IN THE COURT OF APPEALS OF IOWA

No. 7-551 / 06-1889
Filed November 15, 2007

IN RE THE MARRIAGE OF JOHN ROBERT HATTERY AND MARGO M. HATTERY

Upon the Petition of
JOHN ROBERT HATTERY,
Petitioner-Appellant,

And Concerning
MARGO M. HATTERY,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

John Robert Hattery appeals the economic provisions of a divorce decree arguing inherited property should have been divided between the parties and the court's division of property assigned him too much debt. **AFFIRMED.**

Anjela A.Shutts of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Steven Lytle, Des Moines, and Brian J. Humke, Ames, of Nyemaster Law Firm, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

In this dissolution case, the district court awarded Margo Hattery (Margo) her remaining inheritance, minimal additional assets and no alimony. John Robert Hattery (Bob) was awarded the majority of the property and no alimony. Bob appeals arguing (1) Margo's inherited assets should have been divided; and (2) the property division assigned too much debt to Bob.[1] Additionally, both parties seek appellate attorney fees which we decline to award.

I. BACKGROUND FACTS AND PROCEEDINGS.

Bob (fifty-seven years) and Margo (fifty-four years) had been married thirty-five years at the time of the October 3, 2006, dissolution hearing. During the marriage they had five children, four survive, and all are now adults. Both Bob and Margo are in good health. Bob is currently living in the family home, a portion of which is designated as an office for his insurance business. Margo is now living in a townhome purchased with inherited trust assets and held by the trust.

During the marriage Margo stayed home to raise the children while working part-time. For many years Margo worked as a substitute teacher and had a Longaberger basket business. She recently added income by taking on a third part-time job working at Eddie Bauer. From 2001 to 2005, Margo's gross income, including 2005 inheritance dividend income, was $133,429 for a five-year average of $27,192. Margo has not had a permanent, full-time job since her graduation from college; but she recently trained to become a real estate agent,

[1] In addition to the listed issues, Bob also disputes the values placed on some of the marital and inherited assets by the trial court. Upon our review of the record, we are not inclined to disturb the district court's valuation of the Hatterys' property, with one exception: we value Margo's Ameritas annuity at $37,587.

passed the Iowa exam, and has been hired by an Ames firm. Since this is a very new job, she has not participated in any real estate transactions. Her new position does not include any benefits.

Bob graduated from college and worked at several banks, including four years (1972-76) at State Bank & Trust (State Bank), which now holds a substantial amount of the parties' debt. In 1982 Bob left banking and became an agent for AmerUs selling insurance products, annuities, and investment securities. Bob plans to continue this twenty-four year, long-standing employment in the future. From 2001 to 2005, Bob's gross income was $307,837 for a five-year average of $61,567. During those five years, Bob's lowest yearly income was $44,792. At trial in October 2006, Bob's income for the dissolution year was only $6,000. Bob thinks his income will return to prior levels in the future.

Bob, with his background in banking and insurance, ran the finances for the family and was in charge of making the financial decisions. The couple enjoyed a lifestyle significantly beyond what their incomes alone could sustain which included buying and showing horses. Presently, they own six horses with a total value of $40,000. Including a $90,000 loss in an attempt to run a boarding stable, Bob believes the parties spent $598,000 on horse activities over the years.

Inherited and gifted assets were utilized to support this lifestyle. Bob's parents made gifts to Bob during the course of the marriage. For example, in 1976, before Bob's father sold his interest in State Bank, he gave Bob stock in State Bank worth $60,000. In 1979, Bob and Margo bought a house and over six

acres of land. When Bob's father died in 1984, Bob inherited $196,000. In 1985, the parties added a $25,000 pool to their home and doubled the home's square footage with an addition costing in excess of $200,000.

In 1992, Bob received a gift of $600,000 from his mother. In 1993, Bob's mother entered a nursing home and Bob started managing her affairs. Before his mother's death, Bob worked to reduce her estate by starting a gifting process whereby Bob, Margo and the children received gifts on a regular basis. However, Bob used these gifts for family expenses and the money was not kept in separate accounts for each recipient. Bob also reduced the size of the estate by taking excess management fees of $250,000 and farm management fees. This money was used to build a $100,000 horse barn, add two sheds and fencing, and support the "horse habit."

Bob's mother died in 1995, and including the $600,000 gift above, Bob received $1.2 million in cash, stock and farmland. Bob received a life estate in the farmland and his children received the farmland's remainder interest. In 1998, Bob determined he and Margo were having financial difficulties and needed money to continue their lifestyle, so he obtained the consent of the children to sell the farm property for about $1.2 million. After the sale, the family paid $200,000 into a lump sum $1 million insurance policy on Bob's life and Bob received the remaining sale proceeds. The policy is owned by the children and will pay out the 1998 value of the farmland upon Bob's death.

Margo also received an inheritance of $100,000 of Exxon stock when Bob's mother died. Bob asked Margo to sell it to pay off family bills and expenses. Margo agreed and none of this inheritance remains.

Margo also inherited assets from her family. In 1998, she received $256,000 as the residual beneficiary of her grandfather's trust for her mother and $58,750 in Morgan Stanley stock. Margo kept her inherited assets separate, but over the years, she wrote checks for joint family expenses when Bob asked for money.[2] Margo believed Bob's promises to repay inherited funds when Bob talked her into using those assets to pay off debt. Margo also used her mother's inheritance to buy a $70,000 horse in 2001, which she later sold for $60,000. Of the proceeds, $30,000 went into a certificate of deposit and $30,000 was used for bills and living expenses.

One year prior to the filing of the dissolution of marriage, in 2005, Margo received about $1.1 million from her father's estate, approximately $570,000 of which was held in an Irrevocable Life Insurance Trust (ILIT). Margo's inheritance was given exclusively to Margo and not to Bob. Including the value of her current townhome residence held by the trust, Margo's inherited assets now total $1.2 million.

In 2001, Bob's inheritance was gone and he told Margo they were in serious financial trouble. Since Bob handled all the finances for the family, it was the first time Margo was aware that Bob's inheritance had been liquidated instead of the family using the interest income and some portion of the principal. Once Margo learned of their financial problems, she made significant efforts to

[2] In June of 1998, Margo used her inheritance and wrote two checks totalling $60,000 for annuities/insurance with Bob's company. Also in 1998, Margo paid for home expenses of $7000 in concrete work and spent $5500 at Bierl's Interiors and $4600 at Wildwood design. In 1999, Margo gave Bob a personal check for $9000 for living expenses, paid $1800 toward a note at State Bank, and paid the $6000 American Express bill. In 2001, Margo paid over $20,000 to American Express and paid over $2000 to Discover. From 1998 to 2001, Margo paid $110,000 in horse expense, $20,750 in farm expense, and over $36,000 for car-related expense.

reduce spending and increase her income by adding the third part-time job. Bob made no changes in his lifestyle, which included periodic golf trips to resorts, playing golf four times a week as a "business opportunity," and monthly orders for $50-$100 in cigars. The couple attended counselling where Margo expressed unhappiness about Bob's credit card usage and urged him to reduce spending and invest more effort into his current job or take a second job. Bob claims he "technically" did get a second job by persuading the country club to waive the yearly dues of $1500 for his work as club treasurer.

The Hatterys tried to sell their house and acreage for $750,000, but were unsuccessful. Next, they decided to sell off the acreage by dividing the land into lots, installing infrastructure at a cost of $300,000, and turning the property into a residential real estate development. State Bank holds $195,791 of Margo's inherited assets as collateral for the infrastructure improvements. Currently, three of seventeen lots have sold generating $97,000. The family home is on the largest lot and the adjoining lot is used for the Hattery horses and listed for sale with the house lot.

In March 2005, Bob again requested Margo use her inherited funds to pay $25,178 in credit card debt. In prior, similar requests over the years, Bob had verbally told Margo he would repay her inherited money, but it had never happened. Consequently, Margo required a promissory note before she would pay this debt. One year later, in April 2006, Bob filed a dissolution petition.

The subdivision of the acreage necessitated getting rid of a large barn. There was a misunderstanding between the neighbors who were given the barn and the Hatterys, which resulted in the Hatterys suing the neighbors. Shortly

before the dissolution trial, the jury returned a verdict favoring the neighbors. Bob, a co-plaintiff, paid $2500 in attorney fees and Margo paid $43,000 in attorney fees.

II. DISTRICT COURT DECISION

On November 7, 2006, the district court issued its ruling.[3] The parties filed a stipulated dissolution agreement regarding their appliances, furniture, and other household goods which was adopted by the court. Additionally, the court awarded Bob his retirement account, his bank account, his car and a jointly-owned horse trailer, five horses worth $35,000, the $400,000 family home with adjoining lot (occupied by Bob), and the twelve residential development lots near the home valued at $450,000. The court made Bob responsible for the two mortgages on the home ($224,335 and $57,558) and for the twelve lots' two development loans ($254,691 and $30,790). Bob therefore netted $353,210 in assets. Additionally, the court stated the eventual sale of the lots could allow Bob to receive more net assets than the amount calculated above.

Margo was awarded her retirement accounts, her bank account, her car, and one $5000 horse for a total of $45,975.

In allocating the couple's debt, the court divided the country club bill ($1000 Bob and $426 Margo), split a college loan ($12,142 each), and made each party responsible for their own credit card debt ($40,808 Bob and $3600 Margo). Margo sought $25,178 from Bob as payment on the promissory note;

[3] In a footnote, the court awarded Margo the small amounts in her First Federal Longaberger Baskets account and a small savings account for the grandchildren. We agree and also award Bob his Longaberger Baskets account. We award each party their respective cemetary plot of equal value. These assets will not be discussed further.

but the court ruled the funds from the note were spent for joint family expenses and ordered Bob to only pay one-half, or $12,589.

Margo was also ordered to pay $1892 for her medical bill and a Timberland farms account. Margo's total debt assignment is $18,060, leaving her with $27,915 when the debt is deducted from $45,975.

Bob was ordered to pay the house property tax ($3445), the development property tax ($85), the house account bill ($2124), the State Bank overdraft note ($7914), and the State Bank interest due ($25,878). Bob's total debt assignment is $105,985, leaving him with $247,225 when the debt is deducted from $353,210.

We note the court lists State Bank interest due, $25,878, in its overall debt/asset summary. However, probably due to oversight, the debt name and amount were not listed later in the decree specifics of debt allocation. Based on the pattern of the opinion, we conclude the court intended to award that debt to Bob.

The court ruled Margo's inheritance, invested in a clearly identifiable trust ($154,997), annuities ($157,307), a CD ($30,000), a beneficiary IRA ($404,755), a Perishing account ($165,791), and her newly-purchased townhome held by the trust ($318,000), with a balance of $1,230,850 is inherited property and not subject to division between the parties.

The court made specific and lengthy findings about its decision to award Bob the development lots with their debt secured by Margo's inherited property. The court determined the unsold lots would have a net value of $250,000, depending on the sales price. Bob would receive all the net value if, within six

months, he negotiates with the bank to release Margo's inherited property held as collateral. After six months, if Bob is unsuccessful, Margo designates an independent broker to sell the remaining lots and Bob does not receive all the net value, rather, the parties split the net proceeds after debt and interest is paid and Margo's collateral is released. Margo was given a judgment against the lots in the amount of $200,000 until the bank releases her collateral. The court identified four reasons for its decision:

> First, Bob clearly is in a unique relationship with the bank. They have extended him credit and extended his note beyond a level that an average citizen might receive. He is in the best position to free Margo's assets from the bank as collateral. Secondly, The Court is imposing some aspect of a carrot and stick approach to these assets. After observing Bob, the Court is of the opinion that he needs a strong financial incentive to act in this situation. If he acts responsibly, makes a good faith effort to sell the property, and to renegotiate and free Margo's collateral, then he will receive the benefit of such action. On the other hand, if he continues with the attitude that he has demonstrated to the effect that he does not care what the outcome of any division of the assets of the marriage is, then there needs to be some financial penalty for him. Third, this specific plan was indeed suggested by Margo. She agrees to it. Otherwise the Court may have gone directly . . . to an equal division of the [lots' net value]. Fourth, it also gives Bob something more than a strict division of the inherited property would not do. It essentially gives him an additional $125,000 (i.e., one-half of the $250,000 net value of the unsold lots) as an "equitable division" of the marriage assets. To that extent, it recognizes the fact that Margo has received substantial assets as her separate inherited property but also awards him more than he would otherwise be entitled.

Margo sought alimony if the court did not set aside her inheritance and Bob sought $18,000 per year for life in alimony. The court did not award alimony to either party. In declining to award alimony to Bob, the court recognized Margo, with the exception of her inherited property, is not as well-equipped to support herself as is Bob. While Margo continues to substitute teach and plans

to work holidays at Eddie Bauer, her efforts to obtain work and support herself as a realtor will take a number of years to develop. Bob plans to continue in the same business he has been running for twenty-four years with a five-year average income of $61,500. The court stated Bob "would undoubtedly earn more if he worked more. Margo should not be required to pay Bob alimony."

Bob appeals and seeks appellate attorney fees. Margo responds and also asks for appellate attorney fees.

III. SCOPE AND STANDARDS OF REVIEW.

On appeal, equity dissolution cases are reviewed de novo. Iowa R. App. P 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). While we give weight to the district court's findings of fact, especially the credibility of the witnesses, we are not bound by such findings. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). The trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value as we examine the particular facts and circumstances before us. *Id*.

IV. MERITS.

A. Inherited Property.

Iowa statutory law governs the treatment of inherited property in dissolution cases and an equitable distribution of the Hatterys' property must be made according to the criteria established in Iowa Code section 598.21(5) (Supp. 2005). This statute excludes from the court's property division "inherited property or gifts received by one party." *Id*. The latter portion of the statute identifies a

qualification to the gift and inheritance set-aside rule: "Property inherited . . . is not subject to a property division . . . *except upon a finding that refusal to divide the property is inequitable to the other party.*" *Id.* 598.21(6) (emphasis added).

In determining whether inherited property is divisible, the controlling factors are "the intent of the donor and the circumstances surrounding the inheritance." *In re Marriage of Liebich,* 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). The Iowa Supreme Court has identified a number of factors for courts to consider in determining whether inherited property should be divided:

> (1) contributions of the parties toward the property, its care, preservation or improvement;
> (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised;
> (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) (quoting *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989)). Additionally, "the length of the marriage may be an important factor in determining whether gifted property should be included in the property distribution." *Goodwin*, 606 N.W.2d at 319.

Bob argues he is entitled to a large portion of Margo's inheritance. Bob testified he considered the inheritance a joint marital asset the parties would utilize together. Bob asserts his situation fits either of two exceptions listed above: (1) he had an independent, close relationship with Margo's father; and

(2) it would be inequitable to set aside Margo's inheritance when his inheritance is totally gone and was spent for the parties' joint benefit.

Bob claims his close relationship with Margo's father, Mr. McClelland (McClelland), is evidenced by his caring for McClelland after surgery, by Bob assisting McClelland in estate planning, and by Bob assisting Margo's family with trusts established to benefit the Hatterys' children. Bob testified his financial advice saved McClelland's estate $2.4 million, a claim the trial court determined to be grossly overstated and self-serving. In our review, the trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *Will*, 489 N.W.2d at 397

We do not believe Bob has proven the necessary close, independent relationship that would justify ignoring McClelland's intent to leave the assets to Margo and not to Bob. Bob spent a few days helping McClelland while he was recovering from toe surgery. McClelland, a retired lawyer, attended a retirement seminar and then McClelland contacted Bob to inquire about purchasing life insurance to fund ILITs. Bob sold McClelland three life insurance policies to fund the trusts and received over $90,000 in commissions. Bob testified there was nothing extraordinary about the plan and Bob did not do any legal work to implement the estate plan. Bob did type the form letter each year for Margo to sign as trustee for the grandchildren's trusts. McClelland had retired as general counsel for Sears Roebuck and drew his own estate documents, as well as drafting documents for Margo's will and trust. After considering the relationship between Bob and McClelland, we find nothing there to support a conclusion that

it would be inequitable to give effect to McClelland's express intent that Margo, not Bob, inherit McClelland's assets.

Second, Bob contends Margo's inherited property should be subject to division because it is inequitable to Bob to do otherwise. Bob argues the thirty-five year length of the marriage and the fact the parties lived off gifts and inheritances to fuel a lifestyle not affordable on their paychecks requires a division of Margo's inheritance, citing, *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989). Bob argues he will not be able to continue his lifestyle and his standard of living will be lowered, while Margo's will not, if the inherited assets are not divided.

We do not believe the *Muelhaupt* decision requires us to award Bob a portion of Margo's inheritance. In discussing the interplay between the length of a marriage and the equitable treatment of inherited assets, the court stated:

> [A]s time goes on, the benefits of such property are enjoyed by the married couple; it is both natural and proper for the expectations of the other spouse to rise accordingly. A sudden substantial rise in the couple's standard of living made possible by gift or inheritance . . . will naturally and reasonably lead the other spouse to anticipate that that standard of living will be maintained, particularly if it is sustained over a lengthy period of time.

Muelhaupt, 439 N.W.2d at 659 (quoting *In re Marriage of Wallace*, 315 N.W.2d 827, 831 (Iowa Ct. App. 1981)). Since Margo received the majority of her inheritance, $1.1 million, in the year before the dissolution, the inheritance did not raise the standard of living of the Hatterys "over a lengthy period of time." *See id*. 661 (future inheritance has never been an asset relied on during the marriage and there is no reason the spouse should benefit from it). Margo's inheritance was kept separately from the joint accounts and, when Bob asked Margo shortly

before the dissolution to utilize $25,000 of the recent inheritance for bills, Margo required a written promissory note.

Also, the trial court found credible Margo's testimony Bob told her he would repay inherited funds when Bob talked her into using some of her earlier, smaller inheritance to pay off debt during the last five to ten years of the marriage. Since Bob had promised to repay the funds and since Margo kept her inheritance in a separate account, the earlier inheritance could not be reasonably relied upon by Bob to raise his standard of living.

The 2005 inheritance was recent and required signing of a promissory note to access. Bob had promised to repay amounts used from the earlier, smaller inheritance. Therefore, neither part of Margo's inheritances was an asset or resource upon which Bob had long relied during the thirty-five year marriage, nor which had sustained the family for a long period of time.

Even though our review is de novo, we "accord the trial court considerable latitude . . . and will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (1996). We hold the trial court's decision to set aside Margo's inheritance from the division of property is equitable.

B. Property Division.

Distribution of property is made pursuant to the criteria codified in Iowa Code section 598.21(5). Iowa is an equitable distribution state, which means the parties are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage

distribution. *In re Marriage of Bell*, 576 N.W.2d 618, 624 (Iowa Ct. App. 1998). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Russel*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

Bob argues the trial court assigned him too much of the Hatterys' debt and injected fault into the dissolution by implying Bob should have worked more and charged fewer personal items. Bob asks the court to adjust the property division to have Margo pay more of the debt, both debt secured by property and credit card debt, and specifically asks for release of his obligation to pay one-half of the promissory note utilized to reduce the Hatterys' credit card debt.

The dissolution statutes in Iowa remove fault-based standards for termination of marriages. *In re Marriage of Williams*, 199 N.W.2d 339, 344 (Iowa 1972). However, the trial court here was not assigning fault for the marriage breakdown, but rather was examining the conduct of both parties, including Bob's conduct decreasing the value of the marital estate, in determining the appropriate debt assignment. A survey of our cases shows this examination is necessary under Iowa law in order to reach an equitable result. "Conduct of a spouse which results in loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable distribution of property." *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997); *see Goodwin*, 606 N.W.2d at 321. Additionally, the "dissipation or waste of marital assets by a

spouse prior to the dissolution of marriage may generally be considered in making a property division." *Bell*, 576 N.W.2d at 624.

It is undisputed Bob, with his background in banking and insurance, handled the Hatterys' finances and Margo had little financial knowledge. Margo did not know Bob had spent or encumbered his inheritance until he told her of the severe financial problems in 2001. It is also undisputed Bob's lowest gross income in the five years before the marriage was $44,792 and his income in the year of the dissolution was $6000. Undoubtedly, Bob's decision to work significantly less in the year of the dissolution contributed to his credit card debt and is relevant to the court's debt assignment. In considering the current, unpaid debt, it is also notable Bob required Margo to pay $43,000 of attorney fees, while Bob contributed $2500 when their joint lawsuit against the neighbors was unsuccessful.

We detailed the trial court's property division above and will not repeat the details here. After the court's allocation of the debts, Bob was awarded $247,225, nearly all of the marital estate, including the real estate where Bob invested his inherited assets. Additionally, Bob has the opportunity to increase his share of assets by negotiating the release of Margo's collateral on the development loans. We approve the court's creative resolution which allows Bob to increase his assets by using his superior financial skills. Bob is not required to pay alimony despite his superior income-earning potential as he continues to run a twenty-four year old business.

After the court's allocation of the debts, Margo receives only a small proportion of the assets, $27,915 and no alimony at age fifty-four, despite her

obviously inferior earning capacity as she enters a totally new profession while only working part-time during her long-term marriage.

The court's division of property and debt is an equitable way to recognize and award Bob the property accumulated due to his inheritance, without an alimony obligation, while also recognizing and respecting the long-held Iowa law that inherited property should be awarded to the recipient absent special circumstances.

C. Attorney Fees and Costs.

Both parties request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Each party will pay their own appellate attorneys fees and costs will be paid equally.

AFFIRMED.