



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY ANNETTE ROSE
AND JIMMIE EUGENE ROSE

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Upon the Petition of	)	
MARY ANNETTE ROSE,	)	
Petitioner-Appellee/ Cross-Appellant,	)	Filed May 28, 1987
And Concerning	)	
JIMMIE EUGENE ROSE,	)	<u>6-534</u>
Respondent-Appellant/ Cross-Appellee.	)	86-598

Appeal from the Iowa District Court for Keokuk County (No. 2-199),
Richard J. Vogel, Judge.

Respondent husband appeals and petitioner wife cross-appeals from the
decree dissolving the parties' marriage. **AFFIRMED.**

Thomas M. Walter of Johnson, Bauerle, Hester & Walter, Ottumwa, for
appellant.

Allen C. Orsborn of Dull, Keith, Beaver & Orsborn, Ottumwa, for appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

DONIELSON, P.J.

Respondent husband appeals and petitioner wife cross-appeals from the decree dissolving the parties' marriage. On appeal, the husband asserts (1) that the trial court should have awarded him physical care of the parties' children in the joint custody arrangement, and (2) that the trial court should not have awarded the petitioner all of the parties' farm real estate. On cross-appeal, the petitioner wife asserts (1) that the trial court should have set aside to her certain personal property she inherited or received as gifts, and (2) that the trial court incorrectly valued the parties' hogs. Petitioner wife also requests attorney fees on appeal. We affirm.

Petitioner Mary Annette Rose and respondent Jimmie Eugene Rose were married in 1967. They have three children, two of whom are still minors: Terry (a boy), born in 1971, and James, born in 1980. Annette is now 36 years old and Jimmie is 40. During the marriage, Jimmie farmed and Annette helped with the farm operation, cared for the children, and maintained the home. During the marriage, Annette received as gifts or inheritances a 103-acre farm, more than \$26,000 in cash, \$9,285 from the sale of some hogs, and \$4,779 in grain.

In its dissolution decree, the trial court set up a joint custody arrangement with Annette having physical care of the children. The trial court awarded Annette the parties' 80-acre homestead, her 103-acre farm, a car, all of the parties' household furnishings, and her bank accounts. The trial court awarded Jimmie a lot in Martinsburg with a machine shed on it, two pickup trucks, the parties' tools and machinery, some guns, some hogs, some sheep, a bull, the parties' Farm Service shares, a bond in the clerk's office, and his bank accounts. The trial court ordered the parties' cattle, grain, hay, sileage, and seed corn checks equally divided.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

We first address Jimmie's contention that he should be granted physical custody of the parties' children. In considering this issue, the first and governing consideration is the best interests of the children. Iowa R. App. P. 14(f)(15). We assess the custody issue in accordance with Iowa Code § 598.41 (1985) and the principles set forth in In re Marriage of Burnham, 283 N.W.2d 269, 275-76 (Iowa 1979), and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Having carefully reviewed the record, we determine that physical care of the parties' children should have been awarded to Annette and therefore affirm the custody award made by the trial court.

Jimmie next contends that the trial court erred in "denying him the right to pursue his chosen occupation of farming by awarding all of the parties' farmland to Annette." Jimmie contends that the 103-acre farm Annette received from her father should be considered as a gift to both parties and should therefore be divided as a marital asset. We disagree.

Iowa Code section 598.21(2) (1985) specifically states that gifts received by either party during the course of the marriage are the property of that party and not subject to a property division unless a court finds that a refusal to divide the property is inequitable to the other party. The record reveals that in 1972 Annette's parents purchased a 103-acre farm on contract, took a note from Annette for payment of the farm, and then forgave the debt when each payment came due, making the payments themselves. When the debt on the farm was extinguished, Annette's parents directed that the deed be made out to Annette. Annette's father testified that it was the intent of him and his wife that this be a gift to Annette only. Annette's father also testified that he expected

Annette to manage the land and Jimmie to operate it. The record also reveals that when Annette's parents wished to make gifts to both Annette and Jimmie, the checks would be made out payable to both. From these facts, we conclude that the 103-acre farm was a gift to Annette alone.

The rule that a gift to a particular spouse must be set aside when considering a division of property is not, however, absolute. In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982). The Iowa Supreme Court in Thomas set forth five factors to consider when determining the fairness of setting aside gifted property: (1) contributions of the parties toward the property, its care, preservation, or improvement; (2) existence of a close relationship between the donor and the spouse of the one to whom the property was given; (3) the separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property; (4) any special needs of either party; and (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside. Upon close examination of the testimony offered at trial, we find that any improvements made on the farm were made with the joint funds of the parties and were not separate contributions by Jimmie. We also find that there is no evidence of a close relationship to either of Annette's parents; rather, the relationship at times was hostile at worst, indifferent at best.

Nor did we find that Jimmie has exhibited any special need for the 103-acre farm, nor that the failure to divide such property will in effect force Jimmie out of the farming business. The record reveals that Jimmie throughout the parties' marriage derived a significant portion of his income from renting farmland from neighboring farmers and was farming such land at the time of trial. On the other hand, the record reveals that Annette, who has only a high school degree, possesses no employment experience outside of her homemaking abilities.

As the trial court found, Annette must either find alternative employment or live solely on the proceeds from rent. From this, we conclude that the trial court was correct in awarding Annette the 103-acre farm.

We also affirm the trial court's award of the 80-acre farm to Annette. Our courts have recognized that granting the family residence to the spouse awarded custody of the parties' children allows the children to enjoy some measure of stability. See In re Marriage of Florke, 270 N.W.2d 643, 646 (Iowa 1978). Additionally, our courts have held that we must consider all of the economic provisions of the decree as a whole. In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa App. 1982). The trial court in the present case decreed that neither party was to receive alimony. Pursuant to the decree, Jimmie is required to pay support of \$100.00 per month per child. Thus, Annette must make a significant contribution to the support of the children. Awarding Annette the 80-acre farm will provide her an additional source of needed income, given Annette's lack of alternative employment skills. Jimmie was awarded all of the parties' farm equipment. At the time of trial, Jimmie was renting land from other farmers and apparently there is more land available, and it does not appear that he will be forced out of farming as he claims if he is not awarded the 80-acre farm. We therefore affirm the trial court's award of the 80-acre farm to Annette.

We next address Annette's counterclaim on appeal that the trial court erred in failing to award Annette certain items of property which she received by gift or inheritance during the marriage. Annette contends that she was gifted cash and grain in the total amount of \$29,271.84 between 1981 and 1983 and also inherited \$9,283.07 from the death of her brother. We believe, however, the trial court was correct in considering these sums marital assets.

The record reveals that Annette did not place these gifts of money into a separate account subject to her control, but rather placed these sums into

the parties' joint checking account. Annette testified at trial that this money went to pay off a silo the parties had purchased and purchase of a cultivator. Annette admitted that the proceeds from the sale of the grain were used in purchases for the farming operation and family needs. It is therefore apparent that Annette made the money available to the marital unit for its unrestricted use. In the case of In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984), we recognized that separate property of a spouse is transformed into marital property when it is placed in some form of joint ownership. We find this principle applicable to the present case. We therefore find no error in the trial court's dividing these assets as marital property.

Annette lastly asserts that the trial court erred in finding that the value of the hogs owned by the parties was \$210.00, rather than \$15,556.00. At trial, Jimmie testified that the hog partnership in which he had entered with his father had been terminated at the time of trial. Jimmie testified that only fourteen head of feeder pigs remained in his possession which belonged to the partnership, at a value of \$420.00. Annette, however, contends that there should have been over \$15,000.00 worth of hogs. At trial, however, Annette could not say positively that the partnership was still in existence, nor could she testify as to how many hogs were in the partnership. Annette testified that Jimmie refused to allow an assessor access to the hogs to make a valuation.

In the present case, the trial court was given the better opportunity to review the evidence and assess the credibility of the witnesses. In close questions such as the present, we give weight to the findings of fact of the trial court. Iowa R. App. P. 14(f)(7). We will affirm a trial court's equitable ruling if it can be sustained upon any pleaded basis in the record. Midwest Management Corp. v. Stephens, 353 N.W.2d 76, 78 (Iowa 1984). Upon our own de novo review of the record, we find sufficient evidence to support the trial court's determina-

tion that the partnership had terminated, and the one-half interest of the parties in the remaining hogs was valued at \$210.00.

Annette also requests attorney fees on appeal in the amount of \$2,418.75. Attorney fees are not recoverable in a dissolution action as a matter of right, but depend upon one spouse's financial needs and the other spouse's ability to pay. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). In light of the financial condition of both parties, we find that Jimmie has a superior ability to pay and therefore order that Jimmie contribute \$1,000.00 towards Annette's attorney fees.

AFFIRMED.