IN THE COURT OF APPEALS OF IOWA

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No. 7-139 / 96-0520

FILED
MAY 29 1997
CLERK SUPREME COURT

IN RE THE MARRIAGE OF BOBBIE JOE McCLELLAN AND STANLEY GALE McCLELLAN

Upon the Petition of
BOBBIE JOE McCLELLAN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
STANLEY GALE McCLELLAN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jefferson County, Dan F. Morrison, Judge.

The respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Greg A. Life of Life Law Office, Oskaloosa, for appellant.

J.W. McGrath and William Glass of McGrath & McGrath, P.C., Keosaqua, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

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STREIT, J.

The respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. Respondent contends the district court erred in: (1) not setting aside his gifted and inherited property; (2) setting aside certain joint assets to petitioner; and (3) awarding petitioner attorney fees. Petitioner contends: (1) the property division was inequitable; (2) the division of marital debt was inequitable; and (3) she should be awarded appellate attorney fees.

Stanley and Bobbie McClellan were married on May 12, 1972. Four children were born to the marriage: Heather, born February 22, 1976; Heidi, born March 11, 1978; Hollie, born November 20, 1980; and Seth, born May 13, 1985. Stanley was forty-four years of age at the time of trial and Bobbie was forty-one. Both Stanley and Bobbie are high school graduates. The parties purchased the marital homestead from Stanley's parents for $20,000, far below market value.

In 1986, Stanley was gifted a one-half interest in a carpet business from his parents, including the building in which it was housed. In 1987, the remaining one-half was gifted to Stanley and Bobbie as a tenants in common. Bobbie helped in operating the carpet business, but her main duty was to be primary caregiver to their children. The business only had a value equal to the real estate, $65,000 at the time of trial. Stanley inherited his parents' home, valued at $75,000, $48,132 from

savings, joint certificate of deposits, a checking account, life insurance, and a lot in Arkansas from his parents. He inherited some personal property and a gun collection.

Stanley and Bobbie rented the inherited home to third parties. Both parties actively sought renters and performed maintenance on the home to keep it in good condition. Little or no income was made other than to pay taxes and for upkeep.

Bobbie filed a petition for dissolution on March 6, 1995. Prior to trial, the parties stipulated as to the division of most of the personal property, custody, visitation, and child support. The remaining issues at trial centered around the division of the several personal items and joint property.

Following trial, the district court entered its decree. Bobbie was awarded physical care of the parties' children, and Stanley was ordered to pay $585.82 per month for three children, such obligation to be reduced as each child reached the age of majority. The court awarded Stanley certain inherited personal property: an oak dining room table with six chairs, the dining room curio cabinet, a buffet, an antique settee, a pie server, silver tea and coffee sets, and two horse-collar mirrors. Bobbie was awarded the parties' Hummel collection together with their display cabinet. Bobbie was awarded a 1994 Plymouth van valued at $13,102.09 and all indebtedness thereon. Stanley was awarded his father's gun collection valued at $1825.

The court determined Stanley owned a three-fourth interest in the carpet property valued at $65,000, and awarded him $48,750 and Bobbie $16,250. The court further awarded the rental home to Stanley, ruling it was inherited property and contributed little to the family income. Bobbie was awarded the marital home, and was ordered to pay thirty-five percent of the outstanding mortgage.

Stanley was ordered to pay Bobbie $100 per year in alimony and $2000 toward her attorney fees. In order to equalize the difference between the guns' value and the values of the vehicles awarded the parties, the court ordered Stanley to pay Bobbie $3357. The court found the $53,000 mortgage on the marital home was joint debt, even though the vast majority of it was used to pay off various business debts. The court ordered Stanley to pay Bobbie $51,025 to be applied to the mortgage on the marital home. If Stanley was unable to pay this amount, the carpet business was to be listed for sale within fifty days and the sale proceeds used to reduce the mortgage. Stanley has appealed, and Bobbie has cross-appealed.

Stanley contends the district court erred in failing to set aside the inherited property as separate from the marital property. He also claims the court unfairly awarded him a greater percentage of marital debt. Stanley next contends the court erred in awarding the remaining sums of a $5000 certificate of deposit to Heather since they had stipulated it was marital property. He claims Bobbie placing the

remainder in Heather's name was an attempt to insulate this asset from the divorce distribution. He lastly contends the court erred in awarding Bobbie attorney fees.

Bobbie asserts she should be awarded one-half the personal items awarded to Stanley. She also contends the court erred in ordering her to pay thirty-five percent of the debt on the marital home, since most of this debt went to refinance debt owed on the carpet business. Bobbie lastly requests appellate attorney fees.

I. Standard of Review. 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).

II. Property Distribution. The partners to a 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 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. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section

598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Precise percentage divisions are disfavored because "[t]he question is always what is an equitable and just award in a given set of circumstances." *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975). Although an equal division is not necessary, it should nevertheless be a general goal of trial courts to make the division of property approximately equal. *In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979). Financial matters make up but a portion of a marriage, and must not be emphasized over the other contributions made to a marriage in determining an equitable distribution.

A. Inheritance. "[P]roperty inherited by either party or gifts received by either party prior to or during the marriage . . . is the property of that party and not subject to a property distribution . . . except upon a finding that refusing to divide the property is inequitable." *In re Marriage of Mental*, 359 N.W.2d 505, 506 (Iowa App. 1984). *See also*, Iowa Code § 598.21(2) (1993).

Stanley received his parents' home and a lot in Arkansas during the marriage, along with some personal items such as a dining room table with six chairs, a curio cabinet, dining room buffet, antique settee, pie safe, a silver tea & coffee set, as well as two horse-collar mirrors. Since these items were received by inheritance, they will be set aside to him and not included in calculating an equitable division of property.

While the items may have been used in the marital home and the parents' home was used for rental income during the marriage, these items can be readily distinguished as received through inheritance. When gifts and inheritance are easily identified and not commingled with or transformed into marital property, it is not subject to division. *See In re Marriage of Van Brocklin*, 468 N.W.2d 40, 44-45 (Iowa App. 1991). It is equitable to set aside these items from the division of property.

Both parties were gifted the business real estate. Stanley holds a three-fourth's interest in the real estate and Bobbie holds the remaining interest. The parties took out a mortgage on their home in April 1993 to pay off business debts. This was tantimount to shifting debt attributable to gifted property to marital property. The bulk of the mortgage debt was used to pay off business loans which had accumulated from the carpet business.

We award the entire business real estate and the $53,000 mortgage debt to Stanley and order him to pay Bobbie a one-fourth interest of its net value. The $65,000 business real estate, with the debt of $53,000, has a net value of $12,000. Bobbie's one-fourth interest equals $3,000.

Stanely is responsible for and shall pay the mortgage debt off within 180 days. If the mortgage debt on the marital home is not paid within that time, the business real estate shall be sold and the debt and mortgage paid from the proceeds. Bobbie shall

hold a lien on Stanley's inherited house and the business real estate for the entire amount until the debt is paid in full.

After setting the gifted/inherited property aside to Stanely, the remaining assets shall be divided. Equity necessitates the assets shall be devided equally. Stanley shall hold a lien on the homestead equal to $39,000. The lien becomes due if the house is sold, Bobbie ceases to live there, or when the youngest child of the parties' graduates from high shool. No interest on the lien shall accumulate during this time period. After the last child graduates from high school, if the $39,000 lien has not been paid in full, interest will accrue at the rate of ten percent per annum on the amount owed, commencing on July 1 following graduation.

II. Marital Assets Disposed of Pending the Dissolution. Bobbie cashed a $5000 certificate of deposit (CD) to use for payment toward her attorney fees and the remaining amount was placed in a CD for the parties' daughter, Heather. The court awarded the CD to Heather. We determine the $2500 CD was marital property and should go back into the division of assets. We make no order concerning the spending of the $2500 for attorney fees.

DIVISION OF PROPERTY

STANLEY		BOBBIE	
Personal Property (Inherited)			
Oak Table w/6 chairs - $800 00		Hummel Collection	3617 00
Dining Room Buffet - $350 00		Curio for Hummels	200 00
Antique Settee - $150.00			
Silver Tea & Coffee - $75 00			
Curio Cabinet - $375.00			
Pie safe - $625 00			
Horse Collar Mirrors - $70.00	0 00		
Guns	1825 00		
CD	2500 00		
Vehicles			
1988 Dodge Ram Van	4625 00	1994 Plymouth Van	3397 91
Chevy Blazer	1750 00	[16,500 FMV - 13,102 09 loan]	
1963 Internat'l Pickup	150 00		
Harley Motorcycle	2750 00		
Real Estate			
Business real estate-$65,000	0 00	Homestead [FMV - 7% real estate	83,700 00
Mortgage Obligation ($53,000)		commission]	
Rental Residence - $75,000 00	0 00		
Arkansas Lot - $3,000 00	0 00		
TOTAL ASSETS	13600 00		90914 91
Lien Payable to Stanley	38657 46	Lien Payable to Stanley	(38657 46)
Rounded to $39000		Rounded to $39000.	
TOTAL	52257 46		52257 45

III. Attorney Fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the decision of the trial court, Stanley must establish the trial court abused its discretion. *Id.*

Bobbie requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.*

We agree with the trial court's allocation of fees and costs. Each party should pay his or her own attorney fees and court costs on appeal.

AFFIRMED AS MODIFIED.