane, P.C., Sioux City, for appellant.

Bradford Kollars and Michele Lewon of Kollars & Lewon, P.L.C., Sioux
City, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

In this dissolution case, the district court awarded Jean Brinkerhoff traditional alimony and also set aside her inherited assets. Calvin Brinkerhoff appeals arguing alimony should not have been awarded and Jean's inherited assets should have been divided as marital property. Jean seeks appellate attorney fees which we award. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Calvin (fifty-four years) and Jean (fifty-five years) had been married twenty-eight years at the time of the September 28, 2006, dissolution hearing. During the marriage they adopted two infants, who were ten and twelve in September 2006. The parties filed a stipulated dissolution agreement resolving most of the dissolution issues. The agreement gives joint legal custody to both Jean and Calvin, with physical care of the children to Jean. We join the district court in commending the parties for working together to resolve most of the issues, particularly those concerning their children.

On November 30, 2006, the district court awarded Jean child support of \$1235 per month and traditional spousal support of \$1200 per month until Jean dies or remarries. The court ruled Jean's inheritance after her father's death, with a balance of \$78,256 in investments, is inherited property and not subject to division between the parties. Calvin appeals. Jean responds and asks for appellate attorney fees. Because we believe the court's allowances for alimony and property division were equitable under the circumstances, we affirm.

II. SCOPE AND STANDARDS OF REVIEW.

On appeal, equity dissolution cases are reviewed de novo. Iowa R. App. P. 6.4; *Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). While we give weight to the district court's findings of fact, especially the credibility of the witnesses, we are not bound by such findings. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. MERITS.

A. Traditional Alimony.

Calvin argues no alimony should have been awarded and, in the alternative, if alimony is appropriate it should be less than \$1200 per month and for a much shorter duration.

We now consider the facts relevant to an award of traditional alimony. At the time they married, Jean had completed one year of college and Calvin had completed a college degree. During the marriage, while Calvin worked full-time and Jean was not working, Calvin obtained his administration degree and Jean obtained a masters degree in education after earning a bachelor's degree in computer science with a math minor.

The couple spent two years in Las Vegas and six months in Omaha based on Calvin's employment before moving back to Sioux City where Calvin returned to his pre-Las Vegas job of physical education director at Western Iowa Tech (WIT). In June of 2006, Calvin took a job with his current employer, Briar Cliff University, at \$69,000 a year or \$5750 per month. Calvin also receives severance pay from WIT in the amount of \$1012 per month for five years. Calvin's net monthly income is \$4350.

After earning her degree, Jean worked full time for MCI for two years until her job position was transferred to Denver. In 1994, near the end of her time with MCI, the couple adopted their son. After MCI, Jean worked part-time teaching computer classes and writing computer-related textbooks while taking care of the new baby. After a few years, the couple also adopted a daughter and Jean continued to work part-time. Calvin agreed with that plan. Since 1994, Jean has only worked in part-time jobs. She generally worked six-hour days without lunch, which allowed her more time with the children.

Jean had worked part-time for Gateway for nine years earning twenty to twenty-three dollars per hour when, three years prior to the dissolution hearing, Gateway downsized its business and she was laid off. Jean next worked part-time as an aide in the school system her children attended and was working there when the couple separated in March 2005.

In the fall of 2005, the parties agreed to monthly child support while Jean was looking for work. During this search Jean felt her age was a detriment in her efforts to obtain a job. In November 2005, Jean obtained her current job with NetSys Plus where she enters time sheets and invoices into the computer and maintains the company's web page. Jean is hired to work thirty hours a week at ten dollars per hour and there are no benefits. Jean's net monthly income is \$1132.73. She has asked NetSys Plus for more hours, but a full-time position of thirty-five hours a week, which would allow her to receive insurance benefits, is not currently available.

Shortly after starting her new job, prior to Christmas 2005, Jean was diagnosed with breast cancer. After surgery, she routinely receives

chemotherapy and radiation which will last until approximately eighteen weeks after the dissolution hearing. Jean has not applied for other jobs because of her health condition and because she will not know the result of her treatment until it is finished. Jean is hoping her current company will keep growing its business and will need to employ her full-time. She is also qualified for and watching for technical writing jobs.

Jean's medical bills have been submitted to Calvin's insurance plan. After the divorce, coverage under COBRA is available for three years at a cost to Jean of \$490 per month. Jean believes she needs to obtain full-time employment to provide health insurance coverage and pay her expenses. However, she is uncertain what opportunities would be available to her as a result of her health condition and her age. The effects of her cancer treatments have exhausted her and have prevented her from working full-time. Jean has had to take time off from her current employer while she was ill and to attend her medical treatments.

The parties stipulated Calvin's insurance would continue to cover the children's medical and dental expenses. The parties agreed Jean would pay the first \$250 per year per child of uncovered medical and dental expense. Uncovered expenses past the cap would be paid by the parties in proportion to their respective net incomes: twenty-one percent Jean and seventy-nine percent Calvin.

The agreement further provides for a division of the couples' property with Jean receiving assets valued at \$239,110 and responsibility for debts of \$91,377 while Calvin receives assets valued at \$193,707 and responsibility for debts of \$38,362. Jean's largest asset is the home valued at \$130,000 with a debt of

\$84,999 and a monthly payment of \$765. The parties want the children to remain in the home for stability and due to the current school having an appropriate special education program for their son.

After trial, the court ordered Calvin to pay \$1200 per month for traditional spousal support until Jean dies or remarries. The statutory factors considered in awarding alimony were correctly identified by the trial court. See Iowa Code § 598.21(3) (2005). Even though our review is de novo, we “accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity.” *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (1996). In support of its decision, the trial court stated:

The credible evidence demonstrates that Jean is capable of supporting herself but to a limited degree. The limitations on the ability to support herself through full-time employment are imposed by her health condition and her age as well as her obligation to provide the primary physical care for the children of the parties.

As in this case, with a marriage of long duration and with the disparity in earning capacity between Jean and Calvin, the Court concludes that it is appropriate to award spousal support. Jean will not be able to become self-supporting at a standard of living that is reasonably comparable to that which she enjoyed during the marriage. Calvin can afford to provide spousal support in some amount.

In awarding alimony, the Court has considered the factors listed in Iowa Code Section 598.21(3), including the length of this marriage (over 28 years), the age of Jean (55 years), and Jean’s health (suffering from cancer and its effects and the effects of treating her cancer), the parties’ earning capacity, and the unlikely possibility that Jean will be self-supporting.

In determining the amount of spousal support, the Court has considered the fact that Calvin’s child support obligation will cease in the future. The Court has also considered the fact that Jean will be primarily responsible for the physical and economic support of the parties’ two children during their minority. The Court has considered the fact that while Jean’s obligation includes the indebtedness for the homestead, she is being awarded the homestead, which is an asset that will likely appreciate in value over the years. The Court has considered that Jean will have to pay for her own health insurance and that Calvin’s monthly

severance pay will cease in five years. The relative financial condition of the parties has been considered by the Court.

We have considered Calvin's multiple arguments in his attempt to eliminate or reduce his spousal support obligation and reject them. Calvin's claim that Jean could currently earn twenty dollars per hour as she did after working at Gateway for nine years is unrealistic. We agree with the trial court the twenty dollar per hour wage "would be a wage she might receive after being employed for a period of time and not a wage that she would receive at the beginning of her employment if she were able to obtain it." After our de novo review, we agree with the trial court's well-reasoned and thorough decision. We are unable to conclude the trial court's alimony award is inequitable in either its amount or its duration.

B. Inherited Property.

In July 1996, Jean inherited \$84,970.71 from her father. The couple used \$13,000 to add a porch to their home. The balance was moved from a joint savings account to a joint checking account and then invested in clearly identifiable accounts with a current valuation of \$78,256. The trial court ruled the inherited property did not lose its identity, was not used for family living expenses or purposes, and was not marital property subject to division between the parties.

On appeal, Calvin argues he is entitled to one-half of the inheritance. Calvin testified he considered the inheritance a joint marital asset and he would not have paid the \$30,000 adoption expense solely from marital assets if the inheritance was Jean's separate asset. Calvin asserts the movement of the money through the parties' joint checking and savings accounts amounts to a commingling that causes the money to become marital property.

Iowa statutory law governs the treatment of inherited property in dissolution cases:

Property inherited by either party . . . during the course of the marriage is the property of that party and is not subject to a property division . . . 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).

We reject Calvin's claim that movement of the money into and through joint accounts means he is entitled to one half of Jean's inheritance. The act of "placing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property." *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). In determining whether inherited property is divisible as marital property, the controlling factors are "the intent of the donor and the circumstances surrounding the inheritance." *Id.* We agree with the district court's conclusion Jean was to be the sole recipient of the inheritance. No evidence indicates Calvin was intended to be a joint recipient with Jean.

The statute provides inherited property may be divided as marital property where the non-division would be unjust. The inheritance was not used for family living expenses or purposes. We find it is not inequitable to keep Jean's inheritance intact and outside the marital division of the property.

C. Attorney Fees.

Jean was awarded \$3500 in attorney fees by the trial court in the original dissolution action. Jean requests attorney fees on appeal. An award of appellate attorney fees is not a matter of right, but rests within our 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 was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We think an award of appellate attorney fees is appropriate and order Calvin to pay \$500 to Jean for appellate attorney fees.

AFFIRMED.