

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 28 1987

CLERK SUPREME COURT

IN RE THE MARRIAGE OF VAL JEAN A. BERG AND LEONARD BERG

Upon the Petition of	)	27
VAL JEAN A. BERG,	)	Filed January 28, 1987
Petitioner-Appellee,	)	
And Concerning	)	
LEONARD BERG,	)	<u>6-443</u>
	)	86-279
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Linn County (DM12986) - L. Vern Robinson, Judge.

Respondent husband appeals the judgment and decree dissolving the parties' marriage and the trial court's denial of his motion to amend its findings and conclusions pursuant to Iowa Rule of Civil Procedure 179(b). **AFFIRMED.**

James Thomas and Patricia N. Fetzner of the Prison Assistance Clinic, for respondent-appellant.

Stephen B. Jackson of Hines, Pence, Jackson, Day & Powers, Cedar Rapids, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Respondent husband appeals the judgment and decree dissolving the parties' marriage and the trial court's denial of his motion to amend its findings and conclusions pursuant to Iowa Rule of Civil Procedure 179(b). We affirm.

Petitioner, Val Jean Berg, and respondent, Leonard Berg, were married in 1959. Val, who filed a dissolution petition in February 1985, works full-time as an assistant laboratory technician at Rockwell-Collins where she has been employed for the past 26 years. Val has a gross annual salary of \$22,537. Leonard is incarcerated at Iowa State Penitentiary at Fort Madison where he is serving a life sentence. He was convicted of murdering a Cedar Rapids police officer in April 1984. Prior to his arrest and conviction, Leonard worked primarily as a carpenter during the marriage. He now earns 28 cents an hour through prison employment.

Val Jean and Leonard have three children: Sheleen, Colleen, and Eric, who at the time of the hearing were ages 25, 22, and 16, respectively. Colleen is handicapped, lives in her own apartment, and receives government assistance. Val Jean claims that Colleen depends on her for some support. Eric is in high school and lives with Val Jean.

In October 1984 Leonard signed a special warranty deed while incarcerated in the county jail which conveyed his interest in the parties' residence to Val Jean. Leonard signed the deed after Val Jean allegedly told him that the family of the slain police officer might file a lawsuit against him and that such a conveyance would shield the property from a potentially adverse judgment. There was no dissolution action pending when the deed was signed.

The trial court found that Leonard signed the special warranty deed in order to provide a home and security for his children. It also found that Val Jean had assumed several outstanding debts of the parties. In addition, it found

that the parties had signed a stipulation of assets and liabilities which gave Val Jean certain property.

The trial court awarded Val Jean all of the marital property, valued at approximately \$62,000. It ordered Val Jean to pay Leonard \$1,000 and it awarded him his carpentry and plumbing tools. On January 9, 1986, Leonard filed a motion to amend findings and conclusions pursuant to Iowa Rule of Civil Procedure 179(b). His motion was denied by the trial court on January 27, 1986.

Our standard of review is de novo. Iowa R. App. P. 4. We review the facts and law and determine anew the rights of the parties based upon credible evidence where issues have been properly presented and preserved. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa Ct. App. 1985). Although we give weight to the findings of the trial court, especially concerning the credibility of the witnesses, we are not bound by them. In re Marriage of Bornstein, 359 N.W.2d 500, 502 (Iowa Ct. App. 1984); Iowa R. App. P. 14(f)(7).

We consider the factors enumerated in Iowa Code section 598.21 (1985), in evaluating the equitable division of the marital property. The crucial inquiry is whether the trial court's distribution is equitable under the circumstances of the case. In re Marriage of Wallace, 315 N.W.2d 827, 830 (Iowa Ct. App. 1980). Each marital partner is entitled to a just and equitable share of the property accumulated as a result of their joint effort. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). All economic aspects of the divorce decree must be viewed as an integrated whole. In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976). An inequitable property division will be corrected on appeal. In re Marriage of Knott, 331 N.W.2d 135, 137 (Iowa 1983).

This case presents several novel elements: prior to the dissolution proceedings, the husband was convicted for murder and is currently serving a life sentence in prison; prior to the initiation of dissolution proceedings, the husband signed

a special warranty deed conveying title of the family home to the wife; a stipulation of assets and liabilities, signed by both parties, appears to give the wife all the property, including the family home.

We do not find the stipulation dispositive of the division of the marital property. Even if parties stipulate a property division, the court has the obligation to make a just and equitable division of the property. In re Marriage of Hayne, 334 N.W.2d 347, 352 (Iowa Ct. App. 1983). Furthermore, the husband clearly indicated on the stipulation that, "Respondent takes the position that while the titled owner may be petitioner, all assets are joint marital property and subject to division." There was no meeting of the minds evident in the stipulation regarding the disposition of the family home.

The husband executed a special warranty deed, transferring title of the family home to his wife. This deed was executed approximately four months prior to the wife's filing of the dissolution action. The wife testified that the reason for the transfer was to provide a home and security for the family. On appeal, she would have us find that the transfer was a gift. The husband testified he transferred the property to hide assets from the police officer's family, who may have sued him for restitution. He would have us find that the transfer was not a gift, but rather a subterfuge.

Iowa's equitable distribution statute does not specifically classify property as marital property or as separate property. However, gifts are excluded from the equitable division of property upon dissolution of a marriage except if the refusal to divide the property is inequitable to the party or the children of the marriage. Iowa Code §§ 598.21(1), (2) (1985). Therefore, our task is to decide: (1) if the transfer of the property from husband to wife was a gift, and (2) if it was a gift, is the property subject to equitable division.

The factors to be examined to determine if a particular asset was a gift include the intent of the donor at the time of the conveyance, the source of the funds with which the gift was purchased, the character of the property, the status of the marital relationship at the time of the transfer, and whether there was any agreement that the transferred property was to be excluded from marital property. See In re Marriage of Vrbau, 359 N.W.2d 420, 427 (Iowa 1984); D Bray, Iowa Matrimonial Law 134 (1986); L. Golden, Equitable Division of Property 116 (1983). The determining factor is the intent of the donor, which must be proved by the party claiming a gift. In re Marriage of Weidner, 338 N W 2d 351, 360 (Iowa 1983).

The trial court had before it the testimony of the spouses and the warranty deed itself. The wife testified as follows:

Q Now, Val Jean, Petitioner's Exhibit 1 is a deed conveying Leonard and your interest in this real estate over to you?

A Yes.

Q And that's the property that's located on Hamilton Street Southwest that you are presently residing in?

A Yes.

Q Was this a gift from Leonard to you of his interest in that real estate?

A Yes.

Q And was this a written document between, or written agreement made between you and Leonard concerning a property distribution of some of your assets?

A Yes.

Q And was this Special Warranty Deed entered into by Leonard and you in order to protect the financial necessities and the support necessities of Colleen and Eric?

A Yes.

In his deposition, the husband testified as follows:

Q. Now back about, I believe nearly one year ago now, you executed a Deed transferring the title to your home from yourself and Val's names jointly, over to her name alone. Do you recall doing that?

A. Yes.

Q. Whose idea was it to have that Deed made?

A. Well, it was hers really to do it.

Q. What was the stated purpose for executing that Deed?

A. Well, she--MR. JACKSON: I will object to that question as not being specific, it doesn't indicate whose stated purpose, it may be calling for an answer based upon hearsay, it's not specific as to date, time and place.

Q. (By Mr. Nathanson) Well, let me just ask you this, Leonard, at the time that you executed the Deed what was your intent and purpose in doing so?

A. Well, to get it out of my name because she had mentioned to me that there might be a libel case pending from Brett Sunner's side of the family.

Q. You had shot Brett Sunner, is that right?

A. Yes.

Q. And the fear was that his family might file a lawsuit against you for damages?

A. Yes.

Q. So the intention was to get the property out of your name so that if that came about that that would not be an asset in your name that would be subject to a claim for the damages?

A. That's correct.

Q. In making that Deed to Val was it your intention in any way to make a gift to her of your interest in the property?

A. No.

* * *

Q. Mr. Berg, I am going to hand you a copy of what has been marked as Exhibit #1 and ask you to take a look at that document. That appears to be entitled a Special Warranty Deed.

A I see it, I recognize it.

Q Does your signature appear on the line that is above the typed signature of yours near the lower portion or lower one-third of that document?

A Yes.

Q And is that your true signature?

A Yes.

Q There is also a date on there when it appears to have been notarized. Did you sign it on that date?

A Yes.

Q Was your wife present in the room or in the facility near you when it was signed?

A No.

Q Who was it that presented it to you?

A Well, I was in the County Jail.

Q All right, the Linn County Jail?

A Yes.

Q That is where you signed it?

A Yes.

Q And your wife was not present when you signed it?

A No.

Q Did a minister hand that to you to sign?

A Yes.

Q Did the minister or anyone else who was present threaten you to get you to sign that?

A No.

Q Now you told Mr. Nathanson that you signed that in order to prevent a lawsuit being brought against you by the Brett Sunner family or his estate. Do you recall telling Mr. Nathanson that?

A Yes.

Q Did you also sign it so as to provide a home and security for your children.

A Well, I signed it more or less becauseQ. You can just answer that yes or no.

A Well yes.

* * *

Q Now didn't you and she discuss at some point in time in 1968 [sic], from the time that you were incarcerated, until, oh, I don't know, the fall, like through maybe October or so, that if you signed the home over to her she would take care of raising Eric as far as financial concerns are needed, take care of any college or trade school or community college expense and take care of Colleen, wasn't that discussed?

A Not that I recall.

Q If Val alleges that it was discussed and that that was one of the reasons that the home was signed over from you to her would she be correct in that recollection?

A No.

The trial court is in a position to weigh the credibility of witnesses and we give weight to its fact findings. Iowa R. App. P. 4. The trial court, after weighing the witnesses' testimony, decided that the title to the property in question should be quieted in the wife. The trial court found that even though the husband wished to repudiate the prior agreement, referring to both the stipulation and the transfer of property, the court would strongly consider them in its ruling. Iowa law provides that where a wife is made grantee of real estate, the husband is presumed to have intended a gift to or settlement upon her, and such presumption can be overcome only by clear and "practically overwhelming" evidence. Turner v Lambert, 198 Iowa 507, 510, 199 N.W. 415, 416 (1924). The special

warranty deed was exempt from filing a declaration of value pursuant to Iowa Code section 428A.2(11) (1985). When the consideration for property is under \$500, the property is exempt from the transfer tax. The Code does not make a distinction between actual sale of property and a gift. See Iowa Code § 428A.1 (1985). Given the testimony and document, the court did not find that the husband had overcome the presumption that the husband intended to give the wife his interest in the family homestead. It is true that the land was purchased through the joint effort of each party and the land was the family homestead and the husband's chief asset. However, we also recognize that due to the husband's acts, he knew he was to spend the rest of his life in prison and the marital relationship would be greatly altered due to this fact. We also believe that the intent was clearly to give the wife a gift which she could use for herself and the children. Even though, when later faced with the prospect of a divorce, the husband may have changed his mind about the gift, the determining factor is the intent of the donor. In re Marriage of Weidner, 338 N.W.2d at 360. We believe that at the time of the transfer the husband intended to give his interest in the homestead to his wife as a gift.

However, we must now ask whether or not this gift was subject to equitable division. If a court finds that it is inequitable to refuse to divide a gift, it is not required to set aside that gift. See Iowa Code § 598.21(2) (1985). The court is not required to set aside to a party property which has been received as a gift. In re Marriage of Mentel, 359 N.W.2d 505, 506 (Iowa Ct. App. 1984). Exceptions include unfairness to spouse and children, length of marriage, and matters which tend to negative or mitigate against the appropriateness of dividing the property. In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982).

The court, in citing Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), evidenced a consideration of other factors which might be relevant in deciding

whether the gift was subject to equitable division. One important factor in property division is the needs of the respective parties. Id. at 405. If the inherited or gifted asset is necessary for a spouse to continue his or her livelihood, for example, a court may award that asset to one or the other of the spouses. See In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979). The desirability of protecting an asset can permit an acceptable departure from an approximate equality of property division. In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976). We have never required a percentage division of marital property. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa Ct. App. 1984). If it can be equitably provided, a spouse should be able to enjoy a standard of living reasonably comparable to that enjoyed during marriage. See Iowa Code § 598.21(f) (1985); In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa Ct. App. 1981). To force the wife in this case to take out a large mortgage on her house would seriously alter her financial circumstances; to force her to sell would change her entire life-style and negatively affect her ability to provide the same type of home for herself and her family. The husband has no pressing financial needs at the moment and perhaps he never will. The wife must continue to work to support herself and a minor child. The wife testified she also has some financial responsibilities for the adult disabled child. The wife must provide for a secure retirement. Under these circumstances, we think it would be grossly unfair to the wife and her children to force a sale or mortgage of the gifted property.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents.

I dissent.

37

I am unwilling to decide, as the majority did, that because ownership of an asset accumulated during a long-term marriage by the joint effort of both spouses is deeded from one spouse to the other it is considered gifted property under Iowa Code §598.21(2) (1985) and can be divided only upon a finding that refusal to divide the property is inequitable to the other party or the children of the marriage. The house was accumulated by the parties' joint efforts and should be considered with the parties' other assets in arriving at an equitable distribution.

In assessing the property division I look at the criteria of Iowa Code §598.21(1) (1985) and specifically consider:

1. Val Jean is gainfully employed, has income sufficient to meet her needs and leaves the marriage with pension and social security benefits.
2. Leonard has little income and no living expenses.
3. Both parties have a support obligation to the minor child.
4. Under Iowa law fault plays no part in the property division. See Locke v. Locke, 246 N.W.2d 246 (Iowa 1976).

I would modify the award to establish a \$15,000 lien in Leonard's favor against the homestead. When Eric reaches 22 years of age, finishes his schooling, becomes self-supporting, dies or marries (whichever event occurs sooner), I would direct that interest commence to run on the lien at the statutory judgment rate. Twelve months from the date of said event I would direct Val Jean pay \$1,000 principal and accrued interest with a like amount due in each succeeding year until paid.