IN THE COURT OF APPEALS OF IOWA

No. 1999-281 (9-511) / 98-2028
Filed December 27, 1999

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DEC 27 '99
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IN RE THE MARRIAGE OF CHRISTINE ANN COOPER AND JODY R. COOPER

Upon the Petition of
CHRISTINE ANN COOPER,
Petitioner-Appellee,

And Concerning
JODY R. COOPER,
Respondent-Appellant.

Appeal from the Iowa District Court for Washington County, Dan F. Morrison, Judge.

The respondent appeals from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

J.W. McGrath of McGrath & McGrath, P.C., Keosauqua, for appellant.

Leslie D. Lamping of Day, Meeker, Lamping & Schlegel, Washington, until withdrawal; then Christine Ann Cooper, Washington, pro se, for appellee.

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

MILLER, J.

The respondent, Jody Cooper, appeals various economic provisions of the parties' dissolution decree. He claims the district court erred in not setting aside to him over $10,000 in gifted property and in dividing the marital property inequitably. We affirm the decree as modified.

Background. Jody and Christine Cooper married in December 1991. They have three minor children: Taylor, born in 1991, Collin, born in 1994, and Rylee, born in 1996. During the marriage, the parties purchased a home in Wellman, Iowa, on contract for $39,350. Significant improvements were made to the home with the help of Jody's family, including a new bedroom and bath for the children and a new kitchen. Jody's family contributed $10,082.79 toward the remodeling and Christine's family contributed approximately $2000.

In March 1997, Christine filed a petition for dissolution of marriage. At trial, the parties, in pertinent part, disagreed whether Jody's parents expected the sums they contributed toward remodeling to be repaid or whether such contributions were gifts. The court entered separate findings of fact and conclusions of law and directed Christine's attorney to draft a decree in conformity with the findings and conclusions. In its findings the district court concluded the contributions were intended to be gifts to both parties and the children. The court found Christine should retain possession of the marital home, since she needed the residence for the children. The court also found she should pay the mortgage and maintain the property. The court found Jody

should have $16,452 of the equity in the home to make the property division equitable, but that Christine need not sell the home and pay Jody his share of the equity until the youngest child graduates from high school. The equity award would not earn interest until Christine moved or abandoned the home or the youngest child graduated.

In contrast to the court's findings, the decree awarded Jody the home, subject to Christine's lien of $16,452. It also ordered Jody to pay the mortgage. The attorneys for both parties approved the form of the decree. Jody appealed. Christine did not file a brief on appeal.

Appellate claims. Jody claims the contributions from his parents toward remodeling were not intended as gifts to both parties, but to him alone. He argues his parents made a similar contribution to his brother. He contends the district court should have set aside the $10,082.79 to him as gifted property before dividing assets. Jody also claims the property distribution is inequitable. He asserts the court should order Christine to buy his equity interest or order the home sold within a year and the equity divided after he receives an appropriate set off for gifted property.

Analysis. We review decrees of dissolution of marriage de novo. Iowa R. App. P. 4. Iowa courts do not require an equal division or percentage distribution of property from a marriage. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The determining factor is what is fair and equitable in each circumstance. *Id.*

First, we note the paragraph of the decree concerning the marital home obviously was drafted incorrectly. Apparently neither attorney noticed the discrepancies between the decree and the court's findings nor the internal inconsistencies in the paragraph. The record does not contain a rule 179(b) motion or a *nunc pro tunc* order. We modify the decree to reflect that Christine receives the residence and is responsible for the mortgage, while Jody is awarded a lien against the equity in the home.

Jody's claim the money his parents spent to improve the marital home was solely a gift to him is without merit. His father testified the improvements were so the whole family could have a better home. Jody's parents also helped his brother improve his home for the benefit of the whole family. Without a clear indication the money spent on home improvements was intended as a gift to Jody only, the court did not act inequitably in considering the improvements an asset subject to division.

Concerning the division of assets (the home), Jody complains the court made him responsible for the mortgage. Although the original decree does make him responsible for the mortgage, our modification to the decree to conform to the findings of the court resolves this issue. Christine is responsible to pay the mortgage.

The district court intended that Christine could remain in the home as long as the parties' children had not completed high school. She also testified it was important to remain in the homestead because its location near the school greatly aided her child care business. At the time of dissolution, the youngest child was two

years old. Potentially, Christine could remain in the home for sixteen years before any interest would accrue on Jody's property award. We find that requiring Jody to wait sixteen years before receiving his share of the parties' property is inequitable.

Jody argues we should order the home sold and the equity divided. In *In re Marriage of Lovetinsky*, 418 N.W.2d 88, 89-09 (Iowa App. 1987) we considered a situation somewhat similar in which the wife had physical custody of the parties' young child and operated a child-care business in the marital home. We ordered the home sold because she could not afford to maintain the home and it was encumbered beyond its value. We also noted the child was so young that a move to another neighborhood would not be disruptive.

In the present case, the oldest child was of grade school age and the middle child almost of school age. There is no good indication Christine could not afford to keep the home. She testified the location of the home is important to maintaining her child-care business. The court used some of the equity in the marital home to make the division of property equitable. We find, however, forcing Jody to wait up to sixteen years without any interest accruing before he could receive his share of the property destroys the equity of the division. We therefore modify the decree and order Christine to pay Jody his $16,452 share of property from the marriage within sixty days after procedendo is issued. If she is unable to pay Jody as ordered, we direct that the marital residence be sold and that Jody be paid his $16,452 from the net proceeds. The modified language of the decree is as follows:

IT IS FURTHER ORDERED AND DECREED that Petitioner is awarded the Wellman residence at 807 8th Avenue, Wellman, Iowa, more particularly described as:

Wakelee's S.D. of O.L. 3 Lot 7 & N ½ Lot 8 in Wellman, Washington County, Iowa,

subject to Respondent's lien in the amount of $16,452, which shall be paid to Respondent within sixty days after procedendo is issued. Except for refinancing for the purpose of paying Respondent's lien, Petitioner shall not be entitled to encumber the real estate with any debts or make any major repairs in excess of $2,000 without notice to Respondent until Respondent's lien is paid in full. Petitioner shall assume and pay the existing mortgage indebtedness on the Wellman residence to Hills Bank Kalona and hold the Respondent harmless thereon. If Petitioner does not pay Respondent's lien in the time set forth, the Wellman residence shall be sold immediately and Respondent's lien paid from the net proceeds.

Costs of appeal are assessed one-half to each party. We affirm the decree of dissolution as modified.

AFFIRMED AS MODIFIED.