IN THE COURT OF APPEALS OF IOWA

No. 6-474 / 95-1774

IN RE THE MARRIAGE OF JANE ANNE WUBBENS AND TERRY E. WUBBENS

Upon the Petition of
JANE ANNE WUBBENS,
Petitioner-Appellant,

And Concerning
TERRY E. WUBBENS,
Respondent-Appellee.

Appeal from the Iowa District Court for Floyd County, Paul W. Riffel, Judge.

Jane Wubbens appeals from a provision in the parties' dissolution decree ordering a sale of the homestead and equal division of the profits. **AFFIRMED AS MODIFIED.**

Ralph A. Smith of Noah, Smith & Schuknecht, P.L.C., Charles City, for appellant.

Russell Schroeder, Jr. of Schroeder Law Office, Charles City, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Jane Wubbens appeals from a provision in the parties' dissolution decree ordering a sale of the homestead and equal division of the profits. Jane contends the district court should have awarded her the homestead as a setoff for inheritance money she received during the marriage.

Jane and Terry Wubbens were married on September 10, 1983. Their twelve-year marriage was dissolved on October 5, 1995. Pursuant to a stipulation by the parties, Jane was awarded primary care of the parties' minor children, Kara, born June 15, 1985, and Austin, born January 13, 1987. Terry was ordered to pay support according to the child support guidelines. The parties agreed to a division of personal property. On the remaining issues, the district court ordered a sale of the homestead and an equal division of the proceeds.

Jane appeals.

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).

The partners to 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). Iowa courts do not require an equal division or percentage distribution. *Id.* 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) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

"[P]roperty inherited by either party or gifts received by either party prior to or during the marriage . . . is the property of that party and not subject to a property distribution . . . except upon a finding that refusing to divide the property is inequitable." *In re Marriage of Mental*, 359 N.W.2d 505, 506 (Iowa App. 1984). *See also*, Iowa Code § 598.21(2) (1993).

Jane received inheritance of $21,000 two years after the parties were married. She spent $12,000 of the inheritance for two years of college plus $2000 for downpayment on an automobile to transport herself to classes. She also paid $7000 toward the purchase of the parties' first marital residence. Jane contends the district court failed to give her credit in the division of property for the $7000 paid toward the purchase of the parties' first marital residence out of inheritance money. She also claims to have paid for household improvements out of her inheritance to the first marital residence totaling $5420 and improvements to the second marital residence totaling $1525 which she did not receive credit for in the property settlement. Terry argues he also contributed money for improvements made to the residences and paid the mortgage payments, therefore, she should not receive a setoff for these amounts.

The district court found during the marriage the parties generally did not commingle their respective earnings, gifts and inheritances and they each paid certain expenses. The court stated both parties had financially contributed to the accumulation of the equity in the marital residence and therefore the residence should be sold and the proceeds equally divided between the parties. Both parties would substantially recoup their contributions from the share in the sale proceeds.

Inherited property which is easily identified and not commingled with the marital assets is not subject to division. *In re Marriage of Van Brocklin*, 468 N.W.2d 40, 44-45 (Iowa App. 1991). We can readily identify Jane's initial $7000 payment toward the parties' first marital residence out of her inheritance. We setoff this amount to Jane.

According to our calculations, given the amount Jane paid toward her education and downpayments made toward her car and the first marital residence, the amount she claims she paid for improvements could not have been paid out of inheritance. We find the improvements to the marital residence paid by Jane should not be setoff in the division of property. There is no conclusive evidence to show these improvements were paid from the inheritance she received.

Terry's contributions toward improvements or mortgage payments will also not be setoff. Both parties substantially contributed to the care and maintenance of the marital residences by paying for improvements and paying the mortgage. These improvements and mortgage payments occurred during the marriage. While one of the parties paid for these expenses, it made available money for the other party to contribute toward other expenses for the family.

Jane has asked that the house not be sold. Since the equity in the real estate represents a substantial portion of the parties' net worth, we order a lien be applied against the home in Terry's name equal to one-half of the home's equity after subtracting $7000 as setoff to Jane because it is part of her inheritance.

The district court determined the present fair market value of the home as of the date of trial was within the range of $77,900 to 79,900. The mortgage loan had an existing balance of approximately $56,000. Using an average of the fair market value estimate, minus sale costs, *see In re Marriage of Richards*, 439 N.W.2d 876, 882 (Iowa App. 1989) (court found subtracting the seven percent fee at the time of trial results in a net equity figure that more accurately reflects the dollar value of the asset being divided), and the mortgage, we determine there is $17,377 equity in the home. Terry shall hold a lien on the property for $5188.50[1] payable when the last

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[1] $78,900 FMV * 7% = $5523 sales cost.
$78,900 FMV-$5523 sales cost -$56000 mortgage = $17,377 equity.
$17,377 equity - $7000 inheritance = $10,377.
$10,377 equity / 2 = $5188.50 lien.

child graduates from high school. Under the circumstances this will provide the most equitable division of property.

Finally, Jane requests appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Jane.

AFFIRMED AS MODIFIED.