IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 9-399 / 98-0966
Filed November 10, 1999

IN RE THE MARRIAGE OF HOWARD WILLIS AND ANITA WILLIS

Upon the Petition of
HOWARD WILLIS,
Petitioner-Appellant/Cross-Appellee,

And Concerning
ANITA WILLIS n/k/a ANITA MYER,
Respondent-Appellee/Cross Appellant.

Appeal from the Iowa District Court for Shelby County, G.C. Abel, Judge.

On appeal from the entry of the parties' dissolution decree, Howard claims the district court erred in valuing his interest in a farm purchased from his parents and in treating the farm as marital property. Anita has cross-appealed, claiming the district court erred in failing to award her alimony. She also requests an award of appellate attorney fees. **AFFIRMED.**

Robert Kohorst of the Kohorst Law Firm, Harlan, for appellant.

Susan Larson Christensen of Larson, Childs, Hall & Christensen, P.C., Harlan, for appellee.

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

MILLER, J.

Petitioner Howard Willis appeals the decision of the trial court that included certain land as marital property, and further challenges the value placed on that property by the trial court. Respondent Anita Willis cross appeals, challenging the district court's denial of her request for alimony. She requests an award of attorney fees on appeal.

I. Background facts and proceedings. Howard and Anita were married September 26, 1964. In late 1970 Howard and his four brothers, as buyers, entered into a real estate contract with their parents, as sellers, for the purchase of real estate commonly referred to as the Moorhead farm. Anita was not a signatory to the contract. By the terms of the contract, each brother was to pay fifteen dollars per month, for a total of seventy-five dollars per month, toward the purchase price of $15,000. The contract gave the buyers the option to make additional payments on the unpaid principal in the amount ot not to exceed $900 in any one year. The parents reserved a life estate as joint tenants with rights of survivorship. Upon both of their deaths and the brothers having lived up to their contractual obligations, Howard and his brothers would each have a one-fifth undivided interest as tenants in common in the Moorhead farm.

The contract provided in part that in the event a buyer wished "to dispose any of his interest in the above entitled real estate under this contract, he is hereby obligated to give the other brothers the first opportunity to buy his share at the price

he paid for it under the terms hereby." On November 16, 1981, Howard's parents recorded a Warranty Deed conveying all their interest in the Moorhead farm to Howard and his four brothers. The Warranty Deed did not contain any language restricting in any manner the right of any one or more of the brothers to convey his interest in the real estate, and did not contain any language granting any one or more of the brothers a right of first refusal in the event one or more of the brothers were to sell their interests.

On April 18, 1997, Howard filed a petition for dissolution of marriage. The parties' marriage was dissolved by a decree which was filed December 30, 1997. That decree provided that "all other rulings on matters related to this proceeding are reserved." Trial was held on January 8, 1998. At trial the parties stipulated that the current value of the Moorhead farm was $84,300, or $16,860 per brother. The evidence showed, without apparent dispute, that Howard's interest in the Moorhead farm had been paid for with money earned during the parties' marriage. The trial court determined that the one-fifth interest in the Moorhead farm was marital property, subject to division in the dissolution of marriage proceeding, and placed a value of $16860 on it. Howard appeals these decisions.

The trial court found that Howard, age sixty-one, earned about $734 per month, and that Anita, age fifty-four, earned about $984 per month. However, Anita had been working full-time for only about the last four years before trial. Howard suffered a stroke in 1995 and had been off work for a year as a result. At the time of

trial it was estimated that Howard would be eligible for social security benefits of $680 per month at age sixty-two and that Anita would be eligible for social security benefits of $310 per month at age sixty-two. After considering the factors listed in Iowa Code section 598.21(3), the trial court awarded neither party alimony. Anita appeals the denial of alimony.

II. Scope and standard of review. In this equity action our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). 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).

III. The merits.

A. The Moorhead farm. Howard argues that it was error to include the Moorhead farm in the division of marital property, urging that his receipt of his interest in the Moorhead farm was for all intents and purposes a bequest after his parents' death. He bases his argument on the fact that his parents retained a life estate with rights of survivorship, and that his parents retained all rent on the property throughout their lifetime. We disagree with his characterization of the property transfer as an inheritance.

Iowa Code section 598.21(1) provides that upon dissolution of marriage the court shall divide all property, except inherited property or gifts received by one party.

Here, the contract was signed during the lifetime of the parents, and a warranty deed was signed and recorded during the lifetime of the parents. Black's Law Dictionary defines "inherit" as "to take by descent as a matter of law as heir on death of ancestor; though this item has also come to mean to receive by devise (i.e., by will)." Black's Law Dictionary 712 (6th ed. 1990). Because Howard's parents were alive during all relevant transactions, this was not an inheritance, but a sale and purchase. Howard's parents sold, and Howard and his brothers purchased, a remainder interest in the Moorhead farm, the parents reserving a life estate in it.

Howard further argues that the value of the property should be $3000, the amount that he could sell his interest in it to his other brothers under the 1971 contract. We again disagree. Howard urges that the contract clause limiting his right to sell his share of the property is a restrictive covenant, which can only be released by all of the persons in whose favor the restriction runs. However, a restrictive covenant is "a provision in a *deed* limiting the use of the property and prohibiting certain uses." Black's Law Dictionary 1315 (6th ed. 1991) (emphasis added). The provision that Howard would rely on as a restrictive covenant does not appear in the deed. (It is also not at all clear that the restriction on sale that appears in the contract runs in favor of the brothers. As noted below in this ruling, the contract is one between Howard's parents as sellers and Howard and his brother as buyers and nothing in the contract expressly or by necessary implication makes the contract one between Howard and his brothers.)

Howard urges that the restriction on sale contained in the contract did not merge in the deed, but rather survived it. Several Iowa cases set forth rules and contain language that are instructive.

The broad rule is that a contract to convey land presumptively becomes merged in the subsequent deed executed in performance thereof and that the deed speaks and the contract is silent as to all matters of conflict between them. *Phelan v. Peeters*, 260 Iowa 1359, 152 N.W.2d 601, 602 (1967). The rule has many qualifications, one of which is that collateral agreements or conditions not incorporated in the deed or inconsistent therewith will be deemed to survive for the purpose of enforcement. *Id.*

It may not be questioned that when a deed is accepted, in compliance with the terms of a contract for the sale of real estate, the contract is merged in the deed. *Dickerson v. Morse*, 203 Iowa 480, 482-83, 212 N.W. 933, 934 (1927).

The execution of a deed presumably is the consummation of the contract, and parties thereafter look alone to the deed for conditions of the transfer; and where merger of the contract into the deed is denied, the burden of proof rests on the party so denying to show that a merger was not intended. *Gray v. VanGordon*, 187 Iowa 835, 838, 174 N.W. 588, 590 (1919). *See also Swensen v. Union Central Life Ins. Co.*, 225 Iowa 428, 434, 280 N.W. 600, 603 (1938).

We conclude that the restriction on sale contained in the contract did not survive the deed. The language of the contract itself contemplated the demise of the contract upon conveyance by deed. The contract provided

> ***It is mutually agreed that the deed executed by the surviving Seller shall constitute full compliance with this contract*** and when delivered by the escrow agent it shall complete the purchase of the real estate described herein.

(emphasis added.) The sale of the real estate (remainder interest in the Moorhead farm) was complete upon payment of the purchase price, execution, delivery and recording of the warranty deed, and the deaths of the sellers, all of which occurred. Because the deed was accepted in "full compliance with this contract," the contract cannot survive the deed. *See Dickerson v. Morse*, 203 Iowa at 482-83, 212 N.W. at 934.

Although not necessary to our decision, yet another reason suggests that the contract provision in question merged in the deed and did not survive it. Nothing in the contract expressly or by necessary implication made the contract one between Howard and his brothers. Rather, the contract was expressly one between Howard's parents "as Seller" and Howard and his brothers "as Buyers". Because the contract established no contractual relationship between Howard and his brothers, no such contractual relationship could survive the deed.

Howard, who denies merger of the contract into the deed, has the burden to show that a merger was not intended. *Gray v. Van Gordon*, 187 Iowa at 838, 174 N.W. at 590. We conclude, as the district court did, that he has failed to satisfy that burden.

B. Alimony. Both Howard and Anita requested an award of alimony. The trial court considered the factors set forth in Iowa Code section 598.21(3), and

concluded alimony should not be awarded to either party. Anita appeals, claiming the trial court should have awarded her alimony of $185 per month, one-half the difference between Howard's anticipated social security benefits at age sixty-two and her anticipated social security benefits at that age.

Factors for the court's consideration in determining whether or not an order for spousal support is appropriate and, if so, the amount and duration of an award, are set forth in Iowa Code section 598.21(3). *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Any form of alimony is discretionary with the court. *Id.* The trial court is vested with some discretion in considering the ability to pay. *Mitvalsky v. Mitvalsky*, 191 Iowa 8, 10, 179 N.W.520, 521 (1920). We consider the division of property in determining alimony. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa App. 1998).

Neither party claims that the division of property involved in this case should be considered in determining alimony. At the time of trial the parties had been married about thirty-three and one-half years. Howard had suffered a stroke, and although at the time of trial it did not prevent him from working or affect his ability to work, it had caused him to be off work for a year. There was thus some reason to believe that Anita might be in better health than Howard. Howard was sixty-one years of age and Anita was fifty-four years of age. Anita presumably would have seven more years of income producing employment than Howard would. Anita's income

was almost thirty-five percent greater than Howard's. The trial court did not fail to do equity by declining to award Anita alimony.

IV. Attorney fees on appeal. Anita requests appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). In determining this question, we 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. *Id.* Anita was obligated to defend the trial court's decision on appeal, and did so successfully. However, she also challenged the trial court's decision by her cross appeal, and has been unsuccessful in her cross appeal, which Howard was obligated to defend on appeal. We decline to award Anita appellate attorney fees.

V. Disposition. We affirm the trial court on all issues presented. Anita's request for appellate attorney fees is denied.

AFFIRMED.