IN THE COURT OF APPEALS OF IOWA

No. 3-151 / 12-1456
Filed April 10, 2013

IN RE THE MARRIAGE OF CARRIE REYNOLDS AND ROGER DUNLAP

Upon the Petition of
CARRIE REYNOLDS,
Petitioner-Appellee,

And Concerning
ROGER DUNLAP,
Respondent-Appellant.

Appeal from the Iowa District Court for Winneshiek County, Michael J. Shubatt, Judge.

A husband appeals the district court's property distribution, related to inherited property, in his dissolution of marriage case. **AFFIRMED AS MODIFIED.**

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Parrish, P.L.C., Decorah, for appellant.

Barrett M. Gipp of Anderson, Wilmarth, Van Der Maaten, Belay & Fretheim, Decorah, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Roger Dunlap appeals the district court's order on property distribution in the dissolution proceeding regarding his former wife, Carrie Reynolds. Roger claims the district court erred in awarding $32,500, one-half the value of the home, to Carrie because the home was purchased exclusively with funds traceable to Roger's inheritance from his father when he died in 1990.[1] Carrie argues it would be unjust under the facts to set aside the house to Roger as inherited property. Carrie also requests appellate attorney fees.

In this equity action involving the dissolution of a marriage, our review is de novo. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). We give weight to the findings of the district court, particularly concerning the credibility of witnesses; however, those findings are not binding upon us. *Id.* We will disturb the district court's "ruling only when there has been a failure to do equity." *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

Iowa Code section 598.21(6) (2011) provides in part, "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 a finding that refusal to divide the property is inequitable to the other party. . . ." We may still divide inherited property as marital property where awarding the inheritance to one spouse would be unjust. *In re Marriage of McDermott*, __ N.W.2d __, __, 2013 WL 765316 at *8 (Iowa, 2013). We consider the following

[1] The Report and Inventory shows a date of death of "11-03-90." The executor's final report was filed June 12, 1992.

factors when deciding whether it would be inequitable to exempt a spouse's gift or inheritance from division:

> (1) contributions of the parties toward the property, its care, preservation or improvement[ ];
> . . . .
> (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them;
> (4) any special needs of either party;
> (5) any other matter[,] which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

In re Marriage of Goodwin, 606 N.W.2d 315, 319 (Iowa 2000).

To begin our analysis, it is helpful to set out the basic and undisputed facts. Roger received $54,000 from his father's estate in 1992. In September 1993, he used $22,000 to purchase forty acres of farm land. Roger and Carrie were married in 2001. By 2005, the farm land had appreciated considerably, and was sold, in two separate transactions, for a total of just over $100,000. From the sale proceeds, $65,000 was then used to pay cash for the marital home, now in dispute. Although the home was titled in Roger and Carrie, as joint tenants, Roger testified he did not intend to transfer one-half of the value to Carrie. Rather, the way title was held was a reflection on their status as a married couple. Roger testified the remaining proceeds from the sale of the farm were deposited into a joint account and likely used for household expenses. There were few resources apart from the marital home to divide by the time of trial.[2]

During the marriage, Carrie worked as a waitress. Both parties testified they each contributed to the family expenses and maintenance of the home. At

[2] The court inquired and was informed Carrie had about $1700 and Roger had about $1500 cash on hand by the time of trial.

the time of trial, Roger was sixty-four years old and receiving social security of $540 per month along with SSI of $180. Carrie, age forty-one, as Roger's dependent was receiving $178 and a like amount for the parties' six year old son for whom Carrie has physical care.[3] The district court found:

> As the primary care provider, Carrie will have to raise [their son] as a single mother on a modest income. Roger is on disability. It would be unjust to simply give the house (or its value) to Roger, especially with the contributions Carrie has made. Accordingly, the parties are each entitled to one-half the value of the house.

The court then ordered Roger to pay Carrie $32,500 as an equalization amount, or in the alternative, have the home sold and the parties would divide the net proceeds. Roger testified that on his limited social security and disability income, he could not afford to make a lump sum equalization payment to Carrie, nor could he afford to service a mortgage to make the payment. Therefore, the result of the district court's allocation is that the home must be sold.

On our de novo review, we find the district court's allocation inequitable considering the source of the funds to purchase the home and the shared maintenance. Were it not for Roger's wisely invested inheritance, the couple would not have been able to purchase the home, and to maintain it free of debt while using the remainder of Roger's inheritance for general household expenses. We therefore find it more equitable to divide the value of the home one-fourth to Carrie and three-fourths to Roger. This requires Roger to pay Carrie $16,250 within sixty-days of the issuance of procedendo; or in the

[3] There is some discrepancy between the trial testimony and Roger's brief. Contrary to the testimony, the brief states Carrie and the child receive $160 per month. This difference does not change our equitable determination.

alternative, the parties shall list the home for sale and divide the net proceeds in the same fashion.

Carrie seeks attorney fees on appeal. Based on the financial circumstances of both parties, their abilities to pay, and the merits of the claim, we decline to exercise our discretion and award Carrie attorney fees. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Costs on appeal assessed against Carrie.

AFFIRMED AS MODIFIED.

Doyle, J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I respectfully dissent and would affirm the district court's ruling without modification. The majority changes the district court's allocation of the parties' most substantial asset from one-half to each party to one-quarter to Carrie and three-quarters to Roger because the district court's division is "inequitable considering the source of the funds to purchase the home and the shared maintenance. Were it not for Roger's wisely invested inheritance, the couple would not have been able to purchase the home, and to maintain it free of debt while using the remainder of Roger's inheritance for general household expenses." After listening to and viewing the parties' testimonies at trial, the district court found:

> As the primary care provider, Carrie will have to raise [their son] as a single mother on a modest income. Roger is on disability. It would be unjust to simply give the house (or its value) to Roger, especially with the contributions Carrie has made. Accordingly, the parties are each entitled to one-half the value of the house.

While we review this decision by the district court de novo, we still give deference "because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying." *See In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App.1998).

As our division of property statute provides, though inherited property is typically not divisible, it will be divided as marital property where refusal to do so is inequitable. Iowa Code 598.21(6); *McDermott*, ____ N.W.2d at ____, 2013 WL 765316, at *5 ("Notwithstanding the classification of property as inherited or gifted, the court may still divide such an asset as marital property, where awarding the gift or inheritance to one spouse would be unjust."). In *McDermott*,

our court articulated several factors regarding when it would be inequitable to exempt inherited property from division. *Id.* These factors include whether a party contributed to the property's care, preservation, or improvement; separate contributions by the parties to their economic welfare to whatever extent the contributions preserve the inherited property; the special needs of the party; and any other factor which renders setting aside of the property plainly unfair to a spouse or a child. *Id.*

Roger's inheritance was first used to purchase farm land, which appreciated in value. When the parties decided to sell the farm land, they jointly bought the home. Carrie, pregnant with their child, moved to the home, while Roger preferred to stay in the rented farmhouse where they had been living. Roger testified he bought the home as a gift to the family and to the parties' son. After their son was born, Carrie continued to work as a waitress and pay for utilities and taxes and contribute to a street assessment and roof repairs. Roger remained on social security, but had not revealed to Carrie that he received a SSI disability check as well as a social security retirement check. The parties had two vehicles of equal value which were divided, and some cash in the form of a tax return and two bank accounts. The total value of these marital assets was less than five thousand dollars.

The majority would leave Carrie—now a single parent with physical care of the parties' child—with $16,250 though she paid for repair of the roof, contributed to the purchase of a water heater, electrical work, street assessment, taxes, and homeowner insurance. Roger now argues the house is the place where he plans to have visits with the parties' son. But he testified at trial that he

and his son "go out in the country, too, to that other house." Although Roger now argues he will have to sell the house to pay the equalization payment to Carrie, his trial testimony did not indicate he intended to keep the house anyway. On cross-examination, Roger testified:

> Q: So what do you intend to do with the house if the Court awards it to you? Would you keep it? Would you sell it? What would be your intention? A: I'd keep it for awhile.
> Q: Keep it for awhile? A: Yes.
> Q: Has it been your intention to sell the house over the past two years? A: Possibly.
> Q: Possibly? A: Yes.
> Q: Is it possible that you and Carrie have had discussions about that? A: No, not really.
> Q: But is it safe to say that you've wanted to get out of that house for a little while? A: Yes.

Roger also admits the home was purchased for the family. On direct examination, Roger testified:

> Q: Carrie has the opinion that you've tried to give her half the house. Did you hear that? A: Yeah, I think so. [. . .] I wanted her like to have a family house [. . .] like she says.

Changing the percentage allocation will not change whether or not Roger will have to sell the house to pay Carrie an equalization payment. The majority's modification undermines the district court's efforts to prevent an injustice to the parties' son, given Carrie's employment situation, contribution to the property over the years, and the parties' limited assets. *See id.* I would affirm the district court without modification.