IN THE COURT OF APPEALS OF IOWA

No. 2-183 / 11-1575
Filed April 11, 2012

IN RE THE MARRIAGE OF ANDREA L. DUNLAY AND JOHN A. DUNLAY

Upon the Petition of
ANDREA LYNN DUNLAY,
Petitioner-Appellant,

And Concerning
JOHN ANGELO DUNLAY,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Petitioner appeals the property division and spousal support provisions of the parties' dissolution decree. **AFFIRMED.**

John J. Wood and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellee.

Considered by Vaitheswaran, P.J., Tabor, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

ZIMMER, S.J.

Andrea Dunlay appeals from the decree dissolving her marriage to John Dunlay. She contends the property division and spousal support provisions of the decree are inequitable. Upon our review, we conclude the district court achieved an equitable division of the property and agree with the district court's conclusion that alimony is not appropriate in this case.

I. Background Facts & Proceedings.

John and Andrea Dunlay were married in 1991. They have four children, who were born in 1994, 1997, 2000, and 2002. The parties separated in 2010, and Andrea filed a petition for dissolution of marriage. The dissolution hearing was held August 2, 2011.

John was forty-five years old at the time of the hearing. He has a BA degree in accounting from the University of Northern Iowa, and is a certified public accountant. John has been unsuccessful in holding long-term employment; he had about twelve jobs in the accounting field during the parties' marriage. He has been unemployed since the spring of 2010. John has been treated for clinical depression since 1989. At the hearing, he testified he was taking a new medication and felt he could re-enter the job market.

Andrea was forty-three years old at the time of the hearing. She did not work outside the home during most of the marriage. In May 2011 she obtained an associate of applied science degree in medical assisting from Kaplan University. When the hearing was held, Andrea had a part-time job at Target. She was working twenty-five to thirty hours per week at $7.90 per hour. She was looking for a job in the medical field. Andrea is in good health.

Andrea and John purchased a home on Hillside Avenue (Hillside home) in Waterloo in December 1996. In 1998 Andrea's father, Tim Hurley, and his second wife, Kathleen McCoy, were moving to a new home and approached John and Andrea about moving into the home Tim and Kathleen had been occupying on Prospect Boulevard (Prospect home). In two transactions, Tim and Kathleen gifted the Prospect home to John and Andrea by way of joint tenancy deeds with full rights of survivorship. John and Andrea sold the Hillside home. John testified Tim showed him figures demonstrating that the Prospect home, which was the larger of the two residences, would cost about the same to own as the Hillside home had cost, including the mortgage. John stated the Prospect home actually cost more to own, even though he and Andrea did not have a mortgage to pay. John and Andrea relied heavily upon Tim and Kathleen for financial assistance throughout the marriage. As the district court noted, John and Andrea were never able to live within their means.

The district court issued a dissolution decree for the parties on August 4, 2011. The court granted the parties joint legal custody of the children, with Andrea having physical care. The court imputed annual income to John of $30,000. He was ordered to pay child support of $910 per month. John was also ordered to pay $100 per month for medical support until he could provide the children with health insurance through employment. The court did not award any spousal support.

The court determined the gift of the Prospect home had been made to both parties and the value of the home should be divided as a marital asset. The court gave Andrea exclusive possession of the home until August 1, 2016, and

she has until that date to purchase John's undivided one-half interest in the property for $60,000, plus interest. If Andrea does not exercise this option by August 1, 2016, then the decree orders the parties to sell the home, with John receiving $60,000 from the proceeds of the sale. The court divided the parties' other property to give John assets worth $6175 and debts of $23,600. Andrea was awarded assets worth $17,200 and debts of $18,540. Each party was ordered to pay his or her own attorney fees.

John filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) raising several issues. This motion was denied by the court. Andrea appeals the property division and spousal support provisions of the dissolution decree.

II. Standard of Review.

In this equity action our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. Property Division.

Andrea claims the Prospect home should have been considered as a gift to her alone and she should have been awarded the home as her individual property. In matters of property distribution, we are guided by Iowa Code section 598.21 (2009). 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). In considering the economic provisions in a dissolution decree, we will disturb a district court's ruling "only when there has been a failure to do equity." *In re Marriage of Smith*, 573 N.W.2d, 924, 926 (Iowa 1998) (citations omitted).

In considering gifted property, we must first determine whether the gift was given to one party only or if the gift was made to both parties. *In re Marriage of Vrban*, 359 N.W.2d 420, 427 (Iowa 1984). Under Iowa Code section 598.21(5), a court is required to divide all property in a marriage, except inherited property and gifts received by one party. On the other hand, if the property has been gifted to both parties, the property is divisible in the same manner as other marital assets. *In re Marriage of Wendt*, 339 N.W.2d 615, 616 (Iowa Ct. App. 1983). The provisions of section 598.21(5) are not applicable when a gift is made to both parties. *In re Marriage of Martens*, 406 N.W.2d 819, 821 (Iowa Ct. App. 1987).

In making a determination as to whether property has been gifted to one or both parties, we consider (1) the intent of the donor and (2) the circumstances surrounding the gift. *In re Marriage of Wertz*, 492 N.W.2d 711, 714 (Iowa Ct. App. 1992). "The question of whether or not there has been a gift in a given case is one of fact, in which the intent of the alleged donor in delivering the property is a very material inquiry." *Martens*, 406 N.W.2d at 821 (citation omitted). If the gift is real estate, the fact that both parties' names are on the deed is relevant, but not determinative. *Id*.

Tim Hurley testified he had wanted to keep the Prospect home in the family and the transfer of the property "was for Andrea and the children and John

benefited by the fact of being my daughter's spouse." He admitted, however, the deeds show the transfer was made to John and Andrea as joint tenants with rights of survivorship. Tim acknowledged if his daughter had died, the house would have gone to John. Tim and Kathleen both testified they had a good relationship with John. Mark Rolinger, an attorney, assisted Tim and Kathleen with the gratuitous transfer of the Prospect property to John and Andrea. He testified the gift of the Prospect home was made to John and Andrea together for gift tax purposes. He testified, "I think it is a genuine gift to both of them." He also agreed with the statement, "there was an intent to make a gift to both of them."

After carefully considering the evidence the district court found:

> On the whole record, it is apparent that everyone involved intended these conveyances were to vest title to this property in [Andrea] and [John] as joint tenants just as recited in the deed. It was not until the parties separated and had the opportunity to confer with attorneys that the possibility of recasting the transaction as a gift solely to [Andrea] arose and the problem with that position is that donative intent must be determined at the time a gift is made, not after it has been delivered and accepted and consequences have arisen which could not have been foreseen at the time the gift was made.

The court also found that without the expectation that he would be a joint owner of the Prospect home John did not have any incentive to sell the Hillside home, where the parties had been building equity, and take on the responsibility of a more expensive home where he did not share in the equity. The court concluded, "this property was given to the parties as joint tenants and is a marital asset subject to division."

Upon our de novo review, we agree with the district court's conclusion. The evidence shows that at the time the gift of the Prospect home was made, Tim and Kathleen intended the gift to be for John and Andrea jointly. When property has been gifted to both parties, the property is divisible in the same manner as other marital assets. *Wendt*, 339 N.W.2d at 616. We conclude the district court properly included the value of the Prospect home in its division of marital property.[1] We further conclude the court acted equitably when it awarded John one-half interest in the marital home. We will not disturb the district court's division of property on appeal.

Andrea also asserts that if the property is not set aside to her, she should be given more time, until August 1, 2021, to purchase John's interest in the property. She points out that the parties' youngest child will not graduate from high school until 2021. Andrea claims there is a very real possibility she would be forced to sell the house at a time when some of the children would still be living at home.

We note the parties have only one real asset, the Prospect home. In the division of the other marital property, John was given far more debts than assets. We believe it would be inequitable to John to force him to wait until 2021 to receive his share of the equity in the home. We affirm the district court's

[1] We also agree with the district court's conclusion that even if the Prospect home had been given to Andrea alone, it would be inequitable not to treat the property as a divisible marital asset. Inherited and gifted property may be divided "upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." Iowa Code § 598.21(6). The court noted the contributions made by John to the maintenance and upkeep of the home, the payment of higher taxes and responsibilities by John in reliance on an expectation created by Andrea's father that the Prospect home would cost no more to run than the Hillside home, and the unfairness that would result from the loss of equity John could have built up in the Hillside home had they remained there.

determination that Andrea should have until August 1, 2016, to purchase John's interest in the home for $60,000. We note it is by no means certain that the parties would have to sell the home in order for Andrea to pay John $60,000.

IV. Spousal Support.

Andrea recognizes that since John was unemployed at the time of the dissolution hearing, he does not have the ability to pay spousal support. She asks, however, to be awarded spousal support of one dollar per year. That way, if in the future John did have the ability to pay spousal support, she could ask for a modification of the dissolution decree to increase the spousal support award.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *Id*. In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1). *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). We give the district court considerable discretion in awarding alimony, we will disturb the court's ruling only when there has been a failure to do equity. *Smith*, 573 N.W.2d at 926.

The district court denied Andrea's request for a token amount of spousal support. The court found:

> Because she is capable of becoming self-supporting, [Andrea] does not qualify for traditional alimony or permanent spousal support. Rehabilitative spousal support, however, would be appropriate for some limited amount of time while [Andrea] is trying to secure full-time employment and become self-sufficient but [John] can't afford it and, with his share of marital debt and child support, will not be able to afford it within the time it should take [Andrea] to get on her own feet.

We concur in the district court's conclusions. At the time of the hearing, Andrea was employed part-time, and John was not employed at all. Despite his lack of income, John was ordered to pay $910 per month in child support and $100 per month in medical support. Additionally, he was given a majority of the parties' marital debt. We conclude an award of spousal support would not be equitable.

V. Appellate Attorney Fees.

John has requested attorney fees for this appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2 90, 94 (Iowa Ct. App. 2007). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Andrea.

AFFIRMED.