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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Upon The Petition Of)
CLAIRE E. BEHR,)
Appellee,)
And Concerning)
ROBERT E. BEHR,)
Appellant.)
)

Filed March 21, 1977

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2-57047

Appeal from Clinton District Court - M. L. Sutton, Judge.

Appeal from property distribution provisions of dissolution decree. Affirmed.

John P. Murphy, Holleran, Shaw, Murphy & Stoutner, of Clinton, for appellant.

Donald G. Senneff, Shaff, Farwell & Senneff, of Clinton, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Claire E. Behr, petitioner, and Robert E. Behr, respondent, were married May 9, 1954. They separated in 1972 and a decree of dissolution of their marriage was entered January 9, 1974. Robert appeals from the property division decreed by trial court which denied him any substantial portion of the assets inherited by Claire during their marriage. We affirm.

Robert claimed entitlement to an award from one-third to one-half of the assets inherited by Claire. Trial court, however, found that he should have no claim to such properties. In this appeal Robert asserts the decree denied him equal protection of the law and reasserts his claim in this light.

To resolve the issue as trier de novo on appeal we examine the whole record and, while we give weight to the findings of trial court, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). Criteria for determining equitable division of marital assets are set out in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1969), modified, In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

Neither party entered the marriage possessing property of significant value. Claire was employed at the Clinton Y.W.C.A. and Robert worked as a carpenter. Within a few weeks of the marriage Robert became employed as a car salesman for his father-in-law, Ray Dodge. Claire terminated her employment prior to the birth of their first child in August, 1955.

In the years that followed Claire inherited substantial assets, principally real estate, upon the death of her father in 1956 and her mother in 1968. Her inherited

property holdings approached one-half million dollars in value at the time of dissolution according to her evidence; Robert was of the opinion such assets were worth considerably more.

In 1958 Robert turned to management of a 987 acre Illinois farm in which Claire inherited a one-third interest from her father and, subsequently, the remaining two-thirds on her mother's death. Much of the trial evidence centers upon Robert's operation of the farm. Claire and her witnesses testified that Robert's management was poor and he did nothing to permanently improve the farm. In fact, during his management the farm buildings deteriorated, fences were not mended, and no additional land was put under cultivation. He did not farm the land himself, but rather, rented it or sharecropped with others.

Robert did, however, take an interest in animal husbandry. Ordinarily he had one or more hired men to assist him with livestock care and building projects. An early hog raising operation was abandoned following destruction of a hog barn by a lightning caused fire. A cattle venture followed, resulting in losses because, according to testimony, the cattle were poorly attended and some died.

Claire and her witnesses contended the value of the farm increased over the years only because of inflation rather than as a result of Robert's management or labor.

Until the parties separated in 1972, their income was generated from Claire's inherited assets. In addition to the Illinois farm, Claire also had inherited,and at the time

of the dissolution held, real estate in Clinton upon which A. C. Nielsen Building and Don's Drive In were located. Additionally she inherited the stock in Ace Realty Company, which owned and managed an apartment building. Income from all sources, whether from the farming operation or the inherited rental properties, went towards family living expenses including Robert's personal spending. This income, however, was not sufficient for their needs and she was forced to sell other inherited real estate, deriving proceeds of $82,500, which were used in the excavation business, for debts incurred in the farming operation, and for family living expenses.

During their marriage the parties lived in two different family homes. The first home was built in 1957 with money from Claire's father's estate. Robert did some of the carpentry work during construction of the home, decorated the interior, and landscaped the lot. Subsequently, because of financial problems, they sold the home for $28,500 and in 1963 purchased a second family home from the proceeds at a cost of $12,000 according to Claire, or $14,500 by Robert's testimony. Some remodeling of the second home commenced and not finished by Robert was completed during 1973 at a cost to Claire of $17,000. The second home was held in joint tenancy and, as improved by the remodeling, was valued at $35,000.

Four children were born to Claire and Robert, ranging in ages from eighteen to ten at the time of the decree.

Claire was 43 and in good health at the time of decree; Robert was in his 40's, the record is silent concerning his health.

After their separation, Robert became employed as a car salesman for Clinton Lincoln-Mercury where he worked at the time of trial. From September 1972 to December 15, 1973 he had gross earnings of $16,309.15 with net earnings of $12,166.49.

Relevant to disposition of properties inherited by Claire during the marriage, trial court found:

> Under the circumstances, the first question for the Court to determine is whether or not he [Robert] should receive anything from this estate. In light of the fact that he is presently employed, has a reasonable income, and that he contributed much less in worldly goods, in fact, apparently very little, to this union, all of the property which the Court finds was either inherited by her [Claire] or was made possible by reason of her inheritance shall be free from his claim.

We agree with trial court's analysis and finding. The accumulated marital property was acquired by or through inheritance from Claire's parents. Robert contributed little, if any, effort which increased the worth of their property either by his labor or sacrifice. Instead the property provided him a comfortable living. The evidence perforce leads to the conclusion that the financial benefits to Robert from his marriage far exceeded his contribution.

We are aware that a number of decisions have granted one spouse an interest in property inherited by the other spouse. See In re Marriage of Beeh, 214 N.W.2d 170, 175 (Iowa 1974) and cases cited. We find these cases so factually dissimilar as to not justify division of Claire's inherited property. The record reveals Robert is able to comfortably support himself. Trial court ordered that he pay only a token child support to which he had consented. He should

take comfort that his children have a solid financial base to provide for their physical and educational needs.

We do not believe that this result is an invidious discrimination based upon sex so as to deny equal protection. We have been mindful in considering Robert's claim that our societal and legal concepts of the roles which each sex should play have drastically changed. But under this record the result would not be different if the parties were switched.

AFFIRMED.

DONIELSON, SNELL and CARTER, JJ., concur; OXBERGER, J., dissents.

Oxberger, J. (dissenting)

The trial court found Robert contributed very little in "worldly goods" to his marriage and accordingly awarded Claire all substantial marital assets "free from his claim". The majority adopt this reasoning and affirm. I disagree.

I respectfully dissent. Even if Robert can be faulted for poor breadwinning for his family, we cannot conclude Claire thereby retains all substantial marital assets. Rather, we must extend to Robert the same consideration the wives - whose husbands' have attempted to preclude them from a share of marital property on the basis of non-capital contribution - have received. That is, we must recognize Robert's non-capital contributions to the marriage as we do Claire's.

First I believe the picture of Robert's breadwinning contributions should be placed in balance. Robert testified that the deteriorated buildings on the farm were abandoned buildings in an inaccessible area of the farm for which there was no present use. A. 182. He claimed 80 acres had been added to cultivation during the years of his management. A. 183. He asserted the "year-round breeding" practice was instituted after consultation with university agricultural advisers with the expectation any losses in the winter breedings would be offset by year round increases of 25%. A. 181, 186. He claimed the 3-month vacation, during which their excavation business failed, was in fact spent in Florida rennovating his mother-in-law's motel property. A. 178.

Claire testified she and the children spent summers with Robert on the Illinois farm. A. 116. Surely she must have seen

the dead cattle, broken fences, and roofless buildings. I can only conclude that neither party appeared to husband the resources flowing into the marriage with any degree of foresight or acumen. Significantly, Robert was constantly employed during the 16 months of separation and, in fact, earned a gross of $16,309. A realistic appraisal of his breadwinning capacities probably lies somewhere between these characterizations.

However, a property division cannot be drawn solely upon the lines of who earned more dollars for the family bank account. In re Marriage of Briggs, 225 N.W.2d 911, 913 (Iowa 1975); Schantz v. Schantz, 163 N.W.2d 398, 406 (Iowa 1968). Recently, the court spoke specifically to the claim that a non-capital contributor should be denied an equal share of the marital property:

> "We are unable and unwilling to say that James contributed more to it than Juanita simply because he brought the bulk of the income into the home while she worked in the home and devoted her attention to homemaking and child-rearing. . . ." In re Marriage of Ralston, 242 N.W.2d 269, 271 (Iowa 1976).

Generally the claim has been that the wife's contribution of keeping the house and raising the children has not increased the worth of the marital property; since she has had a roof, a bed and food, she should not be heard to ask for more.

The majority state:

> "Robert contributed little, if any, effort which increased the worth of their property either by his labor or sacrifice. Instead the property provided him a comfortable living."

The majority discounts the fact that for 20 years Robert has worked outside the home to support his family. The fact the "employer" was Claire's money should not deny him credit for his labors. This holding engages in the precise ledger balancing

rejected in prior cases:

> "Our law does not contemplate a division of property on a price-per-hour basis as though marriage is a business venture. Husband and wife need not, during happy days, keep a ledger to prove his or her economic value should the marriage later founder . . . The factors listed in Schantz v. Schantz were not intended to work with mathematical precision." (emphasis added.) In re Marriage of Briggs, 225 N.W.2d 911, 913 (Iowa 1975).

Even if we grant that Robert's "price-per-hour" performance was quite low, we must recognize this is not dispositive on the property division issue. *Briggs* clearly indicates proof of economic value is not the intent of *Schantz*.

Any analysis of property division between Robert and Claire must be made consistent with the In re Marriage of Beeh, 214 N.W.2d 170 (Iowa 1974) decision. The majority finds *Beeh* "so factually dissimilar as to not justify division of Claire's inherited property." Yet, *Beeh* is the only recent Iowa case involved with extensive inherited property rights which were used to support the family. Almost all these assets were held in the husband's name and almost all of them had come from his parents as gifts. The *Beeh* court noted, "We may consider that fact (inheritance), the net worth of this property, and that neither party contributed to its acquisition: (*Schantz*, third post-marital criteria)." 214 N.W.2d at 175.

The dissent in *Beeh* sharply objected to ". . . allowing petitioner to live off the largess of her husband's family after dissolution as she has done during the 16 years the marriage endured," and to the wife's "avid pursuit" of golf and bridge which they found very time consuming. 214 N.W.2d at 177, 178.

Beeh cannot be factually distinguished as a case in which the non-wealthy spouse was awarded wealth to maintain the custodial home for the children. The *Beeh* wife was granted liberal

child support to allow the children their accustomed life style. The alimony and child support award was $12,000 annually; the husband's income from earnings, aside from inheritance, was only $8600 annually. She was awarded the $45,000 family home but, she received it outright, without encumbrance; there was no attempt to provide a mere occupancy to preserve the family home for the children's minority years. On appeal she was awarded, from "the largess of her husband's family," alimony on a sliding scale from $350 to $450 and a cash lump sum of $30,000. *Beeh*, 214 N.W.2d at 172, 175. The property award was more than sufficient to maintain the family.

Beeh teaches the third *Schantz* criteria:

> 3 Net worth of property acquired, contributions of each party thereto by labor or otherwise, net worth and present income of each party. *Schantz*, 163 N.W.2d at 405,

in a case in which inheritance funds the family should be applied with a recognition that "neither party contributed to its acquisition", 214 N.W.2d at 175. Therefore, under *Beeh*, Claire cannot claim a greater portion of the property division by asserting that she contributed by her efforts inheritance income.

I would rule that neither party has been shown to have made any extraordinary contribution to the net worth of the family. We are left with the imponderables of non-capital contributions. It is asserted inferentially that Claire reared the family and therefore claims the assets for them.

The whole point of *Briggs* is that the earnings, the love, the discipline, the decisions, the efforts of each sustain the status during "happy days." The record is limited as to Robert's or Claire's contributions in this area; however these parties chose to be married for almost 20 years, it can be reasonably

inferred these marital duties were performed sufficiently to hold them together for many years. To cast aside Robert's contribution during those years with the statement that Claire's property "provided him a comfortable living" means Robert gets no assets because, according to Claire, Robert produced no assets. It is that simple.

I would modify the trial court's decision to allow Robert to share in the increase in property value of the inherited property as we did last month in Kiel v. Kiel, [14] 2-57976, filed January 28, 1977 by this court. Under this analysis the assets themselves and their fair valuation would be dispositive. If in fact, the inheritance amounts have been dissipated and diminished in support of the family, Robert receives no assets. Nor does Claire have any claim for a restoration of any depletion of their past value. The parties chose marriage; that status adhered until dissolution. In short, I would set off to Claire any inheritance amounts at the value they were received into the marriage and divide between Claire and Robert any remainder, if there be such, with two-thirds to Claire and one-third to Robert.

No independent appraisal of the present valuation of these half million dollar property holdings appears upon the record. Accordingly, I would remand for a fair appraisal and division as outlined above.