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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-715 / 90-490

IN RE THE MARRIAGE OF DENISE ROSE SHANAHAN AND BRADLEY LYNN SHANAHAN

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Upon the Petition of

DENISE ROSE SHANAHAN,

Appellee,

And Concerning

BRADLEY LYNN SHANAHAN,

Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

The husband appeals from a dissolution decree, challenging the division of property. Both parties request attorney's fees on appeal. **AFFIRMED.**

Stephen A. Swift, Cedar Rapids, for appellant.

William F. Olinger and David P. McManus of Olinger & McManus, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Brad and Denise Shanahan were married in 1971. They have three children. The children were placed in Denise's sole custody pursuant to a stipulation. Visitation and child support were also determined by stipulation. These provisions are not challenged on appeal.

Denise was fifteen when the parties married. She did not graduate from high school, and has been employed as a baby sitter, a housekeeper, and a school bus driver. Denise is currently employed as a school bus driver earning a net monthly income of $663.52. Her income in 1988 was $9,792.26.

Brad is a high school graduate. He studied for one and a half years to be a computer operator at Kirkwood Community College. He has been employed in several capacities, and he is currently employed with the Universal Gym Equipment Company in Cedar Rapids. Brad has a net monthly income of $890.85. His income in 1988 was $16,459.88.

The parties had accumulated a large amount of personal property, and the district court divided it equally. The subject of this appeal is the parties' house, owned in joint tenancy and free of debt. Finding its value to be attributable to gifts made to Denise by her family, the court awarded the house, valued at $54,000, to Denise.

The district court found that Denise's grandfather and uncle had contributed approximately $26,000.00 to the

Shanahan family between April 29, 1975 and October 6, 1982. During the 1980s, approximately $40,000.00 in additional funds was given to the parties. At least $21,000.00 was paid by Denise's uncle and grandfather toward the parties' real estate payments.

Brad has appealed from the dissolution decree, arguing that he should have been awarded a share of the house's value. Both Brad and Denise request attorney's fees on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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. 14(f)(7).

I. Property Division. 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 Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976). With regard to gifts received by one spouse prior to or during the marriage, we "start with the premise that the property is not subject to division; but the premise yields where its application

would be unjust." In re Marriage of Thomas, 319 N.W.2d 209, 210 (Iowa 1982); see also Iowa Code § 598.21(2) (1989).

Brad raises three main arguments in challenging the award. First, he asserts that Denise intended to give him a one-half interest in the gifted property, thereby rendering the gifts marital property. Second, he asserts if the property is excluded from division by Iowa Code section 598.21(2), then equity demands a division of the gifted property. In support of this argument, he contends his heightened lifestyle expectations created by the gifts necessitate a division of the house's value. He also contends that his work on, and payments toward, the house entitle him to a portion of the house's value. Alternatively, Brad asserts the gifted property does not account for the total value of the house, and, therefore, he should be granted one half of the house's value after subtracting the value attributable to the gifts. While these arguments warrant discussion, we find them, ultimately, unpersuasive.

We first address the question of whether the gifts given to Denise by her family are subject to exclusion from division as contemplated by Iowa Code section 598.21(2). Iowa Code section 598.21(2) provides that "gifts received by either party prior to or during the course of the marriage [are] the property of that party and [are] not subject to a property division under this section . . . ."

In its order regarding division of the house's value, the district court placed emphasis on several factors. The court found that at least $27,000, or half the value of the parties house, was gifted property as contemplated by section 598.21(2). The court stated the appraisal value of $54,000 more closely represented the contributions made by Denise's family. Furthermore, the court considered custody of the minor children had been awarded to Denise, and found that equity could best be achieved by awarding the house to Denise.

There is ample evidence in the record to support the district court's finding that a substantial portion of the house's value was directly attributable to gifts from Denise's family. Two weeks after Brad and Denise were married they moved into a mobile home. They sold the mobile home for $3,000 in 1975 and purchased a house for $13,200. They sold the house for $24,000 in 1977 and moved into a new house, which they built on a lot furnished by Denise's parents. Her parents helped to build the foundation, saving the parties approximately $4,700. A garage was added in 1979, and Denise's uncle and grandfather contributed $1,200 toward its construction.

According to Denise, her uncle and grandfather have given her gifts totaling close to $100,000. She was able to document approximately $60,000 in gifts. Brad disputes the remaining $40,000. Nevertheless, the majority of the parties' personal property and a substantial portion of the

value of their house was financed by gifts given to Denise and the children by members of her family. The gifts given to Denise by her family are not marital assets and are not subject to division.

Second, we address the question of whether Denise's actions constituted a gift of the property to Brad. "A transfer of property into joint tenancy where one party furnishes all of the consideration is presumed to be a gift to the other party of one-half interest in the property." In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). However, we find sufficient evidence in the record to rebut this presumption.

In In re Marriage of Martens, we stated "the question of whether or not there has been a gift in a given case is one of fact, in which the intent of the alleged donor in delivering the property is a very material inquiry." 406 N.W.2d 819, 821 (Iowa App. 1987)(quoting Yagge v. Tyler, 225 Iowa 352, 357, 230 N.W. 559, 562 (1938)). The record establishes that Denise did not possess the requisite donative intent to give any interest in the property to Brad. Denise testified her relationship with Brad was "friendly-hostile." She testified that she agreed to place the lot in joint tenancy because Brad insisted upon it, and she wanted to "keep peace in [her] family." Brad also testified that he pressured Denise to place other gifts in joint ownership. The district court found the marriage was "somewhat rocky from the start; however, it commenced

deteriorating rapidly during the year 1983. At that time checking accounts were divided and the parties began separating items in contemplation of a dissolution of the marriage." We do not believe Denise intended to give any of the property to Brad. Therefore, the property should not be considered as part of the marital assets.

We next address the question of whether equity demands the property be divided. The requirement to set aside to a party the property which has been received as a gift is not absolute. Iowa Code section 598.21(2) provides that gifts received by one party are not subject to division "except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." In In re Marriage of Thomas, the Iowa Supreme Court stated:

> A number of factors might bear on a claim that property should be divided under this exception. 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.

319 N.W.2d at 211.

In light of these considerations, Brad contends his heightened lifestyle expectations created by the gifts and his contributions to the value of the house necessitate a division of the house's value. However, the court in In re Marriage of Thomas went on to state that "[s]till 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.

On balance, we find the district court's decision to award the house to Denise was equitable. While Brad made payments toward the mortgage and has made contributions toward the maintenance and improvement of the house, we believe that, under the circumstances of this case, Denise displays the greater need. Denise has been granted sole custody of the children and earns considerably less than does Brad. Furthermore, we are much more concerned with the children's standard of living expectations than we are with Brad's.

Finally, Brad argues the gifted property does not account for the total value of the house, and, therefore, he should be granted one half of the house's value after subtracting the value attributable to the gifts. We agree with the district court's belief that the entire value of the house can be attributed to the gifts. However, even were we to assume the value of the house is not totally attributable to gifts, an award to Denise of the remaining portion of the house's value would be equitable.

The property distribution should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Among those criteria, and of particular relevance here, are subsections (g) and (f) of Iowa Code section 598.21(1). Respectively, these provisions direct the court to consider the "earning capacity of each party," and the "desirability of awarding the family home . . . to the party having custody of the children."

Again, Denise was awarded sole custody of the children, and her earning capacity is significantly lower than Brad's. Under these circumstances, the district court's award was equitable, and we affirm the court's division of the property.

II. Appellate Attorney Fees. Both parties request an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Taking these considerations into account we order Brad to pay $1,000 toward Denise's appellate attorney fees.

The costs of this appeal are taxed to Brad.

For all the reasons stated, the district court's judgment is affirmed.

AFFIRMED.