IN THE COURT OF APPEALS OF IOWA

No. 0-467 / 09-1948
Filed July 28, 2010

IN RE THE MARRIAGE OF BRADLEY J. FENTON AND TERESA K. FENTON

Upon the Petition of
BRADLEY J. FENTON,
Petitioner-Appellee,

And Concerning
TERESA K. FENTON,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Teresa Fenton appeals from the economic provisions of the decree dissolving her marriage to Bradley Fenton. **AFFIRMED AS MODIFIED.**

Brent A. Cashatt and Kodi A. Brotherson of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

Larry J. Handley of Handley Law Firm, P.C., Ankeny, for appellee.

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

DOYLE, J.

Teresa Fenton appeals from the economic provisions of the decree dissolving her marriage to Bradley Fenton. Upon our review, we affirm the judgment of the district court as modified.

***I. Background Facts and Proceedings*.**

Bradley, born in 1949, and Teresa, born in 1960, were married in May 1993. Both parties had been married previously. Teresa has two children from her prior marriages, and there were no children born of the parties' marriage.

Bradley owned a house prior to the parties' marriage in Montezuma, Iowa. The parties and Teresa's children lived in the home during the marriage. Improvements were made to the home and it was appraised in July 2008 for $338,200. At the time of trial, the house was encumbered by two mortgages and a $11,628 loan for Teresa's daughter's education.

Bradley brought additional property to the marriage, including an empty lot of land on Lake Ponderosa adjacent to the homestead. He purchased the lake lot in 1986 for approximately $32,000. He testified that the lot, at the time of trial, was worth $126,000. The parties used and enjoyed the lot during the marriage, and the parties paid the taxes on the lot from their mortgage bank account. The only improvements made to the lake lot were the removal of a trailer from the property and landscaping of shoreline rock to prevent erosion.

Bradley also brought to the marriage a VIP 21-foot speed boat. Bradley financed the boat's purchase, and the loan required he make monthly payments

for a seven year term.[1] Consequently, the last five years of the payments were paid during the parties' marriage. The court determined the value of the boat to be $5000 at the time of trial.

Bradley owned a Jeep prior to the parties' marriage, which he testified was worth approximately $5000 at the time of the marriage. During the marriage, Bradley bought a 1999 Jeep Grand Cherokee. Bradley's financial affidavit stated that Jeep was worth $4500 at the time of trial.

Prior to marrying Teresa, Bradley was employed by Brownells. Bradley lost his job in 2003, and he was unemployed until 2005. Bradley held that job for approximately one year and earned a salary of approximately $50,000. In October 2005, Bradley inherited $250,000. Bradley started his own pest control business in 2006, using money from his inheritance to purchase business items and equipment, including a 2006 Chevrolet Silverado pickup truck valued at $17,550 at the time of trial. Bradley's business has been minimally profitable, earning net profits of approximately $3500 for 2007 and 2008.

At the time of the parties' marriage, Bradley's retirement account from his employment at Brownells was valued at $12,000. The retirement account's value had increased to $193,000 by December 2008. In January 2009, after Bradley turned fifty-nine and a half, he withdrew $40,000 from his retirement account to pay his monthly expenses. At the time of trial, Bradley's retirement account was valued at $58,586 due to a decline in stock values and the $40,000 withdrawal.

[1] Bradley financed $13,309.52 for the purchase of the boat, motor and trailer. The loan required he make monthly payments of $239.79 a month for seven years (eighty-four months) beginning August 22, 1991.

It is undisputed that during the parties' marriage, Bradley gifted jewelry to Teresa, worth approximately $6891 at the time of trial. Many other items were purchased and acquired by the parties during the marriage, including a golf cart, a riding lawn mower, and a jet ski.

Just prior to the parties' marriage, Teresa earned her associate of science degree, and she began attending classes at the University of Iowa. She took out student loans to pay for her education. She did not work while she was in school; however, she contributed to the household and cared for her children. She graduated during the parties' marriage, receiving dual degrees, and found employment thereafter. At the time of trial, Teresa was earning approximately $100,000 annually and had paid off her student loans. Teresa paid the parties' mortgages while Bradley was unemployed.

In 2006, Teresa purchased a condominium in Altoona, Iowa, valued at $120,000 at the time of trial and encumbered by a mortgage. The parties separated in March 2008, and Bradley subsequently filed a petition for dissolution of marriage. From March 2008 to approximately July 2008, Teresa paid all of the monthly mortgage payments. Thereafter, Teresa paid the mortgage on the Altoona home, and Bradley paid the mortgages on the Montezuma home.

The petition came before the district court for trial in August 2009. At trial, the parties stipulated to the distribution of their property, but disagreed about the valuations and whether certain property brought to the marriage by Bradley should be included in the overall divisible estate. After hearing Bradley's and

Teresa's testimony and receiving their exhibits, the court ruled from the bench. The court stated:

> The court has carefully considered all factors as allowed by law, including all factors as set forth in chapter 598 of the Iowa Code. In dividing the property and the debts, the court has made an equitable division of the property and debts, and the court has considered all factors in [section] 598.21 including the length of the marriage, the property brought into the marriage, the age, physical and emotional health of the parties, contribution of one party to the education, training or increased earning power of the other, the earning capacities of the parties, all other economic circumstances of the parties including their retirement, tax consequences to the parties.
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> In addition, the court has considered Iowa Code section 598.21(6) related to inherited gifted property which states that 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 except upon a finding that refusal to divide the property is inequitable to the party . . . .
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> The court finds that it is equitable for [the lake] lot to be the property of [Bradley], that in computing the payout and property settlement from one to the other, [the court's valuation of the lot] will not be included in the computations as, again, it was property [Bradley] purchased before the marriage. [Teresa] did nothing to increase the value of that property.
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> With regard to [the Jeep Grand Cherokee], . . . [t]he court sets a value of that of $4500. In making the computations on the property, that will not be included because the parties testified that [Bradley] had a vehicle at the time of the marriage and that the vehicle, this particular vehicle, was purchased with inherited funds. So the . . . value will not be included in the computations.
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> The court found the current value of Bradley's 401K account to be $58,586. The court determined that $12,000 should be deducted from the value, because that was the value of the account prior to the parties' marriage. The court found the reduced amount of $46,586 should be equitably divided.
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> The court found that the boat and boat lift were premarital property and that they should not be considered in the computations.
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> The court determined the value of the jewelry gifted to Teresa from Bradley during the marriage should be included in the distribution calculation.

The court further explained:

> [T]he court finds in this case that since the court has set aside gifted or inherited property and is not including that in the calculations and the court has set aside significant premarital property to [Bradley], that it is equitable to divide the property 50/50, the accumulated property, the net property 50/50.
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> . . . .
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> The court finds that a 50/50 division given the circumstances here is appropriate considering all the factors the court has listed. And to set off the premarital property, set off the inherited property, and give something less than 50/50 would not be equitable under the facts of this case.

The court's bench ruling was then set forth in a written decree.

Teresa appeals. She contends the district court erred in excluding certain premarital property and including gifted property in the overall property distribution. She also argues the court erred in its valuation of Bradley's retirement account.

II. Scope and Standards of Review.

We review dissolution cases de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We accord the district court with considerable latitude in its determinations and "will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005) (citation omitted). When a district court's valuation is within the range of evidence, it will not be disturbed on appeal. *See In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987).

III. Discussion.

We begin our discussion with these general principles. 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 Dean*, 642 N.W.2d 321, 325 (Iowa Ct.

App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996).

Under our statutory distribution scheme, the first task in dividing property is to determine the property subject to division. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). Iowa Code section 598.21(5) (2007) requires that "all property, except inherited property or gifts received by one party" be equitably divided between the parties. The second task is to divide this property in an equitable manner according to the criteria codified in section 598.21(5), as well as other relevant factors determined by the court in a particular case. *Schriner*, 695 N.W.2d at 496.

> "Equitable distribution" essentially means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties.
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> In Iowa, two types of property, inherited property and gifts received by one party, are specifically excluded by statute from the divisible estate. This property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process. Yet, this exclusion is not absolute. Iowa has a unique hybrid system that permits the court to divide inherited and gifted property if equity demands in light of the circumstances of a spouse or the children. Property not excluded is included in the divisible estate.

Id. (citations omitted).

Section 598.21(5) lists several factors to consider when dividing property, including:

> a. The length of the marriage.
> b. The property brought to the marriage by each party.
> c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
> d. The age and physical and emotional health of the parties.
> e. The contribution by one party to the education, training, or increased earning power of the other.
> f. The earning capacity of each party . . . .
> . . . .
> m. Other factors the court may determine to be relevant in an individual case.

With these principles in mind, we review the district court's ruling.

***A. Premarital Property*.**

Teresa contends the district court erred in excluding from the parties' divisible estate the lake lot, speed boat, and boat lift purchased by Bradley prior to the parties' marriage. Additionally, Teresa argues the court erred in determining Bradley's 1999 Jeep Grand Cherokee was premarital property purchased with inherited funds and should be excluded from the parties' divisible estate. She also argues Bradley's retirement account should not have been offset by the $12,000 value it held at the time of the parties' marriage.

As stated above, under Iowa law, premarital property is not automatically excluded from the marital estate, but its status is one factor among many others to be considered when dividing the parties' property under Iowa Code section 598.21. *Fennelly*, 737 N.W.2d at 102; *see also* Iowa Code § 598.21.

Upon our de novo review, we agree with Teresa that the court erred in determining Bradley's 1999 Jeep Grand Cherokee was premarital property purchased with inherited funds. It appears the district court's mistaken characterization of that Jeep was the product of some confusion. Bradley did

bring a Jeep into the marriage, but it was not the one he owned at the time of trial. Also, it was his 2006 pickup truck that was purchased with inherited funds, not his 1999 Jeep. We find that Bradley's 1999 Jeep should have been included in the divisible estate as it was acquired during the marriage and was not a premarital or inherited asset.

Likewise, we find that the speed boat should have also been included in the divisible estate.[2] Although Bradley acquired the boat prior to the marriage, seventy-five percent of the loan payments were paid during the course of the marriage. Based upon the boat's $5000 valuation at the time of trial, we conclude seventy-five percent of that value, $3750, should have been included in the divisible estate.

Other than these two changes concerning premarital assets, and upon considering all of the factors under Iowa Code section 598.21, we find the district court's unequal division to be equitable in this case. *See Dean*, 642 N.W.2d at 323. Although Bradley is leaving the marriage with more assets than Teresa, he also leaves with more debt that Teresa. We therefore affirm the district court's rulings regarding premarital property in all other respects.

[2] Teresa claims the boat lift should also be included in the divisible marital estate. Although Bradley purchased the boat lift at the same time as the boat, the financing agreement mentions the boat, motor and trailer, but is silent as to any boat lift. There is no clear evidence in the record before us as to whether any portion of the boat lift's purchase price was financed or paid during the course of the marriage. We therefore consider it a premarital asset.

***B. Gifted Property*.**

Teresa next argues the district court erred by including in the divisible estate the jewelry gifted to her from Bradley during the marriage.[3] She asserts that Iowa Code section 598.21(5) requires the items of jewelry to be excluded because they were gifted property. Bradley does not dispute the items of jewelry were gifts, but contends the statute contemplates only gifts from third parties, not gifts between spouses. He argues that interspousal gifts originating from marital property do not become the separate property of the donee, but maintain their characteristics as marital property subject to division.

"Like most other states, Iowa is known as an 'equitable distribution' jurisdiction for purposes of dividing property in a dissolution of marriage." *See Schriner*, 695 N.W.2d at 496. However, "[e]quitable distribution states have adopted different approaches for determining which assets are included in the divisible marital estate." Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115, 125 (Fall 1997). A majority of states, including Iowa, use a dual classification system that distinguishes between marital property, which is produced through efforts of the marital partnership, and separate property, which is unrelated to marital partnership efforts. *See id*.; *see also* Iowa Code § 598.21

[3] We note that "[p]ersonal items, such as jewelry, 'should be permitted, as far as is reasonably possible, to remain with the person whose possessions they were during the marriage.'" *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa Ct. App. 1992) (quoting *In re Marriage of Wallace*, 315 N.W.2d 827, 832 (Iowa Ct. App. 1981)). Here, the jewelry was awarded to Teresa. The issue is whether its valuation should have been included in the pool of marital assets subject to division.

(requiring "all property, except inherited property or gifts received by one party" be equitably divided between the parties).

Although the statutes of many other dual-classification states expressly limit their statutory gift provision to include only gifts from third parties,[4] Iowa's statute does not specify whether interspousal gifts or only those received from third parties are excluded from the property subject to division. Our case law is silent as to whether interspousal gifts during the marriage are "gifts" within the meaning of Iowa Code section 598.21(5).[5]

Many other states agree that a statute which defines all gifts as separate property must be construed to define interspousal gifts as separate property. *See* Brett R. Turner, 1 *Equitable Distribution of Property* § 5:46 n.5, at 511 (3rd ed. 2005). Where a statute makes no express reference to interspousal gifts, the term "gifts" includes all gifts, including gifts between spouses. *See Semasek v. Semasek*, 502 A.2d 109, 111 (Pa. 1985).[6] We recognize that if the statutory purpose is to include in the marital estate all fruits of the parties' efforts during the marriage, these cases would tend to contradict that purpose. *See Hemily v. Hemily*, 403 A.2d 1139, 1143 (D.C. 1979). However, judicial observations about legislative purpose must take a second chair to actual legislative language. *See Ranniqer v. Iowa Dep't. of Revenue*, 746 N.W.2d 267, 270 (Iowa 2008) ("[I]n

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[4] *See* Brett R. Turner, 1 *Equitable Distribution of Property* § 5:46, at 509 (3rd ed. 2005).

[5] It is noted that this court held that an engagement ring given in contemplation of marriage is a "conditional" gift; a "completed" gift only upon marriage. *See Fierro v. Hoel*, 465 N.W.2d 669, 672 (Iowa Ct. App. 1990).

[6] The results in *Semasek* were overturned by later enactment of 23 Pa. Cons. Stat. § 3501(a)(3), which expressly excludes interspousal gifts from the definition of separate property. *See* 1990 Pa. Laws No. 206 § 2.

searching for legislative intent, we are bound by what the legislature said, not by what it should or might have said."). Our statute states simply that gifts are separate property. Nothing in the statute excludes gifts between spouses. We therefore conclude Iowa Code section 598.21(5) must be construed to define interspousal gifts as separate property and thus excluded from the divisible marital estate.

Nevertheless, if a finding is made that refusal to divide the interspousal gift is inequitable to the other party, the gift is subject to division under Iowa Code section 598.21(5). *See* Iowa Code § 598.21(6). Section 598.21(6) is substantially a codification of the premise established by earlier case law that property inherited by or gifted to one marriage partner is subject to division if the failure to do so would be unjust. *See In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982); *In re Marriage of Byall*, 353 N.W.2d 103, 105-06 (Iowa Ct. App. 1984). In *Thomas*, the court delineated a number of factors that might bear on a claim inherited or gifted property should be divided. *Thomas*, 319 N.W.2d at 211. These include:

> (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.

Id.

Here, Bradley does not dispute that the jewelry was a gift to Teresa. Upon our de novo review, and considering all of the factors stated above, we find refusal to divide the jewelry is not inequitable to Bradley. We therefore conclude the jewelry should not have been included in the pool of marital assets subject to division. Accordingly, we modify the district court's ruling to exclude the value of the jewelry from the divisible estate.

C. Bradley's Retirement Account.

Finally, Teresa contends the district court erred in valuing Bradley's retirement account. She asserts he wasted, dissipated, depleted, or diverted $135,144 from his retirement account after the parties separated without accounting or explanation for the depletion, and the court should have used the account's valuation before the parties' separated. We disagree.

As stated above, the district court's valuation will not be disturbed on appeal if it is within the range of evidence. *See Wiedemann*, 402 N.W.2d at 748. Here, there is no question that the equity markets have declined significantly in recent times. Moreover, we agree with the district court's conclusion that the $40,000 withdrawn by Bradley for living expenses was reasonable, given the income disparity of the parties, and find the court's valuation to be within the range of evidence. We therefore decline to disturb the district court's retirement account valuation.

IV. Conclusion.

Adding to the divisible estate $4500 for the 1999 Jeep Grand Cherokee and $3750 for the speed boat, and subtracting $6891 for the jewelry, we

determine the $25,167 equalization payment from Bradley to Teresa should be increased by $7540 to $32,707. For all the reasons stated above, we affirm the remaining provisions of the decree of the district court as modified. Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.