IN THE COURT OF APPEALS OF IOWA

No. 8-763 / 07-1847
Filed October 29, 2008

IN RE THE MARRIAGE OF KRISTI K. DAY
AND KENNETH A. DAY

Upon the Petition of
KRISTI K. DAY,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KENNETH A. DAY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Humboldt County, Kurt L. Wilke, Judge.

Kenneth Day appeals from the property division provisions of the decree dissolving the parties' marriage, and Kristi Day cross-appeals from the district court's denial of her request for spousal support. **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Monty L. Fisher, Fort Dodge, and Mark D. Fisher of Nidey, Peterson, Erdahl & Tindal, P.L.C., Cedar Rapids, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Kenneth Day appeals from the property division provisions of the decree dissolving the parties' marriage, and Kristi Day cross-appeals from the district court's denial of her request for spousal support. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

Kenneth and Kristi Day were married in July 1978. Four children were born during their marriage. Kristi filed a petition for dissolution of marriage in December 2006. The petition came before the district court for trial in August 2007. Prior to the trial, the parties reached an agreement as to custody, physical care, and child support for their only remaining minor child. The issues presented to the court at trial were thus limited to property division, alimony, and attorney fees.

Kenneth was the family's primary income provider. Although Kristi occasionally obtained employment outside of the home, her main role was as caretaker of the parties' children and residence. At the time of the trial, Kenneth was fifty-one years old, in good health, and employed at Dodgen Industries where he earned approximately $36,000 per year. He also engaged in some part-time carpentry work and farmed about 750 acres during the parties' marriage with Kristi's assistance.

Kristi was forty-eight years old and employed at two part-time jobs at the time of the trial. She worked close to fifteen hours per week earning $10.89 per hour as a bank teller at Bank of Iowa and ten to twelve hours per week earning $6.20 per hour at a Hallmark store. Kristi had been working approximately thirty

hours per week at Bank of Iowa, but she reduced her hours shortly before the trial due to back pain she suffered from as a result of a car accident that occurred in 2000.

Kenneth and Kristi accumulated three tracts of farmland during their marriage. They purchased their first parcel, which consisted of 77.3 acres, in the 1980s. They referred to this parcel of land as the "Johnson Farm." In 2001 they purchased a 160-acre farm that contained their house, some outbuildings, and 145.87 tillable acres. This parcel of land was referred to as the "Home Place." Finally, in 2004 they purchased a seventy-seven percent share, or 120 acres, of a 160-acre farm that had been owned by Kenneth's grandmother. They used Kenneth's cash inheritance from his grandmother, $108,013.92, as a down payment on their share of that farm, which they referred to as "Grandmother's Farm," and borrowed the remaining amount of the purchase price. In addition to these three parcels of land, Kristi owned sixty acres of farmland, forty of which are subject to a life estate held by her mother, which she inherited from her father early in the parties' marriage.

The district court entered a decree dissolving the parties' marriage in September 2007. The court set aside to Kristi the farmland she inherited from her father and set aside to Kenneth the $108,013.92 he inherited from his grandmother. The court then divided the parties' remaining property equally, awarding them each one-half of the net value of the three parcels of farmland that they purchased during their marriage. The court denied Kristi's request for spousal support.

Kenneth appeals. He claims the district court erred in (1) valuing the parties' property, (2) not awarding him the appreciation in his inheritance from his grandmother, and (3) failing to set aside other gifts and inheritances he received during the parties' marriage. Kristi cross-appeals, claiming the district court erred in denying her request for spousal support.

II. Scope and Standards of Review.

We review dissolution cases de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Discussion.

A. Farmland Values.

Each party hired an appraiser to value their farmland. Kenneth claims the district court erred in adopting the valuations of the appraiser hired by Kristi, Wesley Brent Taylor, because Taylor's appraisals included nontillable acres of farmland and incorrectly valued buildings located on the properties. He argues that the values placed on the parties' farmland by his appraiser, James Kesterson, were more accurate. We do not agree.

Taylor testified on behalf of Kristi that he valued the Johnson Farm at $3750 per acre, which resulted in a total value of $289,875. Taylor further testified the Home Place was worth $776,000 or $4852 per acre, while the parties' share of Grandmother's Farm was worth $537,868.80 or $4350 per acre. Taylor included both tillable and nontillable acres in his appraisals of the farms

because "when you look at sales, you look at gross acres." According to Taylor, hardly any farm for sale will include only tillable acres because farms need nontillable acres for drainage ditches and access roads.

Kesterson, the appraiser hired by Kenneth, reviewed the appraisals completed by Taylor. Kesterson testified that while he agreed with Taylor's per-acre value, he disagreed with the amount of acres included in the appraisals. According to Kesterson, Taylor should not have included the nontillable acres in his valuations of the properties because those acres are not "usable." Kesterson accordingly valued the parties' farmland using Taylor's per-acre value but including only the tillable acres, which resulted in a total value of $263,625 for the Johnson Farm, $724,590 for the Home Place, and $501,000 for Grandmother's Farm.

The district court adopted Taylor's valuations of the parties' farmland, concluding his appraisals "were the more accurate." The court found Taylor "took into consideration the non-tillable ground in each tract and adjusted the value per acre to arrive at an overall value that he felt was appropriate for the entire tract." Thus, according to the court, "Kesterson's subtraction of value for nontillable ground was already factored into Taylor's appraisal and no further subtraction is appropriate."

Although our review is de novo, we will defer to the district court where, as here, the court's valuations are accompanied by supporting credibility findings or corroborating evidence. *See In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). We find the valuations adopted by the court to be well within the permissible range of evidence despite Kenneth's arguments to the contrary. *See*

In re Marriage of Hansen, 733 N.W.2d 683, 703 (Iowa 2007) ("Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence.").

B. Inherited and Gifted Property.

In allocating the parties' assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution; rather, the decisive factor is what is fair and equitable in each particular case. *Id.* In determining what division would be equitable, courts are guided by the criteria set forth in Iowa Code section 598.21(5) (Supp. 2005). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). This statute excludes from the court's property division "inherited property or gifts received by one party" unless the court finds exclusion of such property "is inequitable to the other party . . . ." Iowa Code § 598.21(5), (6); *Goodwin*, 606 N.W.2d at 319.

The requirement to set aside to a party inherited or gifted property is thus not absolute, and division may nevertheless occur to avoid injustice. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). Contributions by a party to the care, preservation, or improvement of inherited property is a factor which bears on a claim that inherited property should be divided, and the length of the marriage and the length of time the property was held after it was devised or given may indirectly bear on the question, for their effect on this and other relevant factors. *Id.*

Kenneth claims the district court erred in failing to award him the appreciation in value of his $108,013.92 inheritance from his grandmother realized as a result of its investment in farmland.[1] He argues the court's treatment of the parties' inheritances was inequitable because the "court granted to Kristi all of her inheritance including appreciation in value and to Ken only his inheritance without appreciation in value." We do not agree.

Our courts have treated cash inheritances used to purchase real property during the marriage differently from real property that is simply inherited. In *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995), the court stated that where an inheritance is in the form of cash and then later used to buy property during the marriage, "the resulting appreciation or loss may be characterized as marital property" barring special circumstances. This is so because such "[d]ecisions on how to use property during the marriage, including inherited property, bear most of the characteristics of a family decision." *White*, 537 N.W.2d at 746. However, "[r]eal property that has been in the family of one of the parties prior to their marriage ought, as far as possible, to be permitted to remain in the possession of that party." *In re Marriage of Wallace*, 315 N.W.2d 827, 832 (Iowa Ct. App. 1981).

With these principles in mind, we agree with the district court's treatment of the parties' inherited property. The decision to use Kenneth's cash inheritance from his grandmother towards the purchase of a portion of her farm bears all the characteristics of a family decision. The parties purchased the farm jointly and

[1] When the parties purchased Grandmother's Farm, they paid approximately $2900 per acre. By the time of the dissolution trial, the farm was worth $4350 per acre.

borrowed the remaining amount of the purchase price not satisfied by Kenneth's inheritance. They thereafter made payments on the farm from their joint marital funds. The farmland inherited by Kristi from her father, on the other hand, was maintained separately by Kristi as her own property throughout the parties' marriage. Furthermore, a portion of that land was subject to a life estate in her mother. We therefore see no reason to disturb the district court's decision as to these items of inherited property.

Nor do we see any reason to disturb the court's rejection of Kenneth's claim that an additional $93,400 in gifts and inheritances should have been set aside to him.[2] The court found that "out of all the machinery" and other items Kenneth claimed to have received as gifts or inheritances during the marriage, "the only item remaining is an old grain truck." *See In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005) (noting all property of the marriage that *exists at the time of the divorce* is divisible property). Furthermore, Kenneth admitted at trial that "[e]verything from [his] family got comingled" with the parties' marital assets during their twenty-nine year marriage. It would thus be difficult, if not impossible as the district court found, "[t]o attempt to value those items at this date and determine the percentage used by Kenneth and the percentage used by Kristi." *See In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989) (discussing the importance of the passage of time in considering the division of inherited or gifted property).

[2] Kenneth initially claimed during the trial that $169,428 should be set aside to him as premarital, gifted, and inherited property. However, on appeal, he excluded the property he claimed to have brought with him into the marriage from his assertion that the court erred in its division of the parties' property.

C. Spousal Support.

An award of spousal support is used as a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). It is a discretionary award, dependent upon each party's earning capacity and present standard of living, as well as the ability to pay and the relative need for support. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998). Courts are guided by section 598.21A(1), which mandates consideration of a number of factors, such as the length of the marriage, the parties' ages and health, the earning capacity of the spouse seeking support, and that spouse's ability to become self-sufficient.

The property division and an award of spousal support should be considered together in evaluating the individual sufficiency of each. *In re Marriage of Earsa*, 480 N.W.2d 84, 85 (Iowa Ct. App. 1991). In a marriage of long duration, an award of spousal support and a substantially equal property division may be appropriate, especially where there is a great disparity in earning capacity. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993).

The district court determined an award of spousal support was not justified in this case because it awarded "Kristi property with a value that approximates $1,000,000." The court further determined spousal support was not appropriate because Kristi "voluntarily reduced her work hours and pay while this divorce was pending." Indeed, our review of the record reveals that up until a few months before trial, she was able to work approximately thirty hours per week at Bank of

Iowa. Furthermore, despite her claimed back pain, she was able to assist Kenneth with the family's farming operation and work at several part-time jobs while the parties were married. Finally, we believe it is significant, as Kenneth notes, that Kristi will receive some income from her share of the property she was awarded.

Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only where there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). We do not believe there has been a failure to do equity in this case for the reasons detailed above. We therefore affirm the district court's decision to not award Kristi spousal support.

D. Appellate Attorney Fees.

Kristi requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *Sullins*, 715 N.W.2d at 255. In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id*. Applying these factors to the circumstances in this case, we conclude Kristi is not entitled to an award of appellate attorney fees.

IV. Conclusion.

Upon our de novo review, we affirm the district court's decree dissolving the parties' marriage in all respects. We decline Kristi's request for an award of appellate attorney fees. The costs of the appeal are to be divided equally between the parties.

AFFIRMED.