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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LAUREL G. FLYNN AND JOHN T. FLYNN

Upon the Petition of)
LAUREL G. FLYNN,) 199
Petitioner-Appellee,)
And Concerning) 8-719
JOHN T. FLYNN,) 88-1072
Respondent-Appellant.)

Appeal from the Iowa District Court for Scott County (37830), James E. Kelley, Judge.

The husband has appealed a dissolution decree, challenging the division of property. **AFFIRMED.**

Edward N. Wehr, Davenport, for respondent-appellant.

Jack L. Brooks, Moline, Illinois, for petitioner-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J.

John T. Flynn, the respondent, appeals the decree of dissolution entered in this matter, claiming that the division of property made by the district court was inequitable. He claims that: (1) the court was wrong in its distribution of assets because it ignored his financial contributions to the marriage; (2) the court was in error in excluding from consideration the assets held in Laurel's name alone; (3) the court was in error in basing its division of assets upon his future earnings; and (4) the court was wrong in valuing his law practice.

Our review of this equity action is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law to determine rights anew from the credible evidence on issues properly presented and preserved. While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Lattig, 318 N.W.2d 811, 812 (Iowa App. 1982).

The parties were married in 1974. There are two children, boys, born in 1978 and 1981. The custody of these children is not at issue, and the child support and visitation issues are not before us. John was, at the time of the trial, 38 years of age and was a lawyer engaged in the private practice of law. At the time of trial, his income was approximately $46,000 per year. Laurel, 36

years of age at the time of trial, was employed as a graphic artist, earning a net of $1,076 per month.

At the time of their marriage, Laurel was the owner of an automobile, $8,000 cash, and 210 shares of A.C. Nielsen Company. The cash went into a joint account of the parties, but the stock in Nielsen Company remained in her name. When that stock was sold, the proceeds went into a money market account in her name alone. She also owned certain shares in Massachusetts Investors Trust. These shares were also maintained in her name. John brought into the marriage $400 in cash, an automobile, and personal property worth about $500. He was in debt because of education loans to the extent of approximately $6,000.

The parties agreed upon the division of certain property. The court adopted that agreement. Laurel accordingly received the following assets:

First Federal Savings account	$ 650.
Life Insurance Cash Value	2,198.
Appliances	400.
Furniture	1,500.
Microwave, Stereo & T.V.	700.
Personal Property	1,000.
1986 Pontiac	9,850.
Checking account	500.
Total	$16,798.

John received the following assets:

Individual Retirement Account	$ 3,378.
Checking Account	500.
Life Insurance cash value	209.
Appliances	400.
Furniture	300.
Personal Property	1,600.
Buick Skylark	1,000.
Total	$ 7,387.

The court awarded the homestead to Laurel and required her to assume the indebtedness against it. She was also awarded the piano, with a value of $750, and the Exxon stock owned by the parties, with a value of $11,681. The total value awarded to Laurel was $81,949.

The parties agreed that the law practice, and therefore the stock owned by John in the P.C., would remain John's property. In order for the distribution to be equitable, the court was required to place a value upon that stock. The court decided that John's stock (and therefore, John's interest in the law practice) had a value of $40,000. The court awarded John a home that he had purchased after the parties separated and valued it at $67,000. After awarding three small items worth an aggregate value of $235, the amount awarded to John was valued by the court at $114,622.

The court obligated Laurel to pay debts of $34,875, including the debt on the homestead, the Pontiac

automobile, a church pledge, and a furniture obligation. The resulting net distribution to Laurel was $47,074. The court obligated John to pay the mortgage on the house he purchased, in the amount of $53,575, a loan on his insurance policies in the amount of $11,730, a note to his P.C., and a church pledge. The total indebtedness was $67,063, resulting in a net distribution to John of $47,559. (The trial court stated $47,622).

The court set off to Laurel the property she had received by gift or inheritance, which had remained in her name during the marriage, and did not consider those assets in the division of property.

Two errors seem to have crept into the determination of the distribution in this case. The first concerns the indebtedness the court allocated to Laurel for furniture that she recently purchased. While she is obligated to pay Huebotters $2,500 for new furniture, the value of her property will be increased by $2,500 when the furniture is delivered. The court did not include the value of the furniture in the value of assets distributed to Laurel, so the net amount received by Laurel is short by $2,500, because that amount is included in the indebtedness she must pay.

The second error is a bit more elusive. Prior to the purchase of a second house by John, the parties' marital assets included a life insurance policy on John's life in

the amount of approximately $11,939, the value of which was not included in the property awarded to John. John borrowed from that cash value to pay part of the down payment on the new house. In other words, he converted a cash asset into an asset in the nature of an equity in a house. Although it is his intention to repay the policy loan, he will, in effect, be repaying himself. He effectively received a distribution in advance of trial of the loan value of the policies. We agree with Laurel's assertion that John received a valuable asset from most of the cash value of his life insurance. That item has not been included in the trial court's calculations of the division of assets.

1. John claims that the court was in error in ignoring his financial contributions to the marriage. He urges the adoption of a rule that property should be divided in a ratio of the parties' earnings during the marriage. He cites In re Marriage of Stamp, 300 N.W.2d 275, 277 (Iowa 1980), and In re Marriage of Tucker, 213 N.W.2d 498, 501 (Iowa 1973), as supporting that principal. Stamp considered whether a COLA (cost of living adjustment) should be allowed in the child support. Without comment, the supreme court reported that the trial court allowed a division of property which was roughly in accord with the the parties' earnings. The Iowa Supreme Court did not adopt the rule that John now asserts. Likewise in Tucker, no such rule was enunciated by the supreme court. We likewise decline the invitation to announce such a rule.

Our decisions and the decisions of the Supreme Court of Iowa disavow such a rule. As stated in In re Marriage of Byall, 353 N.W.2d 103, 106 (Iowa App. 1984):

> We have rejected any rule based upon a percentage division of the assets, and recognize that we must determine what is equitable under the specific facts of each case. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App.1982); In re Marriage of Callenius, 309 N.W.2d 510, 511 (Iowa 1981).

2. John next claims the court was in error in failing to consider certain assets held in Laurel's name alone. He claims that the court should have considered dividing the assets that were made up of gifts to her prior to the marriage, plus any increase in value. In the alternative, he suggests that he should have received a larger share of the marital property to make up for the assets distributed to Laurel from her gifted or inherited property.

As a general rule, the distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1) (1987). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). Under that statute, the ultimate question is whether the distribution of the property is equitable; there is no rule based upon percentage division of assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). Division of property is based upon each marital partner's right to a just and equitable share of the property accumulated as the result

of their joint efforts. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). In cases such as this, involving inherited and gifted property received by one spouse during or before the marriage, Iowa Code section 598.21(2) requires that such inherited or gifted property ordinarily is to be considered the property of that party. This section does not impose an absolute requirement that property acquired by gift or inheritance must always be set aside to the donee and omitted altogether from consideration in the division of property. To avoid injustice, property inherited by or given to one party may be divided. In re Marriage of Muelhaupt, No. 87-1336, slip op. at 5 (April 19, 1989). The court must weigh a variety of factors in determining how to treat this property. See In re Marriage of Vrban, 359 N.W.2d 420 (Iowa 1984).

In this case, Laurel received gifts of stock from her grandfather before the marriage. She also received other gifts or inheritances. At the time of the marriage, she placed her cash into a joint account for the benefit of herself and John. She kept the stock in her own name alone, and when that stock was sold, she placed the proceeds of the sale in an account in her own name. From time to time, as the need arose, she transferred some funds from her own separate account to the parties' joint account. Except for those occasions, however, the funds remained segregated in her own accounts and she had the use

of the income from those accounts. It was from such income that Laurel purchased her own IRA, which was also set off to her as her own property by the court.

Laurel's separate funds increased in value, not by any action of hers or John's, but by reason of the economy and the action of the companies in which she held investments. In this case, the appreciation of the property does not make it any more inequitable to set it off to Laurel. As we stated in In re Marriage of Lattig, 318 N.W.2d at 815:

> As an additional factor in dividing appreciated property acquired before the marriage, we consider whether the appreciation which occurred during the marriage was fortuitous or due to the efforts of the parties. The underlying premise of our analysis is that an equitable property division of the appreciated value should be the function of the tangible contributions of each party and not the mere existence of the marital relationship. (Emphasis added.)

In Lattig, there was evidence that the wife had contributed to the enhancement of the farm land that was acquired by the husband before marriage. Because of the wife's financial obligation on the farm machinery as well as her contributions on the farm, she was awarded a small share of the value of the farmland.

In this case, neither party enhanced Laurel's assets. John points out that he paid taxes on capital gains in the sale of some of the assets, and upon the income from them. Laurel, however, was employed and earned income which assisted in the payment of taxes, as well as the parties' expenses. As previously discussed, she also contributed

funds from her own separate assets to the family expenses. Under the record in this case, we do not believe it is inequitable for the court to have set off Laurel's separate inherited or gifted property and to have failed to distribute a portion of it to John.

3. We have examined the record and the trial court's ruling, and we find no merit in John's contention that the trial court was in error because it based its division of the assets upon John's future earnings.

4. Finally, John complains that the court erred in valuing his law practice. He claims that the court valued it upon speculative future income. While the court considered what the earnings of the law practice were, and were likely to be, it considered very carefully the financial conditions of the community and times, and based its valuation primarily upon liquidation value or book value of the P.C. John further complains that the court erred by failing to value the law practice at liquidation value. It is apparent from the record that an attempt was made to estimate the true market value of the law practice. The court valued assets at market value, instead of the depreciated value at which they were carried on the books of the corporation. For example, the automobile driven by John, a Porsche, had a market value, by John's testimony, of $19,000. His partner drove a 1986 Cadillac Fleetwood for which the P.C. had paid $24,000. On the

books of the company, however, those autos, plus office furniture and fixtures and leasehold improvements, were carried at a value of $33,408.36. The trial court did not agree with John's opinion that the P.C.'s accounts receivable in excess of 90 days should be discounted 85%. The court considered work in process, as valued by an expert called by Laurel. The trial court made a conscientious effort to place a proper value upon John's interest in the law practice. After thoroughly examining the evidence presented, we accept that valuation, . We do not accept John's valuation of $4,658.87.

We find John's other complaints with respect to the valuation of the law practice to be without merit. We affirm the trial court's valuation.

Upon the whole record, we hold that the property division was equitable. We affirm the trial court in all respects.

Both parties shall pay their own attorneys' fees in connection with this appeal. The costs of the appeal are taxed to John.

AFFIRMED.