

IN THE COURT OF APPEALS OF IOWA

No. 9-162 / 08-1198

Filed April 8, 2009

**IN RE THE MARRIAGE OF KATHERINE M. BONE
AND MARK W. BONE**

**Upon the Petition of
KATHERINE M. BONE,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
MARK W. BONE,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jones County, Robert E. Sosalla,
Judge.

Mark Bone appeals and Katherine Bone cross-appeals from the district
court's decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

Steven E. Howes of Howes Law Firm, P.C., Cedar Rapids, for appellant.

William D. Werger of Werger Law Firm, Manchester, for appellee.

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

DOYLE, J.

Mark Bone appeals and Katherine Bone cross-appeals from the district court's decree dissolving their marriage. Upon our de novo review, we affirm as modified.

I. Background Facts and Proceedings.

Mark and Katherine were married in June 1989. They have two daughters born of the marriage, both minors at the time of the dissolution.

Katherine is a high school graduate and has one year of college education. She has been employed full time at a local bank since 1975 and worked throughout the parties' marriage. She currently earns \$26,329 a year through her employment with the bank, and also recently began working a part-time job two nights a week. Additionally, Katherine contributed to IRAs and a 401(k) account during the time of her employment. From 2004 to 2006, Katherine withdrew over \$75,000 from her IRA. At the time of trial, Katherine's IRAs had a value of approximately \$28,592, and her 401(k) had a value of \$20,557.

Prior to the parties' marriage, Mark began working full time for the Bomont Land Co., a closely-held family farm corporation formed by Mark's parents, W.C. and Virginia Bone, on June 1, 1980. Mark is paid wages monthly by the corporation equaling \$4800 a year. The corporation also contributes \$2000 annually on Mark's behalf to various IRA accounts. Some years Mark receives a bonus, but there is no set means for determining when or if he will receive a bonus. From 2002 to 2007, Mark earned an average wage of approximately

\$7000 a year from the corporation. At the time of trial, Mark's IRAs had a value of approximately \$212,680.

In addition to wages, the corporation provides extra benefits to Mark. The home the parties lived in during the marriage is owned by the corporation. The corporation allows Mark and his family to live in the home at no cost and pays the utilities and the home telephone bill. The corporation owns the vehicle Mark drives and pays the vehicle expenses, including licensing fees, insurance, and gas. The corporation provides Mark with the use of a motorcycle and an all-terrain vehicle. The corporation provides Mark with a quarter of beef every year for his and his family's consumption. The corporation also pays for Mark's work clothes and pays the family's medical costs that are not covered by Katherine's insurance. Additionally, Mark has been issued shares of the corporation's common stock.

Katherine filed for dissolution of marriage on March 19, 2007. The matter proceeded to trial on March 25, 2008. Katherine testified that she and Mark held separate bank accounts and that the bills and necessities not covered by the corporation were paid by her out of her earnings. She testified that she paid for her and the children's clothing, childcare, groceries, household items, and the children's athletic activities. She further testified that the amount of money withdrawn from her IRA went towards family expenses. Katherine sought child support, alimony, and attorney fees, along with an equitable distribution of the marital property. Katherine further asserted that Mark's corporate stock was an asset to be considered in equitably dividing the property.

Mark testified that he led a frugal lifestyle prior to and during the marriage. He disagreed with Katherine's taking withdrawals from her IRA to pay for the children's athletic activities. Additionally, Mark testified that the stock he had been given was intended to be his inheritance, and he argued its valuation should not be considered in the property distribution. As to his common stock's valuation, he testified that the corporation was authorized to issue 500,000 shares of preferred stock and 500,000 shares of common stock. The preferred stock holders were to have no voting rights in the corporation, and each share of preferred stock was set at the fixed price of one dollar per share. Mark testified that his mother owned the majority interest in the corporation and he owned 12.25% of the corporation's common stock. Mark testified he did not "have a clue" as to how he came up with that percentage. Nine corporate records, each entitled "Report of Stock Gifted," show stocks held by Mark's parents were transferred over a period of time to their children by various certificates. However, there are gaps in the certificate numbers issued—the records begin with certificate number two and several certificate numbers are missing. A summary of his gifted stock shares states that Mark owned 61,269 shares, equaling 12.25% of the authorized common stock.¹ This summary does not state the total number of common stock shares issued by the company.

Mark's mother, Virginia Bone, testified by deposition that she and her husband "started the giving-away [of stock] process as soon as [they] incorporated." However, she was unable to state how much stock was owned by her at the time of her husband's death, or how much total common stock had

¹ 61,269 shares equals 12.25% of 500,000 shares.

been issued by the corporation. When pressed on the issue, she reviewed the corporation's "Book of Certificates" that she brought with her to the deposition. In addition to the nine corporate records introduced at trial, Virginia testified as to the contents of several other records containing missing certificate information (though several remain absent). She testified that certificate number one represented the 20,269 shares of common stock issued to her husband and certificate number two represented the 89,135 shares of common stock issued to her. She also testified that Mark and her other children had been gifted other stock not reflected on the corporate reports introduced at trial, including an additional 5000 shares to Mark in 1993.

After the March 25, 2008 trial, the district court took the matter under advisement. On March 31, 2008, the court entered an order setting the case for further hearing. The order stated that the "facts of this case indicate that the circumstances presented . . . may very well warrant inclusion of all or part of the value of Mark's interest in [the corporation.]" However, the court found that upon its initial review of the evidence, it had no basis upon which to value Mark's interest. The court then set the matter for further hearing to allow the parties to present evidence concerning the value of the corporation and the value of Mark's interest in the corporation as of the original date of trial.

The trial reconvened on May 30, 2008. There, Katherine introduced an appraisal of the corporation's land and buildings, valuing those assets to be \$1,911,000. The appraisal does not include valuation of corporation's machinery, equipment, crops in the ground, harvested corn and beans in storage, cattle, money in the bank, or other assets. Mark did not provide an

appraisal of the corporation, but testified he thought Katherine's appraisal's valuation was high.

Mark offered, without objection, three documents concerning the corporation's stock. The first document, Exhibit M, prepared by Virginia, states that Mark owned fourteen percent of the common stock, his brother owned sixteen percent of the common stock, and Virginia owned the seventy percent of common stock.² Mark explained that the second document, Exhibit P, shows the number of stocks owned by everyone in his family. This document states that Mark's father owned 30,269 shares of stock, his mother owned 192,135 shares of stock, his brother owned 41,135 shares of common stock, and Mark owned 66,269 shares of common stock. It also states that his sisters owned a total of 178,000 shares of preferred stock.³ However, Mark testified it was his understanding that his father's stock had transferred to his mother at his father's death. The document also states that Mark owned 13.3% of 500,000 common shares. The final document, Exhibit Q, prepared by Virginia as secretary of the company, is a record of minutes from various corporate meetings. The minutes of the January 20, 2007 meeting note that "nothing had been done with the remaining stock. It was decided that this should be issued to Virginia." When asked about this minute, Mark testified he didn't know if the remaining stock had been issued to Virginia, and no further testimony or evidence was introduced on the issue.

² Only percentages are stated—the number of shares used to derive the percentages are not revealed.

³ This document does not specify the number of common and preferred shares owned by Mark's parents.

On July 2, 2008, the district court entered its decree of dissolution of marriage. The court found the corporation's perks provided to Mark constituted income and found Mark's total annual income from the corporation to be approximately \$27,750 a year.⁴ The court found Katherine's annual income, including her additional part-time employment, was \$29,500. Based upon these numbers and the child support guidelines, the court determined Mark should pay child support for the two children in the amount of \$583 a month.

The court found the corporation had gifted 66,269 shares of common stock to Mark—36,134 shares issued before the parties' marriage and 30,135 shares during the marriage. In dividing the property, the court found it was equitable to award Katherine fifty percent of the value of Mark's corporate stock he received during the marriage. The court determined the corporation had issued a total of 329,808 shares of common stock and Mark's interest represented over twenty percent of the total shares of common stock.⁵ The court further found that 188,000 shares of preferred stock had been issued to Mark's sisters, for a total value of \$188,000.⁶ The court found the appraised value of the

⁴ The court found Mark's averaged annual traditional wages from the corporation to be \$7000 (respondent's Exhibit A). The court also included the following as income: \$3600 a year for use of the home, \$1500 a year for utilities, \$600 a year for the home phone, \$200 a year for the quarter of beef, \$500 a year for clothes and medical costs, and \$5360 a year for the use of the vehicle. Additionally, the court found Mark's income included an annual \$9000 contribution by the corporation to a separate IRA account. The court also noted that Mark had been paid dividends, averaging \$3250 a year, due to his stockholder status in the corporation.

⁵ The court cited Mark's Exhibit P in arriving at this number of total shares of issued common stock. It is assumed the court took the total number of shares listed in Mark's parents' columns and added them to the total number of Mark and his brother's shares of common stock listed on the exhibit. See also footnote 10.

⁶ It is unclear how the court arrived at 188,000 shares of preferred stock. Mark's Exhibit P reflects that his sisters had been issued 178,000 shares of preferred stock; however, the court's number is not disputed by the parties.

corporation's land and building to be reasonable and subtracted the total value of the preferred stock (\$188,000) from the appraised value, finding the corporation to have a net value of \$1,723,000. Then dividing the net value by the number of common shares issued (329,808), the court found the common shares had a value of \$5.22 each. Based upon that valuation, the court determined Mark's 30,135 shares of common stock issued during the marriage had a value of \$157,306, and that Katherine was entitled to one-half, or \$78,652.

Additionally, the court determined Katherine was entitled to half of Mark's retirement accounts, that she should retrieve one-half of the \$75,000 she depleted from her IRA for family expenditures, and that she was entitled to one-half of her IRA's present value, all equaling \$131,130.⁷ The court declined to award Katherine alimony or attorney fees, and ordered Mark to pay Katherine the sum of \$209,782, payable in installments.

Mark appeals, and Katherine cross-appeals.

II. Scope and Standards of Review.

We review dissolution of marriage proceedings de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We examine the entire record and adjudicate rights anew on the issues properly presented. *Id.* Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g). Our

⁷ The court broke down the \$131,130 as follows: "One-half of Katherine's lost \$75,000 is \$37,500. Mark's IRA accounts have a value of \$212,680. One-half of that amount is \$106,340. Katherine's IRA account has a present value of \$25,420. One-half of that amount is \$12,710. \$37,500 + \$106,340 - \$12,710 = \$131,130."

review of a district court's decision concerning a request for attorney fees is for abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Merits.

A. Property Division.

1. Stock.

Mark first argues that the district court erred in including a portion of his shares of stock in the division of property. Mark asserts his stock should not have been included because the stock was gifted as inheritance and Katherine did not contribute to care, preservation, or improvement of Mark's stock's valuation. We disagree.

Generally, property should be equitably divided between the parties in a dissolution decree. *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). There is an exception, however, for inherited property and gifts received by one party. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 682 (Iowa 2005). "This property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process." *Schriener*, 695 N.W.2d at 496. Nevertheless, Iowa Code section 598.21(6) (2007) provides:

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.

Thus, inherited or gifted property may be divided when it would be inequitable to award the property to one spouse. *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). In determining whether inherited or gifted property should be equitably divided, we consider "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) (citations omitted).

The district court found:

Mark's appreciation in the value of his assets was not fortuitous. It resulted from his hard work and attention to the farm operation. But also, . . . Katherine's efforts allowed Mark to concentrate his efforts on his work. She provided marital companionship and contributed to the marriage as she was able. Her indirect contributions assisted Mark in his endeavors. Concluding otherwise needlessly diminishes a [nineteen] year marriage.

Additionally, I find that it would be inequitable in this case to completely disallow the value of Mark's . . . stock in determining a fair property division because it was property Mark brought into the marriage and/or a gift. It would be inequitable to both Katherine and the children. Once again, Katherine invested all of her income into the marriage, assisting in enabling the farm operation to be successful. . . . It is unreasonable to expect that Katherine should alone make those sacrifices for the children and the home when they are joint responsibilities.

It would also be inequitable to fail to recognize Katherine's contribution to Mark's ability to maintain the successful farm operation. Even though [the corporation] gifted the stock to him, Katherine's efforts enabled the stock to maintain and even increase in value. For example, when the farm operation included dairy cows, Katherine assisted in the dairy operation. Mark's frugal lifestyle and refusal to support the children's activities required Katherine to mortgage her future retirement by \$75,000.

(Footnotes omitted.) We agree with the district court's conclusions and find the court did not err in determining a portion of Mark's stock's valuation should be awarded to Katherine. However, whether the percentage awarded to Katherine is equitable necessarily depends upon the stock's valuation, and we next turn to that issue.

To demonstrate our frustration in reviewing this issue, we quote from the record deposition testimony of Virginia Bone, mother of Mark Bone, matriarch of

the Bone family, and secretary/treasurer of Bomont Land Co. since the day the farm was incorporated:

Q. Can you tell us, at the present time, how much common stock there is, total? A. No, I can't.

Q. How many shares of stock are outstanding at this time, in the Bomont Land Company? A. I don't know.

Q. And I'm asking you how many certificates are outstanding? A. I can't tell you, and what difference does that make?

So, we are faced with a record clear as mud. Our task would have been lightened considerably had these seemingly simple questions been answered somewhere in the record.

Katherine argues the court incorrectly found there had been 329,808 shares of common stock issued by the corporation. Katherine contends the corporation had only issued 109,404 total shares of common stock and thus the price per share was greater than the price the district court found. Mark, still indecisive as to how many common stock shares had been issued, suggests on appeal there had either been 500,000 or 329,808 shares of common stock issued by the corporation. Upon our review, we agree with Katherine.

The corporation is a closely held family farm corporation. Mark was not an outsider. He and his brother served for many years as "co-presidents" of the corporation.⁸ Mark was asked repeatedly to disclose the total number of shares issued by the corporation, and the district court even reconvened the trial for the

⁸ About three months after Katherine filed her petition for dissolution of marriage, it was decided to do away with the co-presidents of the company, and Mark's brother was elected president and Virginia remained as secretary/treasurer. Mark was then no longer an officer in the company. When it was suggested that this decision was made because his wife had filed for divorce and he didn't want to be president anymore, Mark responded: "Could have been, yeah."

presentation of evidence on this issue. Mark merely produced several conflicting documents, none of which disclosed the total number of shares issued. The district court relied upon Mark's Exhibit P in calculating the total number of shares of common stock, apparently adding together the amount of shares listed as being held by Mark, Mark's parents, and Mark's brother. To the district court's credit, it did the best it could with the unclear evidence. Nevertheless, upon our review, we find no corroborating evidence to support a finding that 329,808 shares of common stock had been issued.⁹

Although Mark and his mother Virginia testified that Mark was a minority shareholder and Virginia was a majority shareholder in the corporation, the documentary evidence presented at trial indicates otherwise. Mark's mother testified she was unable to tell how much stock she owned when her husband died, or how much common stock had been issued, or how many shares or certificates were outstanding. When pressed on the issue, she testified that her husband was initially issued 20,269 shares of common stock and she had been issued 89,135 shares of common stock, along with shares of preferred stock.¹⁰ She testified that she and her husband began giving the stock away to their

⁹ W.C.'s and Virginia's shares are not designated as common or preferred on Mark's Exhibit P. It appears Virginia's 192,135 listed shares include 103,000 preferred shares, and these preferred shares were included in the district court's total of common shares outstanding. It also appears the district court included some shares twice in its tally; the original number of shares held by W.C. and Virginia were added to the number of common shares they gifted to their sons.

¹⁰ Exhibit P shows Virginia having 192,135 shares of stock. Based upon Virginia's testimony and the corporate "Report of Stock Gifted," Virginia had been initially issued 89,135 shares of common stock and W.C. gifted her 103,000 shares of preferred stock, which together, total 192,135 shares.

children immediately thereafter.¹¹ Based upon Virginia's testimony, her stock was gifted to her children. There was no evidence presented that the corporation issued any additional stock to Virginia or her husband. In fact, the corporate minutes indicate she and her sons recognized in 2007 that all of the remaining stock had not been issued. Although the minutes authorized the remaining stock be issued to Virginia, there was no evidence presented that the stock was ever issued to Virginia. When asked, Mark testified he did not know if the remaining stock had been issued to Virginia.

Based upon Mark's and Virginia's testimony, along with the corporate "Report of Stock Gifted" documents, we find that at the time of trial the amount of corporate common stock issued was a total of 109,404 shares. Of those shares, we find 66,269 shares had been gifted to Mark (36,134 shares issued before the parties' marriage and 30,135 during the parties' marriage), and 41,135 shares had been gifted to Mark's brother, leaving Virginia with 2,000 shares.

We next turn to the stock's valuation. Mark argues that the district court erred when it did not make various deductions or adjustments to its valuation of the corporation. We disagree.

The district court found the appraised value of \$1,911,000 for the corporation's land and buildings to be reasonable. It subtracted the value of the preferred stock (\$188,000) from the appraised value to arrive at a net value of \$1,723,000. Although our review is *de novo*, we ordinarily defer to the district court when valuations are accompanied by corroborating evidence. *In re*

¹¹ The corporate "Report of Stock Gifted" documents show W.C. and Virginia began gifting stock to their children on October 17, 1980.

Marriage of Vieth, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). We first note the appraised value did not include the value of any machinery, crops, or other assets held by the corporation. Secondly, we note that the reduction for the preferred stock obligation was \$10,000 too high since the evidence supports a finding there were 178,000, not 188,000, outstanding preferred stock shares. Nevertheless, we find the district court's valuation to be within the permissible range of the evidence and, as a result, should not be disturbed. See *In re Marriage of Williams*, 449 N.W.2d 878, 881 (Iowa Ct. App. 1990). Consequently, we agree the net value of the corporation was \$1,723,000. With a total of 109,404 shares of common stock issued, each share's value equals \$15.74. Thus, the total valuation of Mark's 66,269 shares equals \$1,043,074.06. The value of Mark's 30,135 shares issued during the parties' marriage equals \$474,324.90.

Although the district court found that fifty percent of the value of Mark's stock received during the marriage should be awarded to Katherine, we find that, given our valuation of the stock, a fifty/fifty split would not be equitable. We find Katherine should be awarded \$80,000 as her equitable share in the value of Mark's stock.

2. Division of Retirement Accounts.

Mark next argues the court erred in requiring Mark to pay one-half of the IRA account Katherine depleted during the course of the marriage, and that the court should have counted the assets Katherine depleted in calculating each party's share. Additionally, Mark contends the court incorrectly valued Katherine's IRA and 401(k) accounts.

The court found Katherine depleted her IRA account by \$75,000 during the marriage to pay for family expenses. We find this determination to be supported by the evidence and therefore find the court did not err in requiring Mark to pay one-half of the \$75,000. However, we agree the court incorrectly valued Katherine's IRA and 401(k) accounts. Although the court determined Katherine's IRA was valued at \$25,420, Katherine acknowledges her IRA and 401(k) accounts were valued at approximately \$49,149 at the time of trial.¹² Consequently, we find Katherine should be awarded a net amount of \$119,265.50 from the retirement accounts.¹³ Therefore, as a part of the property division, Katherine is awarded an equalization payment of \$199,265.50.

B. Child Support.

Mark next contends that the district court erred in its calculation of child support. Mark argues the amount of child support is more than he has available in cash each month. He also argues his annual income with the corporate perks is less than the amount determined by the district court. We disagree.

"Both parents have a legal obligation to support their children, not necessarily equally but in accordance with his or her ability to pay." *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996). Parents must give their

¹² See footnote 7. The district court erroneously obtained this figure from Exhibit 21, a portfolio analysis dated March 7, 2007. Subsequent to that date, Katherine moved her IRA accounts to another institution. Additionally, the court did not take into account Katherine's 401(k) account. To be fair to the district court, the parties' financial exhibits were offered and received en masse at the commencement of trial, with little or no testimonial follow-up. On appeal Katherine agrees the value of her 401(k) and IRA accounts at the time of trial was about \$49,149. This figure is consistent with trial Exhibits 4, 5, 14, and 15.

¹³ One-half of Katherine's lost \$75,000 is \$37,500. Mark's IRA accounts had a value of \$212,680. One-half of that amount is \$106,340. Katherine's IRA and 401(k) accounts had a present value of \$49,149. One-half of that amount is \$24,574.50. $\$37,500 + \$106,340 - \$24,574.50 = \$119,265.50$.

children's needs high priority and be willing to make reasonable sacrifices to assure their care. *In re Marriage of Fidone*, 462 N.W.2d 710, 712 (Iowa Ct. App. 1990). All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. See *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). Support may be based on a payor's earning capacity rather than actual earnings. *Moore*, 551 N.W.2d at 889.

Here, the district court found Mark's annual income to be \$27,750 a year, including his wages, perks, and retirement contributions. We find the district court's determination was within the permissible range of the evidence and, as a result, find the determination should not be disturbed.

C. Alimony.

Katherine argues the court erred in failing to award her alimony. We disagree.

Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). 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). That section allows the court to consider the property division in connection with the alimony award. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's decision if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540; see also Iowa Code § 598.21A(1).

Here, we find the district court's decision declining Katherine's request for alimony to be equitable and therefore do not disturb the decision.

D. Trial Attorney Fees.

Katherine asserts the district court erred in not awarding her trial attorney fees. An award of attorney fees rests in the sound discretion of the district court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We find no abuse of discretion in the district court's determination that each party should pay his or her own trial attorney fees.

E. Appellate Attorney Fees.

Katherine also seeks attorney fees for this 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 the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We determine each party should pay his or her own appellate attorney fees.

IV. Conclusion.

After considering all issues raised on appeal, whether or not specifically addressed in this opinion, we modify the property equalization so that Mark is required to pay Katherine the sum of \$199,265.50. The rest of the decree is affirmed. Costs of appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.