

IN THE COURT OF APPEALS OF IOWA

No. 9-714 / 09-0189
Filed December 30, 2009

**IN RE THE MARRIAGE OF KATHLEEN ANN JONES
AND DAVID ADDISON JONES**

**Upon the Petition of
KATHLEEN ANN JONES,**
Petitioner-Appellant,

**And Concerning
DAVID ADDISON JONES,**
Respondent-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Daniel F. Morrison, Judge.

Kathleen Jones appeals the alimony and property distribution provisions of the parties' dissolution decree. **AFFIRMED.**

Robert L. Sudmeier and Jenny L. Harris of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Bernard L. Spaeth Jr. of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.

Kathleen Jones appeals the alimony and property distribution provisions of the parties' dissolution decree. We affirm.

I. Background.

Kathleen and David Jones were married in 1979. David had recently graduated from the University of Northern Iowa with a degree in economics. In 1980, David began working at Grinnell State Bank (the Bank), a family-run business.

In 1983, Kathleen attended school part-time to obtain her LPN degree. She worked for about six months after receiving her degree, but quit to be a homemaker and stay-at-home mother to their three sons. Kathleen has maintained her LPN certification.

At the time of the dissolution trial in September 2008, Kathleen and David's sons were adults. The parties were able to agree on the division of much of the marital property, entering into a stipulation covering several items. However, they could not agree with respect to the value of certain items, spousal support, and David's interest in the Bank.

David is president of the Bank, which has been family-run for more than fifty years. Several family members are employed at the Bank, including one of the parties' sons, David's father, his brother Austin, and Austin's daughter. Grinnell Bankshares (Bankshares), a holding company wholly owned by David,

his brother Austin, and their parents, owns the majority of the stock of the Bank.¹ David owns 624 shares of Bankshares, as does his brother Austin. Each brother received their shares as gifts over time. Kathleen presented evidence valuing Bankshares stock at \$9942 per share.

Kathleen had moved to Colorado prior to trial. She has numerous health concerns. In 2002 she was diagnosed with advanced coronary artery disease. She had extremely high cholesterol and small blood vessels, which led to several bypass surgeries, angiograms, angioplasties, and vein grafts. She takes several medications and supplements to control her condition and is subject to a twenty-five pound weight restriction. At trial, she submitted doctors' reports indicating that although her arteries are again occluded despite extensive angioplasties and stenting, additional surgery was not recommended at this time. She has no stamina. Kathleen experiences a great deal of anxiety, for which she has been prescribed antidepressant medications.

On November 6, 2008, the district court entered its Findings of Fact, Conclusions of Law, and Judgment and Decree. The court found that Kathleen "has no particular skills and given her health and age anything other than minimum wage would be difficult for her to obtain. She is in need of traditional alimony." The court found that David was a recovering substance abuser² who suffers from sleep apnea, diabetes, high blood pressure, and an irregular heartbeat. Because of his health problems, the court found that David was

¹ The remainder of the stock is apparently in two generation-skipping trusts: one for the benefit of David and Kathleen's three sons, and the other for the benefit of Austin's children.

² The district court wrote it was "not optimistic for David's success [at remaining clean] since he stated at trial 'most people I know use marijuana.'"

interested in early retirement or cutting back on his working hours. The court noted that the main issue in the dissolution proceeding was whether David's Bankshares shares should be set aside or divided as marital property. The court found:

David's grandfather initially obtained controlling interest in the bank and his son, Addison, (David's father) received the controlling interest from him. David has worked at the bank since 1980 and in 2000 was elected president. The Bankshares holding company formed by the Jones[es] now holds 92% of the GSB. No dividends have been paid since 1990. Several of David's children and nieces work for the bank. David is proud of the fact that GSB is truly a family owned and operated bank.

David received 624 shares as a gift from his parents and Kathleen. David's parents placed 207 shares of stock directly into David's generation-skipping trust for the benefit of David and Kathleen's three sons. The mechanics of the direct gifts consisted of the parents gifting to David and Kathleen enough shares to qualify for the annual gift tax exclusion and then Kathleen transferred her shares to David. This procedure was carried through with David's brother Austin and Austin's wife. . . . The stock increases the wealth of the brothers but does not produce any income. The stock did not improve David and Kathleen's lifestyle with the exception that it may have increased their borrowing power. The parties essentially lived on David's salary, currently a monthly gross of \$20,000 plus.

Kathleen contends she never was told any financial information about the family stock and didn't understand she was gifting away stock to David when she received shares of stock from his parents and she turned around and gifted them to David. The court has serious doubts about Kathleen's lack of knowledge. It is clear from this record that if Kathleen decided not to transfer a gift of stock it would have been the last gift made to her. There was no special or close relationship between David's parents and Kathleen. Kathleen tolerated the Jones[es] and they tolerated Kathleen. Kathleen did not contribute to the preservation of the stock or to the increase in value of the stock. David as president would have been working toward preserving and growing the stock. The court finds the stock was gifted to David and should be set aside to him prior to dividing the marital property. The court finds the record fails to establish any plainly unfair reason why the stock should not be set aside to David.

The district court ordered David to pay Kathleen alimony in the amount of \$6000 per month for two years, \$5000 per month from December 15, 2010, to January 15, 2016, then \$4000 per month until February 15, 2022,³ and then \$1000 per month for Kathleen's life.

David was also ordered to pay an additional \$10,000 toward Kathleen's attorney's fees.⁴

The court approved the parties' stipulation with respect to the division of real estate, personal property, retirement assets, bank accounts, and indebtedness, making specific findings with respect to the value of certain items. Per that court-approved stipulation, Kathleen was awarded two vehicles valued at \$29,000, household contents valued at \$23,890, one-half of David's pension plan with a total current value of \$754,590 (\$377,295), one-half of David's 401k, with a total current value of \$12,788 (\$6394), her checking account (\$742), and \$18,543 in indebtedness. David was awarded the family residence valued at \$338,500, three vehicles and a motorcycle valued at \$38,200, household contents valued at \$67,534, one-half of his pension (\$377,295) and 401k (\$6394), his checking accounts (\$1400), and \$156,199⁵ in indebtedness.

³ The court noted that at that point, "Kathleen will have the benefit of Social Security and her share of the pension funds and 401k."

⁴ In a temporary support order, the district court had previously ordered David to pay \$4000 per month in temporary support and \$10,000 toward Kathleen's attorney's fees.

⁵ In the Stipulated Findings of Fact and Conclusions of law, the court's values of indebtedness allocated to David includes eight debts and notes a total of \$132,799. This appears to be a miscalculation. David's brief makes mention of and includes in his debt total, an additional loan from his father in the amount of \$34,000. The district court specifically assigned a "-0-" value to this purported indebtedness.

The court noted that David was to provide Kathleen with forms necessary to secure health insurance through COBRA. The court found the cost to her for health insurance for the next three years is \$304 per month.

Kathleen filed a motion to enlarge and amend the court's findings, seeking among other things, additional alimony, one-half of the equity in the family residence to allow her to make a down payment on a home, a portion of the Bankshares stock, and additional attorney's fees. David resisted, noting that the alimony award, in essence, provides \$745,000 in spousal support over the next thirteen years, three months. He argued that when considered in light of the parties' respective indebtedness, the distribution of the other assets, and the fact that a substantial portion of the equity in the home could be directly traced to gifts and inheritance from his grandparents, no further award was warranted.

The court ruled its prior order concerning spousal support, the Bankshares stock, and attorney's fees was equitable and would not be amended. However, with respect to Kathleen's request concerning the residence, it concluded:

The court considered the debt assigned to David and the alimony required of David in determining the property settlement. The court considered the \$21,000 paid by David to Kathleen to purchase a new automobile as well as the transfer of the Lincoln and van as required by the temporary order filed January 2, 2008. Kathleen requests \$116,972 in property settlement for her share of the equity of the Grinnell residence where David resides. She claims she cannot purchase a home in Colorado without a large cash payment. The court believes her son who is a banker in Colorado near his mother, could certainly provide technical assistance in helping her buy a home with little or no down payment particularly given the alimony award. However the court does understand her desire to make a down payment.

The decree is hereby amended to require David to pay \$25,000 to Kathleen within 60 days.

Kathleen now appeals. She argues the district court's alimony award and property division are inequitable.

II. Standard of Review.

We review dissolution cases de novo. *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). 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. 6.904(3)(g). "Precedent is of little value as our determination must depend on the facts of the particular case." *Fennelly*, 737 N.W.2d at 100 (citation omitted). We accord the trial court with considerable latitude in its determinations and "will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005) (citation omitted).

III. Discussion.

We begin our discussion with these general principles. The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996).

Under our statutory distribution scheme, the first task in dividing property is to determine the property subject to division. *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). Iowa Code section 598.21(5) (2007) requires that

“all property, except inherited property or gifts received by one party” be equitably divided between the parties. The second task is to divide this property in an equitable manner according to the criteria codified in section 598.21(5), as well as other relevant factors determined by the court in a particular case. *Id.*

“Equitable distribution” essentially means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties.

In Iowa, two types of property, inherited property and gifts received by one party, are specifically excluded by statute from the divisible estate. This property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process. Yet, this exclusion is not absolute. Iowa has a unique hybrid system that permits the court to divide inherited and gifted property if equity demands in light of the circumstances of a spouse or the children. Property not excluded is included in the divisible estate.

Id., (citations omitted).

Section 598.21(5) lists several factors to consider when dividing property, including:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) The contribution of each party to the marriage, giving appropriate economic value to each party’s contribution in homemaking and child care services.
- (d) The age and physical and emotional health of the parties.
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- (f) The earning capacity of each party
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- (h) The amount and duration of an order granting support payments
- (m) Other factors the court may determine to be relevant in an individual case.

The court may also order support payments pursuant to Iowa Code section 598.21A. The purposes of property division and alimony are not the

same. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). As noted above, property division is based on each partner's right to a just and equitable share of the property accumulated as the result of their joint efforts. *Dean*, 642 N.W.2d at 325. Alimony, on the other hand, is a stipend to a spouse in lieu of the other spouse's legal obligation for support. See *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004); *Francis*, 442 N.W.2d at 62. We consider alimony and property distribution together in assessing their individual sufficiency. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). "They are neither made nor subject to evaluation in isolation from one another." *Id.*

With these principles in mind, we review the dissolution court's ruling.

A. *Alimony*. Alimony is not an absolute right; an award of alimony depends on the circumstances of the particular case. *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008) (discussing three types of spousal support—traditional, rehabilitative, and reimbursement). "Traditional spousal support is payable for life or for so long as the spouse is incapable of self-support." *Becker*, 756 N.W.2d at 826. Its purpose "is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *Hettinga*, 574 N.W.2d at 922.

Section 598.21A lists a number of factors the court is to consider in determining whether to order spousal support. Some of these factors include the length of marriage, the age and physical and emotional health of parties, the property distribution, earning capacity, feasibility of becoming self-supporting at a standard of living reasonably comparable to that enjoyed during marriage. See Iowa Code § 598.21A(1). A spouse's medical conditions and anticipated medical

expenses are relevant considerations in awarding alimony. *Id.* § 598.21A(1)(b); *Olson*, 705 N.W.2d at 316.

Based on our de novo review of the record, we find the trial court's alimony award is equitable in amount and duration. This was a twenty-nine-year marriage; Kathleen's health is fragile, she has had numerous heart by-passes and takes many medicines and supplements to control her high cholesterol; while Kathleen is an LPN, she has been away from the work force for years; and Kathleen was not awarded any of the bank shares gifted to David. The district court presumed that Kathleen could obtain health insurance when her COBRA expires. Nothing in this record indicates the court's assumption is incorrect. We find no failure to do equity and therefore will not disturb the district court's award of alimony.

B. Property Division Issues. The record indicates that the marital home was built with monies gifted to the parties by a trust fund,⁶ which gifted amounts were then applied to a mortgage note held by that trust. David testified that those gifts should be set aside to the respective parties, but that approximately \$100,000 remained on the indebtedness to the trust. The parties agreed that David would receive the house, but Kathleen argues she should have been awarded one-half the equity.

The parties' major marital assets included the house, its contents, several vehicles, and David's pension. The court considered the property distribution as set forth in the stipulated findings of fact, as well as the sums awarded in the

⁶ David testified that over the course of eleven years, he received gifts of \$129,000 and Kathleen received gifts of \$66,868 from a trust account, which sums were used to construct the house.

temporary support order, in deciding that Kathleen should receive an additional \$25,000 cash payment in its ruling on Kathleen's Iowa Rule of Civil Procedure 1.904 motion. We believe the property distribution was equitable and make no further adjustments.

Kathleen argues that it is inequitable to set aside the Bankshares stock in light of the parties' lengthy marriage and her fragile health. David received the Bankshares stock as gifts.⁷ David and his brother testified that there is no intention to sell the Bank and that it is the family's intention to continue to operate it as a family owned and run business. Under these circumstances, the district court set aside the gifted shares as David's separate property.

Section 598.21(6) contains a qualification to the gift and inheritance set-aside rule: "Property inherited . . . is not subject to a property division . . . except upon a finding that refusal to divide the property is inequitable to the other party." The Iowa Supreme Court has identified a number of factors for courts to consider in determining whether inherited property should be divided:

- (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.

⁷ We acknowledge that in order to maximize family gifting tax exemptions, some of the shares gifted to David were "given" to Kathleen, who then signed them over to David. The district court correctly concluded, however, that it was the intentions of the donors that the Bankshares stock remain in the family, for the benefit of the family-run bank.

In re Marriage of Goodwin, 606 N.W.2d 315, 319 (Iowa 2000) (quoting *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989)).

The length of David and Kathleen's marriage would be a factor the district court could consider in deciding whether to divide the gifted property. *Goodwin*, 606 N.W.2d at 319 ("the length of the marriage may be an important factor in determining whether gifted property should be included in the property distribution"). However, Kathleen did not contribute to the care, preservation, or improvement of the bank holding company. See *id.* at 320-21 (affirming gift set-aside where husband had not contributed to care, preservation, or improvement of the assets acquired with the insurance proceeds, no close relation between him and donor, and not express intent of donor to benefit him). Nor did the inheritance raise the parties' standard of living other than—as the district court found—by increasing their borrowing power. Kathleen's physical needs were addressed by the court in its award of alimony. The record supports the district court's finding that the Jones family will not or does not intend to sell the underlying assets of Bankshares, which was a factor in the district court's decision. Under this record, we find no inequity in setting aside the Bankshares gifts to David.

C. Attorney Fees. Kathleen requests 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 make no award for attorney fees on appeal.

Costs are assessed to Kathleen.

IV. Conclusion.

Based on our de novo review of the record, we find no inequity in the district court's alimony award or property distribution. We therefore affirm.

AFFIRMED.