IN THE COURT OF APPEALS OF IOWA

No. 6-952 / 06-0100
Filed February 14, 2007

IN RE THE MARRIAGE OF ROGER L. LUDWIG AND SHERRY L. LUDWIG

Upon the Petition of
ROGER L. LUDWIG,
Petitioner-Appellant/Cross-Appellee,

And Concerning
SHERRY L. LUDWIG,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Guthrie County, John D. Lloyd, Judge.

Robert Ludwig appeals and Sherry Ludwig cross-appeals from the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

Patrick W. O'Bryan and Alexander Rhoads, Des Moines, for appellant.

Jeffrey N. Bump of Bump & Bump, Panora, for appellee.

Considered by Huitink, P.J., and Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

VOGEL, J.

Robert Ludwig appeals and Sherry Ludwig cross-appeals from the financial provisions of the decree dissolving their marriage. We affirm as modified.

Background Facts and Proceedings.

Robert and Sherry were married in 1983, and one child was born during their marriage, Orie, in 1988. Both parties worked throughout the marriage, Sherry as a home nursing aide, currently earning $9.00 per hour and Robert as a heating, ventilation, and air conditioning technician, earning $28.65 per hour. In addition to her earnings as a nursing aide, Sherry receives approximately $3548 per year in farm rental income.

During the course of the marriage, both parties received inheritances, and Sherry received substantial gifts. In 1990, Sherry, her brother, and sister inherited from their grandmother a one-half interest in a farm known as the "Disney property." At the time, Sherry's interest was valued at $25,000. In addition, she inherited $5179 which she used to make a down payment on her share of the remaining one-half interest of the farm. Sherry's mother also gifted her $9000 which she used to make principal payments on the purchase of the remaining half of the farm. Thus, her total in gifts and inheritances relative to the farm was $39,179. In addition, Sherry received savings bonds with a face value of $3700 from her mother. In 2001, Sherry realized $28,147 after she and her siblings sold the house on the Disney property along with a few acres. The proceeds were deposited in Sherry's separate savings account, used for her

living expenses after the couple separated, and had diminished to approximately $6600 at the time of trial.

Also during the marriage Roger inherited $28,500 from his mother's estate. From those assets, Roger used $5000 as a down payment on a truck, $1000 on a ring he gave to Sherry, and invested the rest in Fidelity and Janus accounts. The value of those investment accounts had decreased by the time of trial. The district court found that only $22,029 in current assets were traceable to Roger's inheritances.

On February 25, 2005, Roger filed a petition seeking to dissolve the parties' marriage. Following a trial, the court divided the assets and liabilities of the parties, and ordered that Roger make a $45,000 equalization payment[1] to Sherry. It also ordered that Roger pay Sherry alimony of $350 per month "until the death of either party or Sherry's remarriage, whichever first occurs." Roger appeals, claiming the court inequitably divided the parties' assets and erred in failing to order that his alimony obligation cease at the age of sixty-five. Sherry cross-appeals, contending the court overvalued her interest in the Disney property.

Standard of Review.

We review dissolution decrees de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *Id.*

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[1] In a posttrial ruling, the court adjusted this payment downward to $43,750 in recognition of certain assets, it had inadvertently failed to consider in the original property division, as well as a $5000 debt that Roger incurred for attorney fees.

Property Division.

Upon the dissolution of marriage, the court must divide the property of the parties equitably, taking into consideration a number of factors, including the length of the marriage, property brought to the marriage by either party, each party's contribution to the marriage, and the parties' ages, physical health, and earning capacities. Iowa Code § 598.21 (2005). 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).

The district court found that Sherry's undivided one-third interest in the Disney property was $116,000. Because this interest in the farm was obtained through the $42,879 she received in gifts and inheritance, the court determined that current appreciation of $73,121 existed. The court then awarded to Sherry a $50,000 "appreciation credit," which effectively characterized $23,121 of the appreciated value of Sherry's asset as property subject to distribution.

On appeal, Roger urges that all of the appreciated value ($73,121) should have been subject to distribution, while on cross-appeal, Sherry argues that it was "wholly inequitable for the district court to divide any portion of the appreciated value of [her] interest in the Disney farm."

There are several factors given special emphasis when determining an equitable division of property owned prior to the marriage and appreciated during the marriage. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982). First, the "tangible contributions of each party" to the marital relationship

are considered. *Id*. at 815. Looking to the tangible contributions prevents entitlement to appreciated property due to the mere existence of the relationship. *Id*. Second, we look at whether the appreciation of the property is attributed to fortuitous circumstances or the efforts of the parties. *Id*. Third, we look to the length of the marriage. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995). However, the critical inquiry is always whether the distribution is equitable in the particular circumstances. *In re Marriage of Williams*, 449 N.W.2d 878, 881 (Iowa Ct. App. 1989).

Upon our de novo review of the record, we believe that no part of the Disney property's appreciation should have been subject to distribution. From the time Sherry received the inheritance and farm invested gifts, she considered the farm a separate asset held and managed with her siblings with no proceeds from it commingled with marital funds. Any appreciation that occurred to the property was a result of the sound decisions made by Sherry and her siblings. Roger made no tangible contribution toward its appreciation in value. Furthermore, due to Sherry's unique circumstances—her health issues and lower relative earning potential—we conclude equity warrants her receiving credit for all of the appreciation. We therefore modify the decree to delete the portion granting Sherry a $50,000 appreciation credit. We conclude the full portion of the property's appreciation, or $73,121, should have been "credited" or set aside to her.[2]

[2] The effect of this modification is to have the entire current value of the Disney Farm offset to Sherry: Total appreciation of $73,121 plus the $42,879 set aside by the district court as Sherry's separate property equals $116,000, the current

Next Roger asks us to modify his inherited property award from the amount the district court credited him with, $22,029, to the amount of his original inheritance of $28,500. However to do so, would be to set aside to him part of an asset that no longer exists. *See In re Marriage of Schriner*, 695 N.W.2d 493, 495 (Iowa 2005) (noting all property of the marriage *that exists at the time of the divorce* is divisible property). We therefore decline Roger's request.

In this division we must also consider a further argument made by Sherry on appeal. Prior to trial Roger borrowed $5000 from his brother to use towards his attorney fees. This expense was in addition to $5000 Roger had already paid his attorney from joint funds. Sherry, on the other hand, paid a $1500 retainer to her attorney with her inherited funds, but at the time of trial still had outstanding attorney fees of $5972.99. In its property division, the court treated Roger's debt to his brother for attorney fees as a marital debt subject to division. It did not award attorney fees.

In her cross-appeal, Sherry argues it was inequitable to consider this a marital debt while failing to recognize she used inherited funds to pay a portion of her fees and still had an outstanding debt to her attorney. She asks that we modify the decree to award her attorney fees or that we make an allowance in the property settlement to reflect Rogers' depletion of joint funds to pay the remaining portion of his attorney fees. We agree with Sherry that equity is not served by treating Roger's loan from his brother for his attorney fees as a

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value of the farm. As such, we need not address Sherry's argument that the court failed to accurately value the Disney farm.

divisible debt. Accordingly, we remove this debt from the court's distribution calculations.

The net effect of the adjustment for Sherry's appreciated separate property and Roger's attorney fee debt is to have $151,489 of divisible assets distributed to Roger and $35,886 to Sherry. We next must determine what amount, if any should be paid from Roger to Sherry to have an equitable distribution of the divisible assets, keeping in mind that equitable does not require an equal division. We conclude the district court's decision to roughly equalize the distribution is reasonable and therefore do so after consideration of our amended property totals. After recalculation, we therefore modify Roger's equalization payment upwards to $57,801. All other payment terms incorporated into the district court's decree shall remain the same.

Spousal Support.

The district court ordered Roger to pay Sherry spousal support in the amount of $350 per month until either dies or Sherry remarries. On appeal, Roger requests that we modify the decree to provide that his support obligation shall cease when he reaches age sixty-five. In support of this, he notes that his earning capacity will greatly decrease upon his retirement at age sixty-five because he will be living off his pensions, which by the court's order will be split with Sherry.

An award of alimony depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). When determining the appropriateness of alimony, the court must consider the statutory factors enumerated in Iowa Code section 598.21A. The court also

considers each party's earning capacity, as well as the parties' present standards of living and ability to pay, balanced against the relative needs of the other. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

Upon consideration of the appropriate factors, we grant Roger's request that his alimony obligation shall terminate when he reaches the age of sixty-five. Sherry was forty-eight years old at the time of trial and still stands to receive support for almost twenty years. Although she has certain health conditions, none of those conditions appear to present imminent concerns. Furthermore, she will have separate sources that should provide sufficient income to her. She has expectations of income from her farm, received a substantial amount of assets following the dissolution, will receive a portion of Roger's accrued pension benefits through his union, and expects to receive IPERS benefits. We accordingly we do not believe equity supports saddling Roger with such a long-term alimony obligation and modify accordingly.

Appellate Attorney Fees.

Sherry seeks an award of appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa Ct. App. 1994). Given the relative asset position of the parties, we deny Sherry's request for attorney fees on appeal. Costs on appeal are assessed one-half to Roger and one-half to Sherry.

AFFIRMED AS MODIFIED.

Brown, S.J., dissents in part.

BROWN, S.J. (dissenting in part)

I dissent only from the majority's decision to modify the district court's treatment of the appreciation attributed to the property inherited by Sherry during the marriage. The district court concluded that Roger had contributed to the appreciated value, stating "[i]t is also clear that Roger's efforts as the family's primary supporter assisted Sherry in keeping the asset separate." The district court included $23,121 of the appreciated value as a marital asset, and set aside the remaining $50,000 to Sherry.

I believe this is a reasonable resolution of the appreciation issue and justified by the record. I see no reason to second guess the judgment of the district court on this question. *See In re Marriage of Spiegel,* 553 N.W.2d 309, 319 (Iowa 1996) ("Although our review of the trial court's [alimony] award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity."); *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996) (cautioning appellate courts regarding refining trial court's judgment calls).

I would affirm the district court's equitable allocation of the appreciated assets. In all other respects I concur with the majority.