

IN THE COURT OF APPEALS OF IOWA

No. 9-151 / 08-0696
Filed April 8, 2009

**IN RE THE MARRIAGE OF CINDY L. MORGAN
AND JACK M. MORGAN**

**Upon the Petition of
CINDY L. MORGAN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
JACK M. MORGAN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County, David H. Sivright Jr.,
Judge.

Jack Morgan appeals, and Cindy Morgan cross-appeals, from the district
court's decree dissolving their marriage. **AFFIRMED.**

Carrie E. Coyle of Carrie E. Coyle, P.C., Davenport, for appellant.

John T. Flynn of Brubaker, Flynn & Darland, P.C., Davenport, for appellee.

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

MAHAN, P.J.

Jack Morgan appeals the district court's ruling in his dissolution proceeding. He claims the district court erred in (1) failing to offset the inheritance he received from his grandparents during the marriage; (2) setting aside a portion of the child support in a separate trust; and (3) failing to award alimony. Cindy Morgan cross-appeals, arguing the district court erred in (1) failing to impute Jack's income for purposes of child support and the child support trust; (2) failing to consider Jack's wasting of assets and Cindy's increase in assets during the marriage; and (3) failing to award her trial attorney fees. Both parties request appellate attorney fees. We affirm.

I. Background Facts and Proceedings.

Jack and Cindy Morgan were married in 1990 and have three children: Gabriella, born in October 1995; Nicholas, born in January 1998; and Emma, born in August 2001. At the time of trial, Jack was forty-one years old and Cindy was forty years old. Neither party has any physical or mental limitations.

Cindy graduated from the University of Iowa in 1989 with a bachelor's degree in accounting. Since that time, Cindy has been employed by Deere and Company. She began her employment as an auditor and has moved into budget accounting. Her base salary is \$102,000, but with bonuses, her gross earnings in 2006 equaled \$155,711.

Jack graduated from St. Ambrose University in 1988 with a bachelor's degree in business administration with an emphasis on marketing. He has worked in a variety of capacities since that time, including several managerial positions. He began employment at John Deere Seeding Group in June 2002,

but was terminated in August 2006 while he was incarcerated for violating a domestic abuse protection order obtained by Cindy.¹ Upon his release, Jack was rehired by a previous employer, Central Freight Lines, with annual earnings of \$55,000 and the use of a company car. Jack was terminated by Central Freight Lines in December 2006 when he was involved in a collision while intoxicated and operating the employer's vehicle.² At the time of trial, Jack was employed by Pleasure Pools, a company owned by a friend, earning \$8.50 per hour. He testified that he was looking for other employment and conceded an earning capacity of \$55,000 per year.

Cindy filed a petition for dissolution on August 23, 2006. After a trial, the court divided the parties' nearly \$1.4 million in assets. The parties entered into an agreement regarding custody, physical care, and visitation for the children, which the court approved. The court ordered the funds Jack inherited from his grandparents, the majority of which were used to fund the construction of their home, to be subject to division. The court denied Jack's request for rehabilitative alimony. The court ordered Jack to pay child support in the amount of \$345 per month based on his income of \$1332 per month and Cindy's monthly income of \$7772. The court further granted Cindy's request to place funds in the amount of \$41,389 due to Jack in a separate trust for child support, pursuant to Iowa Code

¹ Jack's abusive behavior involved threats of violence without actual physical contact. Jack was charged with stalking in violation of Iowa Code section 708.11(3)(b)(1) (2007), after numerous violations of the protective order. He pled guilty to the lesser offense of stalking in violation of section 708.11(3)(c) and was sentenced to serve 240 days in jail with 120 days suspended. Jack took batterers' education classes while serving time in jail. A no-contact order in effect at the time of the dissolution proceedings was scheduled to expire on August 31, 2008.

² Jack has a history of alcoholism. Jack participated in an alcohol abuse treatment program while serving time in jail. At the time of the dissolution proceedings, Jack alleges he had been sober since April 13, 2007.

section 598.22D. Finally, the court denied Cindy's request for attorney fees. Jack now appeals and Cindy cross-appeals from the decree dissolving their marriage.

II. Scope and Standard of Review.

We review dissolution decrees de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Issues on Appeal.

A. Inheritance.

Jack argues the distribution of property in the dissolution decree was inequitable. He contends the district court erred in failing to offset the inheritance he received from his grandparents during the marriage. He asserts the inheritance should not be subject to division between the parties.

Generally, property should be equitably divided between the parties in the dissolution decree. *In re Marriage of Shriner*, 695 N.W.2d 493, 496 (Iowa 2005). Distribution of property is made pursuant to the criteria codified in Iowa Code section 598.21(5). There is an exception, however, for inherited property and gifts received by one party. Iowa Code § 598.21(6); *In re Marriage of Rhinehart*, 704 N.W.2d 677, 682 (Iowa 2005). Such property is normally awarded to the party who owns the property, regardless of the equitable distribution process. *Shriner*, 695 N.W.2d at 496. Pursuant to Iowa Code section 598.21(6):

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

In determining whether a refusal to divide the inherited property would be unjust, the court should consider several factors, including, “the length of the marriage; contributions made by either party toward the property’s care, preservation, or improvement; and the impact of the property on the parties’ standard of living.” *In re Marriage of Geil*, 509 N.W.2d 738, 741 (Iowa 1993).

In this case, Jack inherited approximately \$134,000 from the estates of his grandparents, which was distributed in installments. Jack received the first installment in 1994, and the second came soon thereafter. Jack placed the inherited funds in the parties’ joint bank account, the same account in which he deposited his salary. Although Cindy did not have a close relationship with Jack’s grandparents and the inheritance was left to Jack alone, no effort was made to keep the inheritance separate from other funds. The parties invested some of the inheritance and used some for marital purposes.

The district court found that the inheritance Jack received from his grandparents during the parties’ marriage should be subject to division. As the court stated:

The court finds the funds inherited by Jack thirteen years ago and invested in the parties’ residence or spent for unstated family purposes are subject to division. Over \$60,000 of the inheritance was used to purchase the lot upon which their home in Eldridge was built, supplement the construction loan, and later pay down the principal of the mortgage on the home at the time it was refinanced. Additional inherited funds were spent on landscaping the property.

Since the parties have lived in the home, Cindy has been primarily responsible for housekeeping, which presumably

implicated the care and preservation of the property. At least during the past ten years, she has made substantial contributions to the parties' economic welfare, also implicating preservation of the property for the family, especially during Jack's recent periods of unemployment. Under the circumstances of this case, a refusal to divide Jack's inheritance would be inequitable to Cindy and the children.

We agree. Cindy and the children, as well as Jack, relied on Jack's inheritance to initiate construction of the family's home. Jack, Cindy, and the children resided in the home together for a number of years prior the parties' separation. The decision to use Jack's inheritance to build a house, provide landscaping, and pay down the principal on the mortgage bear the characteristics of family decisions. Moreover, Cindy has also made significant economic contributions to the family's assets, and particularly to their home, through her income over the years. Jack's inherited funds do not remain separate or identifiable, and none of the family's present assets are directly attributable to them. Although our review is de novo, we "accord the trial court considerable latitude . . . 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 (Iowa 1996). We affirm as to this issue.

B. Child Support Trust.

Jack argued the court erred in setting aside a portion of the funds from the property division in a separate trust for child support pursuant to Iowa Code section 598.22D. Jack stresses that he has never failed to pay his child support obligation. The district court, however, granted Cindy's request for the child support trust after noting that Jack may not maintain consistent employment in the future, based on his history of alcoholism and violations of the protective order. As the court stated:

Cindy's application to place funds due Jack in a separate fund for the support of the children, pursuant to Iowa Code § 598.22D, is granted. Jack's history of alcoholism and his inclination to violate the protective order obtained by Cindy, resulting in his incarceration, make future employment uncertain. Hence, to protect and promote the best interests of the children, some portion of the funds payable to Jack by Cindy pursuant to the division of the parties' property, shall be set aside in a special account at a bank selected by Cindy, from which any arrearage of child support accruing after December 1, 2007, or uncovered medical expenses payable by Jack may be withdrawn by her, after notice to Jack, hearing, and court approval. The account shall be owned by Jack, and interest earned on the deposited funds shall be distributed quarterly to him.

The court later determined that the amount to be set aside in the child support trust should be \$41,389.

Under section 598.22D, the court has the authority to create a trust fund to provide for the "support, education, and welfare" of the children. Iowa Code § 598.22D. Such trust fund is permissible if necessary to protect and promote the best interests of the children. *Id.*; *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995); *In re Marriage of Antisdell*, 478 N.W.2d 864, 867 (Iowa Ct. App. 1991). In this case, Jack had been incarcerated and terminated as a result of his history of alcoholism. At the time of trial, he was making \$8.50 per hour working for a friend, when he had previously had an annual income of \$55,000.³

Upon our de novo review, we find the circumstances in this case raise a reasonable concern with regard to the consistency of Jack's future employment and his ability to maintain his child support and medical obligations. A child support trust is necessary to protect and promote the best interests of the children. See, e.g., Iowa Code § 598.22D. We affirm as to this issue.

³ We further note that even considering the \$41,389 to be placed in a child support trust, Jack was still awarded a settlement payment from Cindy in the amount of \$100,000.

C. Alimony.

Jack argues the district court erred in failing to award him rehabilitative alimony. Specifically, he alleges the court should have awarded him some “transitional money” to assist him for a period of time after the entry of the dissolution decree. He contends he is currently earning \$8.50 per hour, with annual earnings of \$17,680, and even if he is able to make \$55,000 per year, he will still earn one-third of Cindy’s annual salary. He further asserts that he may never be able to reach a standard of living reasonably comparable to that he enjoyed during the parties’ marriage.

Rehabilitative alimony was designed as a way to support “an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.” *In re Marriage of Anliker*, 694 N.W.2d 535, 541 (Iowa 2005). The goal of rehabilitative alimony is self-sufficiency for the dependent spouse. *Id.* As a result, the duration of such an alimony award can be “limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses.” *Id.* at 540-41.

Alimony is not an absolute right. *Id.* at 540. Whether alimony is awarded depends on the circumstances of each particular case. *Id.* In determining whether to award alimony, the district court is to consider the factors in Iowa Code section 598.21A(1) (2007). That section allows the court to consider (1) the length of the marriage; (2) the age and physical and emotional health of the parties; (3) the property distribution; (4) the educational level of the parties at

the time of the marriage and at the time the dissolution action is commenced; (5) the earning capacity of the party seeking alimony; and (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A(1)(a)-(f). We only disturb the district court's decision if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540.

In this case, the district court did not award alimony to Jack. The court considered the factors listed in section 598.21A and determined Jack was capable of being self-supporting without receiving alimony. As the court stated:

Jack is 41 years of age, and now enjoying good physical and mental health. Substantial assets will be distributed to him in this action. He has a college degree and has demonstrated an ability to succeed as a manager, with the capacity to earn \$55,000 per year. All Jack must do to realize this potential is remain sober. This would allow him to be self-sufficient. Although he relapsed after a month of in-patient alcohol abuse treatment at Hazelton, he seems to have benefitted from treatment while incarcerated for 120 days in the Scott County Jail.

Upon our de novo review, we find the district court's decision not to award alimony is equitable in this case. Although the parties were married for seventeen years and enjoyed an economically comfortable standard of living during that time, we find Jack has the capacity to be self-sufficient without alimony. Jack is educated, in good health, and has commendable work experience. He has earned \$55,000 per year in the past and has successfully worked in managerial positions.

After property distribution, Jack and Cindy have comparable assets. Jack's assets are substantial, including nearly one-half million in investments and other funds. Furthermore, Jack was ordered to receive an equity settlement

payment from Cindy in the amount of \$100,000, even after subtracting \$41,389 for the child support trust. We also note that the court did not impute Jack's income and ordered Jack to pay only \$345 per month in child support. This amount was based on Jack's income of \$1332 per month, despite the fact that Jack conceded he had an earning capacity of \$55,000 per year. Given these facts, and considering Jack's history of wasting assets while being unemployed or underemployed due to his alcoholism and incarceration, we cannot find Jack is without the assets and earning capacity to be self-supporting at a standard of living reasonably comparable to that he enjoyed during the parties' marriage. We conclude the district court's decision with regard to alimony is equitable and affirm on this issue.

IV. Issues on Cross-Appeal.

Cindy argues the district court erred (1) in failing to impute Jack's income for purposes of child support and the child support trust and (2) in failing to consider Jack's wasting of assets and Cindy's increase in assets during the marriage. We have already determined the district court's decision with regard to these issues was just and equitable. Because we find the court's decision equitable, we will not further address Cindy's contention that the court should have imputed Jack's salary and considered Jack's wasting of assets and Cindy's increase in assets.

Cindy further contends the court erred in failing to award her trial attorney fees. An award of attorney fees is not a matter of right, but rather rests within the court's discretion. *In re Marriage of Hocker*, 752 N.W.2d 447, 451 (Iowa 2008). We review the district court's award of attorney fees for abuse of discretion.

Sullins, 715 N.W.2d at 255. An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). Considering Cindy's income and substantial assets, we conclude the district court did not abuse its discretion in deciding not to award attorney fees to Cindy.

V. Appellate Attorney Fees.

Both parties request attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.*; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Given the relative asset position of the parties, we deny their requests for appellate attorney fees. Costs on appeal are assessed one-half to Jack and one-half to Cindy.

AFFIRMED.