IN THE COURT OF APPEALS OF IOWA

No. 0-107 / 99-0873
Filed May 31, 2000

IN RE THE MARRIAGE OF KARLEEN A. NELSON and JOHN C. NELSON

F
MAY 3 1 2000
CLERK SUPREME COURT

Upon the Petition of
KARLEEN A. NELSON,
Petitioner-Appellee/Cross-Appellant,

And Concerning
JOHN C. NELSON,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Tama County, Lynne E. Brady, Judge.

John Nelson appeals the property provisions of the parties' dissolution decree. John contends the district court erred in (1) giving Karleen a portion of an inherited farm, and (2) in requiring a cash settlement be paid within twelve months from the date of the decree. **AFFIRMED AS MODIFIED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellant.

Mark Mossman of Mossman & Mossman, L.L.P., Vinton, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

We address challenges to the economic provisions of a decree dissolving a fifteen-year childless marriage. Respondent-Appellant John C. Nelson contends that (1) PetitionerAppellee/Cross Appellant Karleen A. Nelson should not have been given a portion of property he inherited and (2) that the district court should not have ordered he pay her a cash settlement within six months of the date of the decree. Karleen on cross appeal contends that she should have had a larger cash settlement. We affirm as modified.

We review John's challenges to the economic provisions of the decree de novo. *In re Marriage of Clinton,* 579 N.W. 2d 835, 837 (Iowa App. 1998). While not bound by the trial court's factual findings, we give them weight in considering the credibility of witnesses. *In re Marriage of Farrell,* 481 N.W. 2d 528, 530 (Iowa App. 1991).

John, born in 1951, and Karleen, born in 1959, married in 1983. John is a farmer who also hauls grain and custom feeds hogs. He did not complete high school. Karleen is employed as a registered nurse. She has a two-year associate degree, which she earned during the marriage. Both parties were employed at all times during the marriage. Generally Karleen's earnings exceeded John's although in the year preceding the dissolution they both earned approximately $32,000.

The district court divided certain property and debts and ordered John to pay Karleen the sum of $33,800 plus interest at the normal legal rate. John was directed to pay one-half the amount within six months of the date of the entry of the decree and the balance six months later.

John contends that the property division is not equitable because the district court did not properly treat an undivided remainder interest he holds in 160 acres of farm real estate. He also contends if he is required to divide the interest he holds in the farm with Karleen, he should not be required to pay her until his mother dies.

The farm belonged to John's father, who died testate in 1966. His will provided that his wife Evelyn, John's mother, should have a life estate in the farm. The remainder interest was given to John and his siblings. The result is that John owns an undivided one-half of a seven-ninths interest in the farm subject to Evelyn's life estate. At the time of the dissolution Evelyn was seventy years old.

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 Robinson*, 542 N.W. 2d 4, 4 (Iowa App.1995); *In re Marriage of Havran,* 406 N.W. 2d 450, 452 (Iowa App. 1987). The distribution of property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). *Robinson* 542 N.W. 2d at 5; *In re Marriage of Estlund,* 344 N.W. 2d 276, 280 (Iowa App. 1983). Iowa courts do not require an equal division or percentage division. *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 particular case. *Id.*

The Iowa Code provides, [T]he court shall divide all property, *except inherited property or gifts received by one party*, equitably between the parties.

Iowa Code § 598.21(1) (1997) (emphasis added). This section also sets forth other factors to consider in a property division.

The code further states,

> Property inherited by either party . . . prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Iowa Code § 589.21(2) (1997).

In determining whether inherited property is divisible the controlling factors are the intent of the donor and the circumstances surrounding the inheritance. *In re Marriage of Liebich,* 547 N.W.2d 844, 850 (Iowa App. 1996). Factors to consider in determining whether inherited property should be divided 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.

Id.; In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982). Other matters, such as the length of the marriage or the length 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. *Thomas,* 319 N.W.2d at 211.

The property of the parties other than John's remainder interest in the 160 acres was divided by the district court in such a way that Karleen received about $9,000 in value and John received a negative of about $500 in value. The district court then made a division of John's remainder interest. To do so she took

$6,530, her determination of the value of John's interest when his father died, from the value she gave his interest at the time of the dissolution. The court figured the values by applying land values at the time of each event to John's undivided interest and subtracting from those amounts the percentage attributable to John's mother's life estate. The result was an increase of $77,293.00, which was divided with Karleen.

The sparse record complicates our review of the issue. It is conceded that John was about $130,000 in debt when the parties married. Though John did not have a possessor right to the farm, his mother allowed him to farm it. He did not pay her any form of rent either for the cropland he farmed or the farmhouse on the farm where John and Karleen lived. The parties did make some improvements to the farmstead and John gave his mother things, but the record gives us no indication as to the amounts of the improvements and gifts. Consequently while the parties enjoyed income from the land it came in the way of a gift from John's mother in her forgiveness of rent. The record gives us little guidance as to what a fair rent would have been. We can, as Karleen argues, assume a portion of the income from the farm went to discharge debts John had at the time of marriage even though the record is bare as to any amounts paid.

Because John entered the marriage with substantial debt it would be inequitable to exclude Karleen from any benefit from John's remainder interest. However, John's interest is not readily marketable at a fair value as it is owned with others and subject to his mother's life estate. He should have the benefit of deferring paying until his mother's death. While the district court gave Karleen one-half of the increase in John's interest from the date of his inheritance to the

date of dissolution, John held the remainder interest approximately seventeen years before the marriage.

Karleen obtained a nursing degree during the marriage and has a sufficient ability to support herself and it appears her future income will be larger than John's. While we do not consider Karleen's advance degree an asset because it has the potential to increase her future earnings, it is a factor considered when determining the equitable division of property. See *Marriage of Plasencia,* 541 N.W. 2d 923, 925 (Iowa App. 1995); *In re Marriage of Wagner,* 435 N.W. 2d 372, 373 (Iowa App. 1998). There was no equity in awarding Karleen approximately $10,000 more in other property value than was awarded John.

We modify to provide that John shall pay Karleen the sum of $23,000. With interest at the rate of eight percent per annum due and payable no later than six months of his mother's death. It shall accrue interest at eight percent per annum until paid. We award no attorney fees. Appellate court costs shall be paid one-half by each party.

AFFIRMED AS MODIFIED.

Sackett, C.J. and Hecht, J. concur, Vogel, J. concurs in part and dissents in part.

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

I respectfully dissent:

I agree with the trial court and the majority that Karleen should be awarded a portion of John's interest in the farm. The trial court based the award on one-half the increase in value from the time John inherited his remainder interest to the time of trial. The majority found this to be incorrect because John held his remainder interest for approximately seventeen years prior to his marriage to Karleen. Based on this reasoning, the majority reduced Karleen's portion by $10,000.

Where I depart from the majority is in finding support in the record for the $10,000 modification. There is no evidence in the record as to the value of John's interest in the farm as of the date of the marriage. Without this figure, an accurate increase of the value cannot be determined. *See Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 344 (Iowa 2000) (concluding the district court erred in setting the amount of attorney fees awarded without any factual basis in the record). Without knowing the value of John's remainder interest at the time of the marriage, I cannot find a factual basis for the modification made by the majority.

Accordingly, I would remand for the limited purpose of establishing the value of John's remainder interest as of the date of the marriage. Once that is determined, it would be subtracted from $83,823, the value as of the date of trial as found by the trial court. I would then award Karleen one-half of this increase.

In all other respects, I concur with the majority.