IN THE COURT OF APPEALS OF IOWA

No. 4-337 / 93-1038

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF WILBUR HAMMERICH AND NANCY HAMMERICH

Upon the Petition of
WILBUR HAMMERICH,

Appellant/Cross-Appellee,

And Concerning
NANCY HAMMERICH,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Muscatine County, Max A. Werling, Senior Judge.

Wilbur appeals and Nancy cross-appeals from the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

David Scieszinski, Wilton, for appellant.

Gerald F. Denning of Allbee, Allison & Denning, P.C., Wilton, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Wilbur and Nancy Hammerich were married on August 19, 1962. They have one adult daughter, Kelly.

Wilbur was born in approximately 1935 (as estimated by the trial court based upon the assumption Wilbur was eighteen when he graduated from high school in 1953). He has had no formal education or vocational training beyond high school. Other than four years of service in the army, Wilbur has farmed all of his adult life.

On March 2, 1962, Wilbur and his brother, Henry, purchased an eighty-acre tract of farmland on contract. At that time Wilbur and Henry were farming four different tracts: their own eighty acres; eighty acres rented from an aunt; and two tracts owned by their parents. The brothers had no formal accounting. Each owned his own machinery and filed separate income tax statements.

Nancy was born in 1943. She also has no formal education beyond high school. After the marriage, Nancy moved to a house on the farm owned by Wilbur and Henry. She apparently performed a substantial amount of work on the farm until they moved into the city of Wilton in 1972. The money to build the house in Wilton was obtained by securing both the house and Wilbur's interest in the farmland he owned with Henry. Nancy continued milking the cows on the farm until 1975.

In 1972 Wilbur's father died. His mother died three months later. Before their mother's death, in an apparent

exchange for Wilbur's interest in inherited property, Nancy and Wilbur obtained Henry's interest in the eighty-acre farm as joint tenants.

On December 11, 1991, Wilbur suffered a stroke and was hospitalized for one month. He returned home for approximately three months before his commitment to the state mental hospital in Independence. He was then transferred to the Veterans Administration Hospital in Knoxville. He eventually returned to Wilton and resided with his brother and sister. He is now unable to earn an income.

Nancy secured a power of attorney and sold the dairy herd for $20,000. She sold the farm machinery for $8,710. She gave the remaining machinery to Henry in consideration for the assumption of a farm loan. A substantial portion of these monies is not now traceable. Nancy apparently lost track of how she spent the money or what she did with it. She claims it went to debts and to help Kelly with single parenthood.

Additionally, Wilbur and Nancy found it necessary to sell seventy-five acres of the eighty-acre farm to pay off the mortgage on the Wilton home. Wilbur retained five acres in order to locate a mobile home. After the sale of the farmland, the parties were left with an escrow account of $29,300.

Among other things, the trial court ordered the escrow account divided equally after the payment of the parties'

income taxes. It awarded Nancy a life estate in the Wilton home and the remainder divided equally.

Wilbur appeals and Nancy cross-appeals from the decree dissolving their marriage. Wilbur claims the court erred in (1) determining property held in joint tenancy was marital property to be divided equally and (2) failing to find Nancy's inability to account for monies from the sale of farm machinery and dairy herd should be charged against her share of the marital assets. Nancy claims the court failed to make an equitable division of the marital assets. She also requests attorney fees on appeal.

I. **Scope 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 in Joint Tenancy.**

Wilbur argues the trial court erred when it determined eighty acres of land constituted marital property. The trial court apparently saw the issue as one of "transmutation": that is, once Wilbur placed the inherited property in joint ownership, it became marital property. This is incorrect, however. The placement of the

inheritance in joint ownership is not controlling. In re Marriage of Wertz, 492 N.W.2d 711, 714 (Iowa App. 1992).

Despite questionable analysis, the trial court reached the correct result. The trial court should have looked at Iowa Code section 598.21(2) (1993) and recent case law interpreting this provision. Iowa Code section 598.21(2) provides inheritances are to be retained in the dissolution by the recipient absent a finding of inequity. Iowa Code § 598.21 (1993); In re Marriage of Van Brocklin, 468 N.W.2d 40, 44 (Iowa App. 1991). The intent of the donor and the circumstances surrounding the inheritance control whether the inheritance is to be set off in dissolution. Wertz, 492 N.W.2d at 714.

Looking at these appropriate factors, we determine the eighty acres constitutes marital property. Under this record, the intent of the donors is unclear. It is reasonable to assume, however, Wilbur's parents had no objection to benefiting Nancy, their daughter-in-law of approximately ten years at that time and the mother of their grandchild.

Furthermore, the partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987) (citation omitted). After inheriting the property, approximately twenty years of marriage passed before dissolution. During that time, Wilbur agrees Nancy worked extensively on the farm. When

asked what kind of farm work Nancy did, Wilbur replied, "Everything, I guess." The uncontroverted testimony shows Nancy performed many chores, including discing, milking cows, shoveling manure, mowing hay, and other heavy labor. In addition to her farm work, Nancy did all the housework and care for Kelly. Considering the record before us, not allowing Nancy some division of the eighty acres would be inequitable. We affirm the trial court on this issue.

III. **Farm Machinery and Dairy Herd Proceeds.**

Wilbur also contends the trial court erred in not charging Nancy with at least a portion of $15,100.91. We agree.

After having Wilbur committed to the state mental hospital, Nancy secured a power of attorney and proceeded to sell the farm machinery and dairy herd. After paying outstanding family debts and expenses, the balance was 15,100.91. When questioned as to what happened to this money, Nancy had a complete lapse of memory.

A party may not secrete assets of the marriage in order to avoid the obligation to provide for a just and equitable division of marital property. In re Marriage of Hanson, 475 N.W.2d 660, 663 (Iowa App. 1991). Again, partners in 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).

The equities of this case demand Wilbur receive a share of the proceeds from the sale of the farm equipment and

dairy herd. We determine the proceeds should be divided equally between Wilbur and Nancy. One-half of $15,100.91 is approximately $7,550. We therefore award Wilbur $7,550 as a lien upon Nancy's real estate. The lien will draw interest at ten percent per annum. The principal and interest shall be due and payable to Wilbur one year after the clerk of the Iowa Supreme Court issues procedendo on this appeal.

IV. Division of Marital Assets.

Nancy argues the trial court division of marital assets was inequitable as to her. She claims she is entitled to a greater share of the assets because the homestead needs substantial repairs. We disagree.

According to Nancy, she received less than half of the marital assets. Our review of the record leads us to doubt this conclusion. Even if this assertion is true, Iowa courts do not require an equal division or percentage distribution. Id. We reject precise percentage divisions 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). Nancy's share of marital assets is just and equitable under these circumstances.

V. Attorney Fees.

Nancy requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial

positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Neither party is in a financial position to pay substantial attorney fees. We deny Nancy's request.

Judgment of the trial court is modified to allow a division of the proceeds from the sale of the farm machinery and dairy herd. We award Wilbur $7,550 as a lien upon Nancy's real estate. The lien will draw interest at ten percent per annum. The principal and interest shall be due and payable to Wilbur one year after the clerk of the Iowa Supreme Court issues procedendo on this appeal. In all other respects, the trial court is affirmed. Costs are to be taxed evenly between the parties.

AFFIRMED AS MODIFIED.