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JAN 26 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LARRY L. KAY AND CAROLYN K. KAY

Upon the Petition of	)	
LARRY L. KAY,	)	Filed January 26, 1983
Petitioner-Appellant-Cross-Appellee,	)	
And Concerning	)	2-370 / 2-67215
CAROLYN K. KAY,	)	
Respondent-Appellee-Cross-Appellant.	)	

Appeal from Pottawattamie District Court - J. C. Irvin, Judge.

Petitioner-husband appeals and respondent-wife cross-appeals from the decree dissolving the parties' marriage. Both allege that the trial court's division of property should be modified. The wife also seeks attorney fees on appeal. AFFIRMED AS MODIFIED.

Ronald W. Feilmeyer of Cambridge, Feilmeyer, Landsness, Chase, Anderson & Wells, Atlantic, Iowa, for petitioner-appellant.

J. C. Salvo and Richard C. Schenck of Hines, Lewis, Salvo, Deren & Schenck, Earling, Iowa, for respondent-appellee.

Considered en banc.

JOHNSON, J.

Petitioner-husband, Larry L. Kay, appeals and respondent-wife, Carolyn K. Kay, cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner-husband asserts: (1) that the trial court incorrectly valued his interest in a hog confinement operation; (2) that the trial court should not have directed him to pay all of the parties' short-term, high interest debts; and (3) that the trial court should not have awarded respondent-wife any of the parties' farmland. On cross-appeal, respondent-wife asserts that the trial court should have included in the property division (a) the interest in the family farm corporation started by the husband's father, and (b) approximately $19,000 of the value of the farm machinery the husband held under a lease with an option to buy. The wife also requests attorney fees on appeal. We affirm as modified.

The parties were married in 1971. During the marriage, the husband farmed; the wife cared for the parties' children and helped with the farming operation. Most of the property the parties now own was acquired during the marriage.

The various disputes on appeal involve the trial court's property division between the parties. The trial court awarded the husband the following: 205 acres of farm land; all farm machinery; his prepaid crop expenses; his interest in a feed store; his interest in a hog confinement operation; his life insurance; stocks and commodities; a car; and some town lots. The wife received 280 acres of farmland; household goods; a car; and some town lots. The trial court's valuation resulted in a net award to the husband of $411,514 and to the wife of $382,000. As part of the award, the wife was directed to pay the debt on the farmland awarded to her. The husband was ordered to pay the wife $50,000 and assume all other debts of the parties. From this division of their property the parties appeal.

I. Scope of Review. Since this is an action in equity, our review is **de novo.** Iowa R. App. P. 4.

II. Propriety of the Property Division.

A. Value of Hog Confinement Operation. The husband argues that the trial court erred when it refused to find a hog confinement operation, named Pig Knoll, Inc., to be an "excess liability." At trial the husband contended that the hog operation had a negative value of $212,346. The wife asserts that the zero valuation assessed by the trial court for the hog operation was proper.

Various experts testified at trial regarding the value of the hog operation. The valuations ranged from $250,000 to $700,000. It was the consensus of the experts that there was no market for hog operations at the time of trial, thus rendering the current value of the operation nominal. The wife notes that the liability of the hog operation was $86,000 on the husband's financial affidavit rather than the $212,346 he claimed at trial. The husband at trial claimed that he had been losing $2,000 to $3,000 a week during many months prior to trial.

In reviewing the evidence, we find that the trial court did not err in valuing the hog operation. Where the trial court's valuation is within the permissible range of evidence, we will not disturb it. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973).

B. Allocation of Debt. The husband also contends that the trial court erred in burdening him with liability for all of the parties short-term obligations at interest rates from 12% to 17%. He stresses that the wife is responsible only for long-term obligations at a 9% interest rate. The husband seeks to be relieved of some of the short-term debt or in the alternative be awarded additional assets.

"The allocation of marital debts between the parties is as integral a part of the property division as is the apportionment of marital assets." In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980). In support of his contention, the husband cites to the holding in In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981). In his reply brief, the husband contends "[respondent] misses the essential point . . .; that is in making an equitable division, it is not fair to give

one party all the assets and on the other hand give the other of them all the debt." We may agree with this contention, but this is hardly the situation presented to this court on appeal. According to the trial court's valuation of assets, the husband received $411,514 and the wife received $382,000. These figures were determined after the trial court had already deducted indebtedness of the husband in the amount of nearly $900,000 and of the wife in the amount of $246,000. These amounts also do not include the husband's interest in Kay Farms, Inc., valued at $1,224,300, which the trial court did not consider in making its property division. We discuss the husband's gifted property in subdivision C of this opinion.

Mr. Gordon Nicholas, President of the First Whitney Bank and Trust, testified that a farm operation would not profit at a rate greater than the interest rate carried by the short-term debt, resulting in a net loss for almost any farming operation. In spite of this, it appears the husband increased his short-term debt at First Whitney Bank and Trust from $430,000 to nearly $600,000 while the dissolution was pending. Also considered by the trial court was the tax consequences of the property division and the trial court included as a liability the potential $75,000 tax liability of the husband with regard to this division.

It appears from the record that the husband is an able and competent businessman. He has enjoyed success in farming as reflected by the property subject to division in this proceeding. The trial court awarded him nearly all the property which is capable of generating income in the farm operation. The short-term debt is closely related to the farming operation. With the husband's business ability and his retention of the income generating properties, we do not believe the debt allocation is inequitable. "The 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), and we find the trial court did not err in allocating the debt of the parties under these circumstances.

C. Consideration of the Husband's Interest in Kay Farms, Inc. The wife argues that the trial court erred in not considering the husband's interest in Kay Farms, Inc., in its property division. This interest was valued by the trial court at $1,224,300. The wife alleges that the trial court failed to take into account her contribution to Kay Farms, Inc.

The husband owns 408.1 shares of stock in Kay Farms, Inc., and the wife owns 10.1 shares. Each share is valued at approximately $3,000. The husband is currently the president and manager of Kay Farms, Inc., and owns 26.9% of all stock. The trial court excluded the shares valued at $1,224,300 on the basis of Iowa Code § 598.21(2) (1981), which 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 party.

The wife argues that her contribution to Kay Farms, Inc., is equal to that of the wives in In re Marriage of Moffat, 279 N.W.2d 15 (Iowa 1979), and In re Marriage of Cook, 205 N.W.2d 682 (Iowa 1973), both of whom received a portion of gifts made to their respective spouses. Both Moffat and Cook, however, predated the current section 598.21. In light of the current provisions of this section, we find that the trial court's refusal to divide the gifts is not so inequitable as to warrant its inclusion in the marital assets and affirm the trial court's exclusion of the gift. We additionally find the trial court committed no error by not including the value of Kay Farms, Inc.'s, contribution to the family operation or the leasehold improvements made by the parties since these improvements were included in the value of the leasehold. Likewise, we find no error by the trial court in excluding the value of machinery held under a lease with an option to buy.

D. Award of Farm Land. The husband asserts that the trial court erred in awarding the wife 280 acres of the total 485 acres owned by the parties. He premises this argument on the court's holding in In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981), where the court upheld an award of all the farm land to the husband who was the exclusive operator and manager of the farm business.

While we believe that the holding in Callenius is distinguishable on the basis of the precarious financial condition of the husband's farming operations in Callenius, we do find merit in the husband's contention. In dividing the farm land, the trial court stated ". . . it would appear that petitioner could rent another 280 acres, if necessary. Indeed, he may very well be able to rent an additional portion of the 2,500+ acres of Kay Farms, Inc., of which he is the President." We find no evidence in the record of land available to the husband. As president of Kay Farms, Inc., he is subject to the fiduciary obligations attendant to all corporate officers and the renting of additional corporate land to him may be suspect. We believe the trial court considered matters which are too speculative and not documented in the record. Consequently, we conclude that it is preferrable for the husband to have the option of maintaining the integrity of the farming unit and modify the decree accordingly.

It is the order of this court that the husband shall have the option of retaining the 280 acres awarded to the respondent on the following conditions: 1) that the husband exercise the option within 90 days of the issuance of procedendo by notifying the wife of his intent to exercise this option by certified mail directed to her; 2) that the husband shall assume all outstanding indebtedness on the 280 acres; 3) that the husband shall pay the wife the sum of $365,000, representing the approximate equity in the property, plus the $50,000 awarded by trial court, payable in five equal installments; 4) that the first payment must be paid within 30 days after the husband's mailing of notice to exercise this option;

5) that the husband shall pay annual payments on the same day and month of his first payment in 1983 for the years 1984, 1985, 1986 and 1987; and 6) that interest will accumulate on the unpaid principal at 10% per annum. We believe that by providing this option we protect in the most equitable fashion the husband's ability to maintain his farming unit and the wife's interest in the marital assets. Should the husband fail properly to exercise this option and make the required payment, the trial court's division of the farm land controls and the wife will receive the 280 acres as provided by the trial court

III. Attorney Fees. The wife requests attorney fees on appeal. We deny her request since, based upon the parties' present relative capacities and available resources, each party can pay his or her own respective attorney fees.

AFFIRMED AS MODIFIED.