

IN THE COURT OF APPEALS OF IOWA

No. 6-449 / 95-1099

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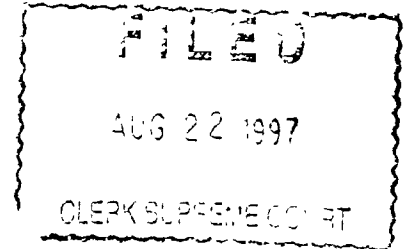
**IN RE THE MARRIAGE OF BEVERLY JEAN HARDER
AND CHARLES P. HARDER**

Upon the Petition of
BEVERLY JEAN HARDER,

Appellee,

And Concerning
CHARLES P. HARDER,

Appellant.



Appeal from the Iowa District Court for Cherokee County, Joseph P. Straub,
Judge.

Charles Harder appeals various economic provisions of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Willis J. Hamilton of the Hamilton Law firm, P.C., Storm Lake, for appellant.

M.W. Miller, Jr., of Miller, Miller, & Miller, P.C., Cherokee, for appellee.

Heard by Habhab, C.J., and Sackett, and Cady, JJ.

CADY, J.

Charles Harder appeals from the economic provisions of a decree dissolving his marriage to Beverly Harder. Charles and Beverly were married on October 25, 1951. They had two children, both of whom are adults and not subject to the present appeal. At the time of the trial, Charles was sixty-three years of age and Beverly was sixty-two.

During the marriage, the Harders first resided on a farm owned by Charles' father for four years and later on a farm which they rented for twenty-five years. In 1978, Charles' father, Fred Harder, formed a partnership. He was the general partner and gave an eight percent interest to Charles as a limited partner. The sole asset of the partnership was a 160-acre tract of land owned by Fred Harder. Charles and Beverly lost their farm business in 1982. They relocated to California in 1984 and worked outside the home until both suffered career ending work-related injuries.

Charles and Beverly each received lump sum workers' compensation settlements. Charles received \$20,200 and Beverly received \$18,000. In addition, the couple received lump sum social security benefits. Charles received \$7800 and Beverly received \$5000. Charles now receives \$692 per month in social security benefits. Beverly receives \$400 per month in social security and a monthly disability payment from CNA Insurance Company of \$690 per month. When Beverly turns sixty-five, the CNA disability payments will end.

Throughout their marriage, both parties worked hard and contributed to the operation of the farm and the household. Until the last year of the marriage, Charles gave his checks to Beverly and she placed them in her checking account. When the couple returned to Iowa in 1993, Beverly used all of Charles's workers' compensation settlement and a portion of her own to purchase the marital home. Although Charles sometimes fixes fences and feeds cattle for other people, neither party is presently employed.

The parties separated in 1993. Beverly remained in the marital home and Charles lived in a hog buying station in Quimby, Iowa. A petition for dissolution of marriage was filed by Beverly on November 15, 1994. Following trial, the district court entered its decree. The court awarded Beverly the marital home valued at \$36,000, a Toyota automobile valued at \$4000, two IRAs valued at \$17,013, and other property for a total of \$66,420. Charles was awarded \$10,786 of the workers' compensation settlement, his eight percent interest in the limited partnership, cattle valued at \$4900, and other property for a total of \$33,407. Charles has appealed.

Charles argues the district court should have set-off to him the entirety of his worker's compensation settlement of \$20,200. He also asserts the court erred in including his share of the limited partnership as a marital asset. He claims this property should have been set aside to him as a gift. Next he contends the district court erred in concluding he was the owner of \$4900 worth of cattle. Finally, he contends the district court inequitably divided the remaining marital property.

I. Scope of Review

Our review is de novo. Iowa R. App. P. 4. De novo review requires examination of the trial record and adjudication anew of rights properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). We give weight to the district court's findings, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Worker's Compensation Award

Charles contends the district court erred in not setting aside to him his workers' compensation settlement. He claims he should have received the \$20,200 which was awarded to him. We affirm the district court's division of this asset.

Proceeds from personal injury claims in a dissolution of marriage do not automatically belong to either party. *In re McNerney*, 417 N.W.2d 205, 208 (Iowa 1987). In the *McNerney* decision, the Iowa Supreme Court adopted the "mechanistic" approach to determine how settlements should be divided. *Id.* Under this approach, the wording of the statute defines items expressly deleted from the property to be equitably distributed. *Id.* at 207. Because Iowa Code section 598.21(1) only mentions inherited property and gifts, all other property is subject to division. *Id.*

Charles attempts to distinguish the present case from *McNerney* because it does not involve automobile accident proceeds. *Id.* He maintains workers' compensation proceeds differ from automobile proceeds because they are proportionate to the extent of the disability and do not include compensation for the non-injured spouse. Iowa Code § 85.20 (1995). Charles also asserts he has a greater

need for the amount he was awarded than does his wife because he suffered a head injury which prevents him from working and having a drivers license.

The district court divided the Harders' marital assets based on its view of the record. The court considered the house, purchased with workers' compensation proceeds from both Charles and Beverly, to be a marital asset. Accordingly, the court concluded the most equitable solution would be to award Beverly the house and Charles the remainder of Beverly's workers' compensation settlement. On our de novo review, we agree with the district court's division of this asset.

III. Gifted Property

In the decree, the district court determined Charles's interest in the limited farm partnership was a marital asset. Charles argues he received the interest in this property as a gift and it should be set aside unless Beverly can show substantial contribution to the property's care, preservation, and improvement. We agree and modify the decree to set aside Charles' eight percent interest in the limited partnership.

The requirement to set aside property which has been inherited or received as a gift is not absolute. *In re Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Iowa Code section 598.21(2) states property received as a gift is not subject to division unless the court finds it would be inequitable to the other party not to do so. Iowa Code § 598.21(2). Factors the court considers when determining whether a gift should be set aside include: (1) the contribution of the parties toward the property; (2) the

existence of a close independent relationship between the donor and the spouse of the one to whom the property was given; (3) separate economic contributions by the parties to preserve the gift; (4) any special needs of either party; and, (5) any other matter which would render it unfair to the spouse to have the gift set aside for the exclusive enjoyment of the donee. *Thomas*, 319 N.W.2d at 211. In addition, the court should consider the length of marriage and the extent to which the married couple's standard of living increases as a result of the gift. *In re Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989).

Charles maintains none of the factors outlined in *Thomas* were met. See *Thomas*, 319 N.W.2d at 211. In particular, the couple made no substantial improvements to the property while they lived there and no special relationship existed between Beverly and Charles's father. Further there was not a substantial rise in the couple's standard of living as a result of the gift. Moreover, based on the partnership agreement, there is no assurance that Charles's gift will provide him with any measurable income during the remainder of his natural life.

On balance, we find there are no mitigating circumstances to justify inclusion of the gift as a marital asset. We modify the dissolution decree to set aside Charles's interest in the limited partnership as separate property.

IV. Other Marital Property

Charles contends the district court erred in finding he was the owner of \$4900 worth of cattle. Charles testified he had insufficient income to be the owner of cattle.

In contrast, Beverly testified Charles owned seven head of cattle worth \$700 per head. When confronted with conflicting testimony considerable weight is given to the findings of the district court on the credibility of the witnesses. *In re Hoak*, 364 N.W.2d 185, 192 (Iowa 1985). In this case, we accept the district court's finding that Charles could have purchased the cattle with the cash he received from his monthly social security payments. We affirm the district court's decision to include the cattle as part of the marital assets.

V. Property Division

Charles contends the assets of the parties should be divided evenly. He maintains it was not equitable to award Beverly a greater share of the marital property. We agree adjustments are necessary to ensure that each partner receives an equitable share of the property accumulated during marriage.

The criteria governing the division of property is codified in Iowa Code section 598.21. Iowa Code § 598.21. Because the determination as to what constitutes an equitable property division can not be reduced to a precise formula, the courts must strive to make a just and equitable award under the circumstances of each case. *In re McNamer*, 452 N.W.2d 812, 814 (Iowa App. 1990). Among the factors to be considered are the length of the marriage, property brought into the marriage, contributions of each party to the marriage, physical and emotional health of the parties, earning capacity of each party, economic circumstances of each party, tax

consequences to each party, written agreements concerning the distribution of the property, and any other relevant considerations. Iowa Code § 598.21(1).

In dividing the marital estate, the district court determined it was equitable to award Beverly sixty-seven percent of the assets. Charles was awarded thirty-three percent of the assets. The award to Charles included his gift of the limited partnership. While we agree that both parties have contributed to the marital enterprise, have extensive health problems, and lack earning capacity, we find it necessary to modify the award to exclude Charles' gift of the limited partnership from consideration. Nevertheless, we agree with the trial court the division of property needs to be weighted in favor of Beverly. Despite his disability, Charles is able to supplement his social security benefits with income from odd jobs. Furthermore, Charles will receive nearly \$300 more than Beverly in social security benefits each month after her insurance benefits terminate in a few years. Thus, the economic circumstances of the parties justifies a division of property weighted in favor of Beverly.

In making this adjustment, we affirm the trial court's allocation of the marital home, Toyota car, and other marital property to Beverly. However, we conclude the IRA from Central Trust should be divided between the two parties. Keeping this in mind, we determine the property be divided as follows:

DESCRIPTION	HUSBAND	WIFE
Homestead		\$36,000
Toyota		\$4,000
Life Investors Policy #0199752791		\$1,634
Furniture (wife)		\$4,000
Appliances (wife)		\$3,000
Checking Account, Central Trust		\$626
Savings Account, FIG Credit Union	\$634	
IRA, FIG Credit Union		\$3,261
IRA, Central Trust	\$9,768	\$3,984
Worker's Compensation Settlement	\$10,786	
Cemetery Plots	\$147	\$147
Buick	\$2,000	
Life Investors Policy #01695	\$680	
Life Investors Policy #10847	\$1,400	
Cattle	\$4,900	
Silver	\$74	
Savings Bonds	\$265	
Furniture & Appliances (husband)	\$1,000	
Total	\$31,654	\$56,653

We otherwise affirm the district court order.

AFFIRMED AS MODIFIED.

Habhab, C J , concurs; Sackett, J., partially dissents.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. The issue is whether the property division made by the trial court is equitable. In assessing this issue, we consider the applicable statutory provisions and case law.

I do not find the issue of whether gifted property should be divided an issue of whether or not it is marital property; rather the question is whether there are facts and circumstances that justify Charles dividing it with Beverly. I agree with the majority's reasoning and conclusion that there are not, although it is properly considered in assessing both Charles's and Beverly's needs for future support.

In all other respects, I would affirm the trial court.