IN THE COURT OF APPEALS OF IOWA

No. 8-472 / 07-1809
Filed July 16, 2008

IN RE THE MARRIAGE OF DAVID DALE HAZEN AND SHARON KAY HAZEN

Upon the Petition of
DAVID DALE HAZEN,
Petitioner-Appellee,

And Concerning
SHARON KAY HAZEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Sharon Hazen appeals challenging certain economic provisions of the decree dissolving her marriage to David Hazen. **AFFIRMED AS MODIFIED.**

Robert J. Engler of Schulte, Hahn, Swanson, Engler & Gordon Law Firm, Burlington, for appellant.

Myron L. Gookin of Foss, Kuiken, Gookin & Cochran, P.C., Fairfield, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Sharon Hazen appeals challenging certain economic provisions of the decree dissolving her marriage to David Hazen. We affirm as modified.

BACKGROUND. Sharon, born in 1954, and David, born in 1953, married in 1978. At the time of the marriage Sharon had earned her Associate's Degree in nursing two years earlier and was working as a nurse. She continued working as a nurse but left nursing after the parties' daughters were born. David had completed courses at Iowa State University and Southeastern Community College and a year before the marriage began managing the fertilizer department of a business owned by his father. He continued in this capacity until 1992 when he started Hazen Computers after purchasing the computer division of his father's business. Both parties then worked for Hazen Computers. David took a larger salary than did Sharon. The business was sold to a telephone company in 2005 and the company retained David, but not Sharon, as an employee. At the time of trial David's annual salary at the company was $55,500. He had a benefits package that included money for health insurance, retirement support, and vacation pay. Sharon was unemployed.

The parties have two daughters, the oldest born in 1983 and the youngest born in 1990. The older daughter is emancipated. By agreement the parties share joint custody of the younger daughter and David has primary physical care.

Sharon, who was not employed at the time of trial, has a series of health problems and has so suffered during a good portion of the marriage. She claims to have migraine headaches and also claims to suffer from anxiety, depression, neck and back pain, high blood pressure, acid reflux, sinus infections, kidney

stones, and ulcers. She takes multiple medications and has a history of abusing prescription drugs. There was evidence she has made progress in dealing with her depression and that the completion of the dissolution will remove a significant stress in her life, and hopefully she will be able to enter the work force in twelve months. David's health on the other hand is good.

The district court divided assets resulting in each party receiving about $175,000 in equities. In addition, the court set aside to David as gifted property, $244,003 in stock in Hazen Farms, Inc. David was ordered to pay spousal support to Sharon in the amount of $550 a month until she reaches age sixty-five, or remarries, or either party dies, whichever event occurs first. Sharon was ordered to pay fifty dollars a month in child support to David. No attorney fees were awarded.

Sharon contends the property division is not equitable and she should have additional spousal support. She also requests an award for additional attorney fees. We review provisions of a dissolution decree de novo, deciding the issues anew but giving the trial court's factual findings weight, particularly with respect to the credibility of witnesses. Iowa R. App. P. 6.4; *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007).

PROPERTY DIVISION. Sharon recognizes that Hazen Farms stock was gifted to David by his parents prior to the marriage and has no problem with it remaining in his name. She contends the stock should have been considered in allocating their other property and it should have been considered in awarding her alimony. She also contends the court should have given consideration to a Hazen family trust that owns life insurance policies on David's parents. David is

trustee of the trust, yet he has no present interest in the trust and it is a revocable trust.

Iowa is an equitable division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.* Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The partners in the 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 circumstance. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(5) (Supp.2005). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not demanded. *Keener*, 728 N.W.2d at 193.

GIFTED PROPERTY AND PROPERTY OVER WHICH DAVID IS TRUSTEE. While Sharon is not seeking the Hazen stock, the question is whether it should have been considered in making the property division so as to give her a greater share of the assets accumulated during the marriage.

Iowa Code section 598.21(6) provides in part that "gifts received by either party prior to or during the course of the marriage" are not subject to property division unless the refusal to divide the property is inequitable to the other party or the children. Section 598.21(6) is substantially a codification of the premise

established by earlier case law that property inherited by or gifted to one marriage partner is not subject to division unless the failure to do so would be unjust. *See In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982); *In re Marriage of Byall*, 353 N.W.2d 103, 105-06 (Iowa Ct. App. 1984). In *Thomas*, 319 N.W.2d at 211, the court delineated a number of factors which might bear on a claim inherited or gifted property should be divided. These 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.

Thomas, 319 N.W.2d at 211.

Other matters, such as the length of the marriage or the length of time the property was held after it was devised or given, though not independent factors, may indirectly bear on the question for their effect on the listed factors. *Id.* 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.*

We believe the district court correctly set Hazen Farms aside for David. There is no evidence Sharon did anything to contribute to the stock, its care, or preservation. Nor was the property given because of a relationship between Sharon and David's parents. It came to David before the marriage. There is no evidence Sharon made any contribution to the family's economic welfare that preserved the shares of stock. In fact the opposite occurred. The trial court

found, and the record supports a finding, that Sharon engaged in reckless spending during the marriage that depleted the family assets. The district court specifically found that Sharon, through abuse of credit cards, dissipated assets of the parties and David has had to use the parties' assets to pay for Sharon's extravagant spending. We see no reason to accept the argument that because of David's ownership of the stock, Sharon's share of the parties' equities should be increased.

We deny Sharon's request to receive credit for the trust in which David has no ownership interest even though he may have an interest after his parents' deaths. We do not make property divisions based on speculation of future inheritances. *In re Marriage of Griffin*, 356 N.W.2d 606, 609 (Iowa Ct. App. 1984). A future interest is only considered in a property division to the extent the future interest accrues during the marriage. *See In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989). We affirm the property division made by the district court in all respects; however, as noted below we do consider the division in assessing the award of spousal support.

SPOUSAL SUPPORT. Spousal support is provided for under Iowa Code section 598.21(3). Whether spousal support is justified is dependent on the facts of each case. *See In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). In assessing a claim for spousal support we consider the property division and spousal support provisions together in determining their sufficiency. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). Entitlement to spousal support is not an absolute right. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976). A spousal support award is justified when the

distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support who also has a need for support. *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa Ct. App. 1992). Inherited or gifted property can be considered on the issue of spousal support. *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984).

We believe Sharon's award should be increased. While she is educated and at an age whereby she can re-enter the job market, she will need support to assist her to do so. We increase the spousal support award to $1050 a month for three years and affirm the award of $550 a month thereafter. We affirm as modified on this issue.

ATTORNEY FEES. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Miller*, 532 N.W.2d 160, 163 (Iowa Ct. App. 1995). The court should make an attorney fee award that is fair and reasonable in light of the parties' financial positions. *Id*. To overturn an award, the complaining party must show the district court abused its discretion. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997).

Sharon's attorney received a $3500 retainer. At trial Sharon's attorney submitted a bill for attorney fees in the amount of $8495.50. In considering her request the district court noted that $3500 had been paid towards her fees, David had incurred his own bill for substantial attorney fees, and David had paid for all the necessary appraisals of assets and sought no reimbursement from Sharon. The court also considered she was receiving substantial assets and found that

neither party should be required to make any further contribution to the payment of the other's attorney fees.

Sharon contends the district court abused its discretion in not awarding additional fees because she received few liquid assets to use towards legal fees and because the court noted that the payment of previous fees came either from David's personal income or other assets. We do not believe the district court abused its discretion in not awarding Sharon additional attorney fees. We affirm on this issue.

Sharon requests $1500 in appellate attorney fees. Considering the respective income positions of the parties' and the fact that Sharon realized some success on appeal, we find this request reasonable and order that David be responsible for $1500 in attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.