

IN THE COURT OF APPEALS OF IOWA

No. 3-096 / 92-1506

FILED

MAY 04 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF WANDA K. GARRETT AND RICKY E. GARRETT

Upon the Petition of

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WANDA K. GARRETT,

Appellant/Cross-Appellee,

And Concerning

RICKY E. GARRETT,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County,
William R. Eads, Judge.

Wife appeals the child custody provisions and the
husband cross-appeals the economic provisions of the
parties' dissolution decree. **AFFIRMED.**

Karen A. Volz of Ackley, Kopecky & Kingery,
Cedar Rapids, for appellant.

Allan L. Harms of Wenzel, Piersall & Harms,
Cedar Rapids, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J. 000160

Wanda and Ricky Garrett were married on March 20, 1984. They had a son, Robert, born October 6, 1987. In November of 1991, Wanda moved out. She felt it important to maintain stability in Robert's life and therefore rented nearby housing and saw him extensively. The parties were divorced in September of 1992. In the dissolution decree, the district court gave Ricky physical care, believing this would best promote Robert's maximum contact with both parents.

Ricky works as a mail carrier for the United States Postal Service, earning approximately \$35,000 per year. Wanda works as an office manager for a small company, earning approximately \$26,000 per year. Wanda was ordered to pay \$78.50 per week child support.

In January of 1985, the parties paid Ricky's parents \$26,000 for a house. Ricky claims the rest of the purchase price was paid for by a rental credit option Ricky had with his parents. Ricky and his father testified that Ricky had rented this house for many years and that \$40,500 was applied to the purchase price from past rental as a result of the rental credit agreement. At the time of the purchase, Ricky and Wanda borrowed \$35,000 on a first mortgage on the home and applied the excess over the purchase price towards credit card bills. The house was titled in both Ricky and Wanda's name as joint tenants. Both signed the mortgage. In 1990, the parties placed a

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second mortgage of \$20,000 on the house and used the proceeds to pay credit card bills and to make improvements to the lower level of the home. The balance of the two mortgages is now \$56,000. The court assigned a value to the home of \$71,500.

The district court awarded the house to Ricky. Wanda was awarded \$7750 as her share of the equity and given a lien for that amount.

During the marriage Ricky had received a gift of \$7500 from his parents and an inheritance of \$1000 from his grandmother. The district court found these funds were applied to purchases and improvements to the house. They were not offset from the property division.

Wanda was injured in two accidents during the marriage. She and Ricky received a settlement from the first accident of \$25,000. She has not filed any claims from the second accident in which she was a passenger in a friend's car and involved another motorist she believes is uninsured.

Wanda appealed from the custodial provisions of the dissolution decree. Ricky cross-appealed from the property division.

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

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court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Primary Physical Custody of Robert.

Wanda appeals the custodial provisions of the dissolution decree. She argues that since she can work flexible hours, she could spend more time with Robert. She also argues that it would be in Robert's best interest if she were awarded physical care because of the superior preschool and speech therapy available in her new neighborhood.

The district court found that both parties are dedicated to their son's welfare and appear to love him very much. However, the court awarded primary physical custody of Robert to Ricky because the court felt Ricky would promote stability in Robert's life. Ricky plans on continuing to send Robert to the same day care and preschool Robert attended before his parents separated. The district court felt stability was very important in the lives of young children.

From our de novo review of the record, we determine that both parents are equally capable of caring for Robert. Both have been actively involved with Robert's day-to-day care from birth. The trial court had the opportunity to evaluate the conduct and demeanor of the parties on the witness stand. It determined that Ricky

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could best provide for the long-range interests of Robert. We find no reason to disturb the district court's award of primary physical custody of Robert to Ricky.

II. Distribution of Property.

Ricky argues the district court erred in making its distribution of property. Specifically, Ricky contends the district court erred in: 1) finding the equity in the house was a marital asset; 2) its failure to set off Ricky's inheritance and gifts from Ricky's parents; 3) its division of his lump sum pension payment; 4) its failure to consider Wanda's possible settlement from a car accident in the division of property; and 5) its division of the credit card debt.

The partners in 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). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable. Id.

A. Family Home. Ricky contends Wanda is not entitled to any equity in the family home because he brought into the marriage approximately \$40,500 in equity and that this should be set off to him.

The district court found that Ricky made Wanda a gift of any equity he had in the house as the result of his rent credit. Ricky's father testified that he wanted the house

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to be put in his son's name, but that Ricky insisted on the deed being in both his and Wanda's names. Although separate property is no longer automatically transformed into marital property when it is placed in some form of joint tenancy, we find the record supports the district court's finding that Ricky made Wanda a gift of the equity. In re Marriage of Wertz, 492 N.W.2d 711, 713-714 (Iowa App. 1992).

Ricky and Wanda treated the house and the equity in the house as marital property. Both mortgages were taken out in both Ricky and Wanda's names. The original mortgage was for more than the purchase price with the excess being used to pay off marital debts. When the second mortgage was taken out, part of the money went to finance improvements to the downstairs and part of the money went to pay off marital debt in the form of credit cards. No record was provided at trial of how much of the second mortgage went to making improvements to the downstairs. In addition, money Wanda received from a car accident was used to help pay for remodeling. Ricky admits he does not know the value of the house at the time he and Wanda bought it from his parents.

We find that Ricky's actions of commingling the financing of the house shows Ricky's intent to make a gift to Wanda of his rent credit in the home.

B. Gifts and Inheritance. Ricky also contends a gift of \$7500 from his parents and an inheritance of \$1000 from

his grandmother should have been set off to Ricky prior to the division of property.

Iowa Code section 598.21(2) provides:

2. Property inherited by either party or gifts received 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 a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

Iowa Code § 598.21(2)(1991).

Here, we find that the inheritance and the gift were applied to improvements to the house and to pay bills incurred during the marriage. However, we find the money has been commingled with and transformed into marital property and it would be inequitable to Wanda to attempt to set out the amount of the inheritance and gift now.

C. Other Issues of the Property Settlement. After carefully examining the rest of the district court's property settlement we determine it is equitable and fair. We find no merit in Ricky's claim that the district court failed to consider the possible proceeds from Wanda's accident when it divided the marital property. The trial court has the flexibility to divide settlement proceeds equitably on a case-by-case basis. In re Marriage of McNerney, 417 N.W.2d 205, 208 (Iowa 1987). Here, the trial court specifically found that the proceeds of the second accident, if there are any should go to Wanda.

We also note that the district court found that throughout the marriage Ricky purchased EE bonds from payroll withholding. Ricky has not accounted for the bonds he has apparently cashed since the separation.

Court costs assessed one-half to Wanda, one-half to Ricky.

AFFIRMED.

Schlegel, P.J., concurs; Hayden, J., dissents.

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RAYDEN, J. (concurring in part and dissenting in part)

I respectfully dissent in part.

I concur with the majority as to primary physical care of the parties' minor child being placed with the father, Ricky E. Garrett. I do not concur with the majority in its distribution of property determination.

I disagree the evidence supports the trial court's determination Ricky made a gift of his equity of \$40,500 in the house to Wanda. I would set this amount off to Ricky. Placing Wanda's name on the first and second mortgages was for the lender's requirement, security, and benefit.

The sums of money Ricky received from his grandmother and his parents as inheritance and gifts respectively in the total amount of \$8,500 should also be set aside to him.

I determine it would be inequitable to withhold distribution of the home to Ricky. Also it is inequitable to Ricky not to reimburse him for his parents' monetary gift of \$7,500 and his grandmother's inheritance of \$1,000.