IN THE COURT OF APPEALS OF IOWA

No. 9-557 / 98-0701
Filed November 23, 1999

Upon the Petition of
CALLY CERWICK,
Petitioner-Appellee,

And Concerning
RONALD CERWICK,
Respondent-Appellant.

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Appeal from the Iowa District Court for Plymouth County, James D. Scott, Judge.

Respondent appeals the property division of the parties' dissolution decree. Respondent contends the district court erred in awarding the petitioner a larger portion of the net proceeds from a sale of the property, awarding petitioner a payment of the proceeds before dividing the equity, and not granting him the first right to purchase the property's equity. **AFFIRMED.**

Paul W. Deck of Deck & Deck, Sioux City, **for appellant.**

Jeffrey T. Myers, Sioux City, for appellee.

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

SACKETT, C.J.

Respondent-Appellant Ronald J. Cerwick appeals challenging the property division made by the district court in the February 1998 decree dissolving his marriage to Petitioner Cally S. Cerwick. We affirm.

Ronald and Cally were married in 1984. At the time of the marriage neither spouse had assets of any particular value. No children were born to the marriage though Ronald and Cally each have at least one child from a prior marriage or relationship. Both parties were employed during the marriage; however, at the time of the dissolution only Cally was employed for wages. She did not disclose her income. Ronald contends that her employment during the marriage was sporadic. Ronald was unemployed at the time of the dissolution hearing though he advanced he was working for room and board. He had worked at Iowa Beef Packers, but lost his job after he was found guilty of domestic abuse in December of 1996. Ronald claims he was earning $32,000 a year prior to that time and had been employed during the time the couple lived together. Ronald claimed he had work lined up after the dissolution was finalized.

At the time of the dissolution Ronald was thirty-seven and Cally was thirty-four. Their major asset was their homestead, a thirty-five acre track of Woodbury county land with a mobile home. The real estate was purchased on contract for $39,000 in 1990. At the time of purchase they made a down payment of $4,000.

Cally contends this represents money she inherited or received from the insurance proceeds of her child's father. Ronald denies she had an inheritance.

At the time of the dissolution the balance due on the real estate contract was $13,467. The contract had called for monthly payments of $450, but the balance is due in December of 1999. After purchasing the real estate the parties purchased a 1997 Windsor mobile home, put it on the acreage and made improvements to it. The money for this endeavor was borrowed by Cally. Ronald claimed she took $5,000 from his pension fund to assist with the improvements.

Ronald contends there was appreciation of their property because of the work he and his friends put into the premises. He contends that after he left Cally did not like to keep up the property and at the time of the dissolution hearing the property was run down.

The district court found both parties had disposed of assets during the period of the dissolution. Apparently the money was used for legal fees and for living. They disputed how the money was divided. Ronald had some judgments against him which are a lien on the real estate. The judgments appear to be the result of obligations incurred during the marriage. However one of the judgments for $4,000 is for child support for his children from another relationship.

Calley wanted the real estate sold. Ronald wanted to retain ownership of it. The district court ordered the property be listed for sale for $60,000. If the property does not sell within seventy-five days, then the court ordered an auction within 120

days of the entry of its decree. The court then ordered the proceeds of the sale were to be disbursed in the following order: (1) pay sale expenses; (2) pay the balance due on contract; (3) pay debts that are a lien on the property; (4) pay $15,000 to Cally; and (5) divide the balance equally between the two parties.

The parties also owned certain farm machinery which they stipulated was worth about $6,600. There were not liens on this property and it was given totally to Ronald.

Ronald contends he should have the acreage and pay Cally for her equity. He also contends that the decision to award Cally a payment of $15,000 before the property is divided is not equitable.

A dissolution of marriage case is tried in equity. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). Our review is de novo. Iowa R. App. P. 4.

Iowa is an equitable distribution state which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa App. 1995), *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). A justified property division is one that is equitable under the circumstances. *In re Marriage of Stewart*, 356 N.W.2d 611, 612 (Iowa App.1984). The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *Russell*, 473 N.W.2d at 246. Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Plasencia*, 541

N.W.2d 923, 925 (Iowa App. 1995). The determining factor is what is fair and equitable in each circumstance. *Id.*

The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa App. 1993), *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Iowa Code section 598.21(2) provides, in part, gifts received by either party prior to or during the course of the marriage are not subject to property division unless the refusal to divide the property is inequitable to the other party or the children. Section 598.21(2) is substantially a codification of the premise established by earlier case law that property inherited by or gifted to one marriage partner is not subject to division unless the failure to do so would be unjust. *See In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982); *In re Marriage of Byall*, 353 N.W.2d 103, 105-06 (Iowa App.1984). In *Thomas*, the supreme court delineated a number of factors which might bear on how inherited or gifted property should be divided. These include: (1) contributions of the parties toward the property, its care, preservation or improvement; (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) any special needs of either party; (5) any other matter which would render it plainly unfair

to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee. *Thomas*, 319 N.W.2d at 211. In *Thomas* the court went on to say:

> Other matters, such as the length of the marriage or the length of time the property was held after it was devised or given, though not independent factors, may indirectly bear on the question for their effect on the listed factors. Still other matters might tend to negative [sic] or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception. *Id.*

The district court determined that Cally had made some contribution to the purchase of the acreage with money that came to her from an inheritance or insurance policy of a former spouse. Ronald received some $6,600 in farm machinery. The property was encumbered by a child support judgment against Ronald for about $4,500 which will have to be paid before there can be a sale. Our assessment on the record made is that the division made by the district court is equitable.

We award no attorney fees. Costs on appeal are taxed to Ronald.

AFFIRMED.