IN THE COURT OF APPEALS OF IOWA

No. 9-167 / 98-444
Filed August 27, 1999

IN RE THE MARRIAGE OF HARRY ROSS AND VALERIE L. ROSS

Upon the Petition of
HARRY ROSS,
Appellant/Cross-Appellee,

And Concerning
VALERIE L. ROSS,
Appellee/Cross-Appellant.

FILED
AUG 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Harry Ross appeals, and Valerie Ross cross-appeals, the property distribution provisions of the parties' dissolution decree. **AFFIRMED.**

Joseph L. Marks of Marks, Marks, & Marks, Urbandale, for appellant.

Becky S. Knutson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

000193

VOGEL, J.

Harry Ross appeals, and Valerie Ross cross-appeals, the property distribution provisions of the parties' dissolution decree. We affirm.

Background facts. Harry and Valerie Ross were married in March of 1974. It was Harry's third marriage and Valerie's second. Both parties had children from their prior marriages, but did not have any children together.

Harry filed a petition for dissolution in February of 1997. Following trial, the district court entered a decree dissolving the parties' marriage and distributing their assets and debts. Harry appeals and Valerie cross-appeals from the property distribution provisions.

Scope of review. Our review of this equitable proceeding 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 Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Property division. Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). Assets and debts should be equitably, but not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1). *See In re Marriage of Driscoll*, 563

N.W.2d 640, 642 (Iowa App. 1997). Although our review is de novo, we will defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa App. 1999); *see also In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

At the time of the parties' marriage, Harry moved into Valerie's previous marital residence at 2350 Park Avenue in Des Moines. The home had an outstanding mortgage of $30,800, and the trial court found that the value of the property at the time was approximately $45,000. During the marriage the parties renovated the kitchen and constructed a large addition to the home. These improvements were financed through joint income, child support which Valerie received from her ex-husband, and a loan from Harry's mother. At the time of trial the parties agreed that the approximate net value of the home was $112,302. In 1994, the parties decided to look for a new home which would require less maintenance. They ultimately purchased a town home at 3013 Walters Circle in Des Moines with a $40,000 down payment. To do so, Harry cashed in an annuity which had been purchased with an inheritance he received from his mother, and he and Valerie borrowed $20,000 against the Park Avenue home.[1] At the time of trial there was a $162,564 outstanding mortgage on the property. The trial court found the value of this property to be between $203,000 and $207,000.

---

[1] The parties began renting the Park Avenue home to contract purchasers in November of 1996. The purchasers eventually declined their option to buy.

In its decree, the court determined that the Park Avenue property should be awarded to Valerie with a lien to Harry in the amount of $24,000, to represent the amount of the loan from Harry's mother which had been forgiven as a gift to him. The court further found that the Walters Circle property should be sold, and that Valerie should receive credit for the payments she made on the mortgage after Harry moved out. The court then ordered that Harry should receive the next $20,000 to reimburse him for the inherited money he contributed, and found that all remaining equity should be split equally between the parties. The court further found that Valerie should be solely responsible for the mortgage payments, taxes, insurance, maintenance, repairs, association dues, and utilities for the Walters Circle property until it was sold.

II. Cross-appeal issues. Valerie first asserts that the court erred in determining the value of the Park Avenue property at the time of the marriage and, consequently, erred in calculating the amount of her premarital equity. However, we find the value assigned by the trial court to be within the permissible range of evidence and will not disturb it on appeal. *See In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994).

Valerie next contends that the district court should have enforced an oral agreement between the parties concerning the equity in the 2350 Park Avenue home. The record reveals that the parties did discuss this agreement during trial, but it is not mentioned in the decree. Although we do not know if the district court considered the

agreement to be a relevant factor in determining an equitable distribution, this was a matter for the court's discretion. *See* Iowa Code § 598.21(1)(k) (1997) (listing written agreements between parties regarding property distribution as a factor for the court to consider); *In re Marriage of Johnson*, 350 N.W.2d 199, 202 (Iowa 1984) (noting that it is mandatory for the court to consider the listed factors in 598.21 and discretionary for it to consider others).

Finally, Valerie contends that the court erred in requiring her to pay all costs associated with the Walters Circle property until its sale. Considering the parties' relative financial situations and the benefit conferred on Valerie to reside there until the property is sold, we find this was a reasonable provision and will not disturb it on appeal.

IV. Gift and inheritance issues. Valerie contends the court erred in determining that Harry was entitled to a setoff on the Park Avenue property. She asserts that the $24,000 gift from Harry's mother in the guise of a forgiven loan was intended to be a joint gift to the couple. The record does contain conflicting evidence regarding the intent of the gift. On our de novo review, we could find indications in the record that the gift was intended to be joint. However, such a finding would only serve to benefit Valerie disproportionately in the final distribution. The trial court had the opportunity to weigh the evidence and determine the parties' credibility. We defer to the trial court's finding that the gift was made to Harry alone.

Valerie also challenges the setoff awarded to Harry for his $20,000 contribution on the Walters Circle property. While Valerie concedes that Harry's contribution was made from inherited funds, she asserts that he should not be entitled to any offset because she also contributed $20,000 to the down payment by taking out a loan against the Park Avenue property. However, both parties took out that loan and both remain responsible for the debt. We find no error in the court's distribution of the Walters Circle property.

V. Overall distribution. Both parties claim the overall distribution is inequitable and they are entitled to a greater share of the marital assets. We found it very difficult to calculate a net distribution to guide us in reviewing the equities of this case, largely because the precise value of the parties' real estate is uncertain until sold. However, it is clear that the overall distribution favored Valerie, even when the setoffs to Harry are considered. We find the overall distribution to be equitable considering all relevant factors under section 598.21 and decline to modify in this appeal.

Finally, Harry contends that the court erred in failing to provide a means for the payment of his lien in the Park Avenue property. He asserts that they had contemplated the sale of the property to contract purchasers at the time of trial, but that the deal had fallen through. He complains that there is nothing to prevent Valerie from holding on to the property indefinitely. We find that these are circumstances

60019S

outside of our record which would be more properly dealt with in a modification action before the district court. We take no position on the merits of such an action.

VI. Attorney fees. Both Harry and Valerie request that they be awarded attorneys fees and costs. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *Benson*, 545 N.W.2d at 258. 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). After considering these factors, we decline to make an award appellate attorney fees to either party. Costs of this appeal are to be split equally between the parties.

AFFIRMED.