

IN THE COURT OF APPEALS OF IOWA

No. 2-544 / 11-1541
Filed August 22, 2012

**IN RE THE MARRIAGE OF NANCY JANE NEVINS
AND LYLE DEAN NEVINS**

Upon the Petition of

NANCY JANE NEVINS,
Petitioner-Appellant,

And Concerning

LYLE DEAN NEVINS,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

Nancy Nevins appeals from the economic provisions of the decree dissolving her marriage to Lyle Nevins. **AFFIRMED AS MODIFIED.**

John P. Roehrick of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant.

Andrew B. Howie of Hudson, Malleney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Nancy Nevins appeals from the economic provisions of the decree dissolving her marriage to Lyle Nevins. She contends the district court erred in finding her inherited property had been commingled and was subject to division. She also argues the court erred in its valuation and distribution of the marital assets. Lyle requests an award of his appellate attorney fees.

Upon our de novo review, we find \$25,000.00 of Nancy's inherited money should be set aside. We believe the court appropriately handled the question of the parties' shareholder debt to a company they formed. We agree also with Nancy that the court erred in computing Lyle's dissipation of marital assets from his 401(k) account following the parties' separation. We modify the decree to balance that inequity.

I. Background Facts and Proceedings.

Nancy and Lyle met in 1981 and soon started living together. They have a daughter, who was born in 1984. Their nearly twenty-year marriage began in September 1991.

Nancy has a son from a previous marriage. Her first husband died in an automobile collision in 1980. Nancy received the proceeds of his insurance policy and Social Security benefits until she remarried. Her son received Social Security benefits until he turned eighteen in 1998. Nancy used the money she received from her husband's death to purchase a home in DeSoto in December 1980, making a \$25,000.00 down payment on the property with \$193.01 monthly

payments to owner Don McQueen. Lyle did not contribute to the monthly payments while living with Nancy.

In 1984, Nancy sold the DeSoto house on contract. The contract required the buyer to pay \$10,000.00 down and twice monthly payments of \$193.01. One of the payments each month satisfied Nancy's requirements under her contract with McQueen, and she kept the second payment. When the contract with the second purchaser was paid off, McQueen received \$12,125.69 to settle the amount Nancy still owed on her contract, and Nancy received \$15,710.04. Nancy does not recall how she used that money.

After Nancy received the down payment on the DeSoto house contract, she and Lyle purchased five acres in Dallas Center for \$30,000.00 and remodeled a carriage house on the property to use as their home. Nancy used part of the proceeds from the sale of the DeSoto house for the \$3000.00 down payment on the Dallas Center property. The couple financed the remodeling project with the remaining \$7000.00 from the \$10,000.00 down payment. The couple borrowed another \$7406.92 against Nancy's 1984 Toyota.

In 1988, Nancy and Lyle began construction on a home on the same Dallas Center parcel. The couple borrowed \$91,700.00 to build the house. To obtain the loan, Nancy cashed out life insurance policies she had purchased for herself and her son after her first husband's death; the annuities were worth about \$10,000.00. Nancy and Lyle then leased out the carriage house on the property. At the time of the dissolution, Nancy was receiving \$450.00 per month for its rental. The Dallas Center property is assessed at \$210,680.00. A total of

\$89,245.28 is owed on the first mortgage and \$90,182.78 is owed on a line of credit to U.S. Bank that operates as a second mortgage on the property.

Nancy was employed outside the home off and on until 1989, when she became a real estate agent. In 1999, Nancy acquired a ReMax franchise (hereinafter referred to as West Realty). Nancy and Lyle formed a "C corporation" known as West Realty, Inc. Nancy owns fifty-one percent of the stock and Lyle has a forty-nine percent share. Nancy is the sole officer of the corporation.

Nancy and Lyle also formed an "S corporation" known as Business Support Services, which owns and manages the office building where West Realty is based. The corporation financed the building with a mortgage through Freedom Bank and a second mortgage through the Small Business Administration (SBA). At the time of dissolution trial, the property was in foreclosure to satisfy the Freedom Bank mortgage and the SBA loan was seven months in arrears. Nancy and Lyle personally guaranteed the SBA loan in the amount of \$197,000. If the sale of the property exceeds the amount Business Support Services owes Freedom Bank, there is a possibility the SBA will forgive the loan it made. Business Support Services also owns a Kabota tractor, attachments, two trailers, and a BMW.

When Nancy and Lyle began their relationship, Lyle was unemployed. He took heating, ventilation and air conditioning (HVAC) classes at Des Moines Area Community College and, in 1982, started working full-time as an HVAC technician. In 1991, just before the marriage, Lyle suffered a work-related injury,

severing the first digits of two fingers on his left hand. He received approximately \$60,000.00 in workers' compensation benefits. In 2003, Lyle ended his career as an HVAC technician and started working for West Realty. He earned approximately \$59,000.00 his last year of HVAC employment, which included a severance package. Lyle was not paid for the work he performed for West Realty.

At the time of dissolution, Lyle was employed as a maintenance manager for U.S. Bank buildings. He earned \$52,000.00 per year and was eligible for bonuses. Lyle also received health insurance and 401(k) contributions from his work.

During the marriage the parties invested in farmland in Dallas County and Guthrie County. In 2005, they purchased the eighty-acre "Dallas Center farm" in Dallas County for \$352,080.00. The parties financed a \$206,115.00 mortgage through Farm Credit Services. They paid the rest of the purchase price with earnest money they obtained through a loan from West Realty. The farm is worth approximately \$460,000.00 and has a tenant. At the time of trial, the parties owed approximately \$177,286.00 on the mortgage.

Nancy and Lyle acquired the one-hundred-acre "Redfield farm"—spanning the border between Dallas and Guthrie counties—for \$310,465.00. The parties put down \$105,000, which they borrowed from West Realty, and obtained a \$205,000 loan from Farm Credit Services. At the time of trial, they owed approximately \$176,322.00 on the mortgage. The court valued the property at approximately \$500,000.00.

Nancy and Lyle also formed L & N Lake, L.L.C, which purchased a lot at Lake Panorama for \$152,500.00 in 2008. The couple paid for the lot with a \$52,331.00 loan from West Realty and a mortgage from Charter Bank. The court valued the property at approximately \$200,000.00. The parties owed approximately \$95,047.00 on the mortgage at the time of trial.

On December 30, 2009, Nancy filed a petition seeking to dissolve the marriage. In a July 23, 2010 temporary order, the district court allocated responsibility for the monthly expenses of the parties and their businesses. The court conducted a trial in February and March 2011. The court held additional hearings in April and May 2011 regarding Nancy's motion to reopen the record for additional testimony concerning Lyle's dissipation of funds from his 401(k) account. The record indicated that Lyle used approximately \$59,000.00 of his \$115,000.00 401(k) account on early-withdrawal penalties and attorney fees incurred during the divorce proceedings and in another legal matter.

On July 13, 2011, the district court entered the divorce decree. The court found both parties received money before the marriage that was distinctly their own—workers' compensation benefits to Lyle and life insurance proceeds to Nancy. But the court declined to exclude those amounts from the decree's distribution because the parties commingled those funds with their regular income to the extent that they were "indistinguishable" from their other marital assets. The court further found Lyle dissipated assets by removing funds from his Fidelity 401(k) account to pay legal fees and held that "adjustment should be made therefore in the distribution of assets and liabilities."

The decree awarded the marital homestead, the Dallas Center farm, the BMW owned by Business Support Services, the West Realty assets, and various investments to Nancy. Those assets had a total value of \$814,840.00. Lyle received the Redfield farm, a Cadillac, the Lake Panorama lot, and investments. The court valued these assets at a total of \$745,812.00. The district court's asset calculations did not include the mortgages on the properties. The debt was distributed with Nancy responsible for \$110,898.00 and Lyle responsible for \$60,895.00.

Both parties filed motions under Iowa Rule of Civil Procedure 1.904(2), seeking to enlarge or amend the court's findings. Following a hearing, the court entered its August 22, 2011 order, amending the decree to provide the legal descriptions of the parties' property and allowing them one year to refinance or assume the existing mortgages and debts on the property awarded in the decree. The order also provided a mechanism by which either party could elect to have their respective portion of the West Realty loan to the shareholders forgiven.

II. Scope and Standard of Review.

We review dissolution cases de novo. *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). We decide the issues raised on appeal anew; but we give weight to the trial court's fact findings, especially where witness credibility is concerned. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). Because our determination turns on the facts of a particular case, precedent is of little value. *Id.*

III. Property Distribution.

Nancy received insurance proceeds related to the death of her first husband. Given our case law, Lyle does not question Nancy's characterization of these proceeds as inherited property. See *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). Nancy contends the district court erred in failing to exclude her inherited property from the property division after finding it had been commingled with other marital assets. She claims she is entitled to an additional \$59,000.00 before equitable distribution is considered.

Iowa Code section 598.21(5) (2009) requires the equitable division of property between divorcing spouses. Inherited or gifted property stands as an exception to the statutory mandate of equitable distribution. Iowa Code § 598.21(6). Inherited property is normally awarded to the individual spouse who owns the property, independent from the equitable distribution process. *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). But this exclusion is not absolute; inherited property may be divided if equity demands it in light of the circumstances of a spouse or the children. *Id.*

We consider multiple factors in determining whether to divide inherited property, including (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; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) special needs of either party; and (5) any other matter which would render it plainly unfair to have the

property set aside for the exclusive enjoyment of the devisee. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). Other matters, such as the marriage length and the amount of time the property was held after it was devised, though not independent factors, may indirectly bear on the question for their effect on the listed factors. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982).

Nancy's first husband died in 1980. The same year, she purchased a home in DeSoto, using the proceeds from his life insurance policy to make a \$25,000.00 down payment on the property. When she sold the home on contract, she received a \$10,000.00 down payment from the buyer, which she used to purchase the Dallas Center property and make improvements to the carriage house. She received \$15,783.08 in interest on the contract from the sale, plus an additional \$15,710.00 when the balance was paid. Nancy asserts the \$7406.92 loan she and Lyle received to renovate the carriage house—for which she used the car she purchased from her inherited funds as collateral—should also be counted as her inherited property. In addition, she counts the \$10,000.00 insurance annuity she cashed out to secure the loan to build their Dallas Center residence as inherited property. She tallies these amounts, minus recoupment of the \$25,000.00 down payment, for a total claimed offset of \$58,900.00.

The district court declined to exclude any of Nancy's inherited funds from the property distribution. The court equated Nancy's inherited funds with Lyle's workers' compensation payout, including both amounts in the divisible marital

estate. The court said “no doubt” the parties used these funds during the course of the marriage, comingling them with their marital assets. Because the parties’ combined cohabitation and marriage lasted thirty years, the court decided the funds were “indistinguishable from the parties other assets and no specific portion of the parties’ present assets are directly attributable to Nancy’s inheritance or Lyle’s workers’ compensation benefits.”

A different legal analysis applies to premarital assets, such as workers’ compensation benefits, than to inherited or gifted property, such as life insurance proceeds. Inherited property—even if received before the marriage—is not divided unless the failure to do so creates an inequity. Iowa Code § 598.21(6). By contrast, when it comes to other premarital property, the district court may place differing weight on its status, but may not separate the asset from the divisible estate and automatically award it to the spouse that owned the property prior to the marriage. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Life insurance proceeds are considered inherited property that should be excluded from the property distribution unless doing so would be inequitable. *See Goodwin*, 606 N.W.2d at 15. .

We agree with the district court that the evidence does not warrant setting aside the entire \$59,000.00 Nancy claims is attributable to her inheritance. The record establishes that Nancy purchased the DeSoto home by making a \$25,000.00 down payment with the money she inherited from her first husband. When she sold that home on contract, she received \$10,000.00, which she used as a down payment on the Dallas Center property she purchased with Lyle and

to remodel the carriage house. While the contract was being repaid, Nancy received \$15,783.08 in interest (the total of the \$193.01 monthly payments made on the contract). She testified she placed that money in a separate account, but also paid household expenses out of that account. Nancy received \$15,710.04 when the balance on the contract came due, but testified, "I'm not sure what we did with it. I think put it into the Dallas Center property." We find it is equitable to set off the original \$25,000.00 Nancy inherited and used as a down payment on the DeSoto home. But we decline to set aside any additional amount attributable to appreciation or interest because the evidence in the record does not provide a basis to calculate which portion of those funds remain. See *Goodwin*, 606 N.W.2d at 321 (setting aside only the original contribution to a mutual fund made from an inheritance and not any portion of the mutual fund attributable to earnings where the record did not provide a basis to calculate such earnings). Nancy provided no accounting for how that money was spent.

We are unconvinced by Nancy's argument the \$7400.00 loan secured using her 1984 Toyota should be considered inherited property. The record includes no evidence the loan depleted the asset. We presume the loan was repaid using marital funds.

Nancy also claims she should receive a set off for the \$10,000.00 life insurance annuity she cashed out to secure the loan to build the marital residence on the Dallas Center property. While Nancy testified she purchased the annuity shortly after her husband's death, there is no evidence in the record to support it was purchased with \$10,000.00 of inherited funds. Because there is

insufficient evidence by which we can characterize the annuity as inherited property, we decline to set it off.

We modify the property distribution to set aside \$25,000.00 of Nancy's inherited funds.

B. Property Dissipation.

Nancy next contends Lyle received more than his share of the property because the district court failed to account for Lyle's dissipation of marital assets when dividing the marital estate.

It is proper for the court to consider the dissipation of assets when dividing property. *In re Marriage of Fennelly*, 737 N.W.2d 97, 104 (Iowa 2007). In determining whether dissipation has occurred, the court must determine: "(1) whether the alleged purpose of the expenditure is supported by the evidence and, if so, (2) whether that purpose amounts to dissipation under the circumstances." *Id.* In determining whether the purpose of the expenditure amounts to dissipation, the court considers several factors:

(1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.

Id. at 104-05.

The district court found "Lyle did in fact dissipate assets by removing funds from the Fidelity 401(k) and using the same to satisfy legal attorney fees in this and other actions to the detriment of Nancy." The court determined an adjustment should be made in the distribution of assets and liabilities to account

for the dissipation. It awarded Nancy \$50,000.00 of the Fidelity account and awarded Lyle the balance after “[t]aking into consideration Nancy’s disposal of considerable of Lyle’s personal property.”

Nancy does not object to the district court’s division of the Fidelity account. Her argument is the district court should have allocated the \$59,000.00 in dissipated funds to Lyle, which would have the effect of increasing her share of the property distribution. We agree Lyle’s side of the ledger should be credited for the \$59,000.00 he withdrew and spent from the account while the dissolution proceedings were pending.¹ See *Goodwin*, 606 N.W.2d at 322-32 (including \$9000.00 the wife dissipated from a mutual fund account in the property distribution by placing it in the wife’s list of assets).

Nancy also argues by allowing Lyle to elect to have the loan he owed to West Realty forgiven, the court created a taxable event. She argues the court failed to consider the tax consequences of such an election, which also increased Lyle’s share of the property distribution, while decreasing the value of West Realty.

Although forgiving Lyle’s debts to West Realty would “lower” the value of the company, which was awarded to Nancy, the court never assigned the company a value aside from the value of a Lexus and some paintings. Nor did the court factor the debts into its property distribution scheme. The court found, “It is not very likely that the parties can repay [the shareholder loans].” Given that the parties’ assets are encumbered by debt, much of which is in arrears, this

¹ Taking the dissipated funds into account, the chart on page 15 of this opinion shows the \$59,000 as one of Lyle’s assets.

finding is supported by the evidence. Because the court did not assign Nancy a value for West Realty and did not include the shareholder loans in the property distribution, the debt forgiveness does not require a balancing of equities.

The tax consequences to each party are one factor to consider in dividing property. Iowa Code § 598.21(5)(j). In its order amending or enlarging its findings, the court states, "In the event either party elects to have his/her loan indebtedness forgiven, he/she shall be responsible for any tax consequences that may result and shall indemnify and hold the other party harmless for the same." We find this disposition was proper.

C. Overall Distribution.

Finally, Nancy contends, taking into consideration the factors outlined in section 598.21(5), she should receive a greater share of the property accumulated during the marriage.

Having considered the length of the parties' marriage, the property brought into the marriage by each spouse, their respective contributions during the marriage, and their age, health, and earning capacity, we find a roughly equal division of the property is equitable. The property distribution crafted by the district court awards both parties a vehicle, income-generating property, and retirement assets. To account for the dissipated 401(k) funds and the setoff of inherited monies, we modify the property distribution to require Lyle to make a \$76,500.00 equalization payment to Nancy. The payment should be made within one year of the issuance of procedendo in this case.

The following chart shows the gross assets awarded to the parties and their gross debts. After subtracting the gross debts from the gross assets, the chart shows Lyle with \$475,734.00 in net assets and Nancy with \$322,908.00 in net assets—a difference of \$152,826.00 in Lyle’s favor. The equalization payment balances the equities, leaving each party with a total of approximately \$399,000.00 in assets.

	Nancy's Assets			Lyle's Assets	
Residence		210,680	Redfield Farm		500,000
Dallas Center Farm		460,000	Cadillac		10,150
BMW		11,600	IPERS		22,000
West Realty Assets:			Fidelity IRA		7,000
	Lexus	26,000	EMCOR 401(k)		1154
	Paintings	8000	Farm Bureau IRA		5508
Fidelity IRA		50,000	Lake Lot		200,000
MMTIF Stock		11,740	Farm Bureau Life		3,186
Farm Bureau 401(k)		37,500	Fidelity IRA (dissipated funds)		59,000
Setoff for inherited property		-25,000			
Gross assets		790,520	Gross assets		807,998
	Nancy's Debts			Lyle's Debts	
Wells Fargo credit line		-103,000	Bank of America credit cards		-27,692
Veridian judgment		-6709	Casey's Barclay credit card		-25,390
Bank of America credit card		-1189	Capitol One credit card		-1769
Residence - first mortgage		-89,245.28	Veridian Judgment		-6044
Residence - second mortgage		-90,182.78	Redfield farm mortgage		-176,322
Dallas Center farm mortgage		-177,286	Lake lot mortgage		-95,047
Gross debts		-467,612	Gross debts		-332,264
Net assets		322,908	Net assets		475,734
Equalization payment		76,500	Equalization payment		-76,500
TOTAL		399,408	TOTAL		399,234

IV. Appellate Attorney Fees.

Appellate attorney fees are not a matter of right, but rest within the court’s discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). In

determining whether to award appellate attorney fees, we consider “the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.” *Id.* Given the parties similar economic situations and the outcome of the appeal, we decline to award Lyle appellate attorney fees.

Costs of the appeal are assessed one-third to Nancy and two-thirds to Lyle.

AFFIRMED AS MODIFIED.