IN THE COURT OF APPEALS OF IOWA

No. 8-177 / 07-0970
Filed June 25, 2008

IN RE THE MARRIAGE OF CYNTHIA COLLINS EUBANK AND KEITH HAROLD EUBANK

Upon the Petition of
CYNTHIA COLLINS EUBANK,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KEITH HAROLD EUBANK,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Warren County, William H. Joy, Judge.

Keith Eubank appeals and Cynthia Eubank cross-appeals from the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

William W. Graham of Graham & Ervanian, P.C., Des Moines, for appellant.

Leslie Babich and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Keith Eubank appeals and Cynthia Eubank cross-appeals from the decree dissolving their marriage. We affirm as modified.

I. Background Facts and Proceedings.

Keith and Cynthia were married on May 26, 1989. At that time, Cynthia was forty and Keith was forty-nine. Each had been married previously and no children were born during this marriage. Cynthia entered the marriage with a master's degree in education and a bachelor of science degree in nursing. She completed a master's program in nursing in 1993 and is a member of the nursing department at Des Moines Area Community College, earning approximately $60,000 per year, with some additional side income. Keith had been a practicing doctor of veterinary medicine since 1968, and earned $190,470 in 2004 from his practice.

On March 29, 2004, Cynthia filed a petition to dissolve the marriage. On the day prior to the scheduled trial, the attorneys notified the court that a settlement had been reached. However, Keith did not agree to the proposed settlement, prompting Cynthia to file an application to enforce the settlement. A six-day trial on that application and the dissolution petition commenced on May 4, 2005. The district court entered a ruling granting Cynthia's application to enforce the settlement, dissolving the marriage, and awarding her attorney fees. On appeal, this court reversed, concluding the district court erred in determining a binding settlement agreement had been reached by the parties. We therefore remanded for "a full consideration of the issues presented and the entry of an

appropriate decree based on the evidence previously presented at trial". *In re Marriage of Eubank*, No. 05-1690 (Iowa Ct. App. Nov. 16, 2006).

Upon remand, the court reviewed the court file, trial transcripts and exhibits, and entered a decree, dividing the parties' assets and liabilities, such that Cynthia's "adjusted net worth" was $559,956 and Keith's was $578,106. The court denied Cynthia's request for alimony, but awarded her attorney fees totaling $24,000. Keith appeals, contending the court erred in various economic provisions of the decree. Cynthia cross-appeals, claiming the court erred in setting aside a $25,500 Corvette to Keith and in its failure to award an additional $26,000 of attorney fees. She also seeks attorney fees on appeal.

II. Scope and Standards of Review.

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). Although we are 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*). We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Property Distribution.

Iowa law requires that marital property be divided "equitably between the parties," considering several factors. Iowa Code § 598.21(1) (2003). Although an equal division is not required, it is generally recognized that equality is often most equitable. *See In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979).

All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005) (citing Iowa Code § 598.21(1)). Importantly, "the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party." *Id.* Gifts received by either party prior to or during the course of the marriage are the property of that party and are not subject to property division except upon a finding that refusal to divide the property is inequitable to the other party. Iowa Code § 598.21(6).

Marital Home and Tree Farm. Keith asserts the court should have granted him the marital home and a Christmas tree farm on an adjoining property. The parties built the home together and Cynthia's two youngest children were primarily raised in the home. Both parties expressed sentimental attachment to the home. The parties began the tree farm before the marriage by purchasing and planting the trees. While Cynthia admitted Keith has been devoted to the farm since the marriage, she testified they were both involved in the annual sale of trees from Thanksgiving to Christmas. Keith testified that one of the primary reasons he started the tree farm was to provide him with meaningful work and activity in his retirement years.

While Keith's claim concerning the future operation of the tree farm certainly does have appeal, largely due to his personal contributions to the farm and his expectation of working it upon his retirement, we conclude the district court's treatment of this asset was appropriate. Significantly, Keith concedes that whoever receives the farm should also receive the adjoining homestead. It

appears that the animosity between the parties precludes separating the adjoining properties. In light of these facts, there was simply no other way to fashion an equitable remedy by which the properties could be split up. The district court made the decision based on the extensive testimony of the parties and its findings placing more credibility on Cynthia's testimony than on Keith's. We find no reason to disturb that distribution.

Platted Roadways. Concerning the parcels in Fairacre—the subdivision in which the marital home, the tree farm, and the veterinary clinic were located—the decree granted to Cynthia certain platted, but unconstructed roadways. Keith requests that these roadways be granted to him because the roadways comprise or run through part of the property owned and maintained by his veterinary clinic for agricultural purposes and are not contiguous to any land Cynthia received.

While it is true the parties agreed the tree farm should not be awarded separately from the home, from a review of the plats and aerial photos, it is evident the platted roadways in question do not comprise any part of the tree farm or marital residence property. Thus to award this property to Keith would not run afoul of the parties' intentions. Moreover, to award these roadways to Cynthia would seriously interfere with the clinic's ability to conduct agricultural operations on its land. Equity therefore requires that they be granted to Keith. We therefore modify the decree so as to award Keith all the platted roadways owned by the parties in the Fairacre subdivision except to the extent they are physically contiguous to the home or tree farm acreage.

Uncashed Employment Checks. The court included in its property division calculations $65,000 in uncashed employment checks, which Keith held in

February 2005. While Keith admits he did have those checks in his possession "at some point prior to trial" he contends those funds were no longer in his hands in May 2005 because he had used them to pay for such expenses as attorney fees, alimony, property taxes, and income taxes. The record supports that these checks were available at the time of the failed settlement negotiations, but were no longer in existence at the time of trial, some three months later. Keith claims that because he was no longer in possession of those funds, "it would be inequitable for the court to include that asset for purposes of property division."

We ordinarily value assets at the time of the trial. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). There is no evidence in the record that this asset was wasted or spent in an attempt to hide or protect it from Cynthia. In light of the fact Keith's unrebutted testimony reflects these funds were spent for legitimate purposes, including support of Cynthia, attorney fees, and real estate and income taxes, we conclude it would be inequitable to consider the checks for purposes of property division at the time of trial.[1] Accordingly, we adjust the distribution by deleting $65,000 from Keith's asset column. This requires adjusting the equalization payment ordered by the district court. In its decree the court ordered Keith to pay to Cynthia a property settlement of $9000. In light of our ruling concerning the uncashed checks, we order that Cynthia pay to Keith a property settlement of $23,425, representing one-half of the difference in the parties' adjusted net worths.

[1] Specifically, Keith testified he paid: $26,390 to his attorneys; $10,000 to Cynthia's attorneys; $6000 in temporary alimony; real estate taxes of $3332; expert witness fees of $5000; federal and Iowa income taxes of $25,361; and federal and Iowa first quarter estimated income taxes of $25,000.

Valuation and Distribution of Gifts, Inheritances and Retirement Accounts. Keith next claims the court inequitably valued and divided the parties' retirement accounts, gifts and inheritances, which he argues relate to each other under the district court's analysis. He submits that "prior to the equitable division of the [parties'] other assets, there should be separate allocations to Cynthia of her inherited assets[2] and her IPERS account, and to Keith of his retirement accounts and the gifts he received during the marriage."

"Spent" Assets. Keith first contends the court overvalued, and overincluded some of the assets that Cynthia brought into the marriage while undervaluing his premarital contributions. The district court found Cynthia's premarital assets as well as various "spent, traded or worn out" assets should be valued at $22,000. Keith claims the court should not have included the $22,000 of assets that were never contributed to the marriage or were nonexistent at the time of trial. However, the district court also gave Keith credit for premarital assets that he no longer had in his possession, namely a 1984 pickup and miscellaneous furniture and equipment totaling $17,300. Therefore, the district court treated both parties "spent" premarital assets in like manner, and we therefore find no inequity in this result.

Retirement Accounts. The district court considered the value of both parties' assets on the date of trial, then made an adjustment, setting off the premarital, gifted, and inherited property to each, including premarital values of

[2] Keith does not take issue with Cynthia's inheritances, of which $294,870 remained at the time of trial, being set off to her. *See* Iowa Code § 598.21(6) (providing inherited property not subject to division).

the various retirement accounts. With regard to Cynthia's IPERS retirement account, the court included the full amount of $87,113 as an asset of the marriage, and then subtracted out that portion Cynthia claimed to be premarital, $15,000. Likewise the court set out all of Keith's retirement funds—including his SEPT IRA account valued at $311,926, and then reduced that account by $7800, according to the only testimony he provided to support his premarital contribution. No QDRO was ordered and neither party takes issue with this method of segregating the premarital contributions from the marital contributions. Moreover, all of the retirement accounts remained titled in the name of the party owning each account. Accordingly, all of the designated retirement funds will be available to each party upon their retirement. We find no inequity in the ultimate valuation and distribution of these accounts when considered in relation to the totality of the district court's property distribution.

Veterinary Clinic. Keith next takes issue with the court's valuation of his interest in the veterinary clinic as of the date of the marriage, as well as its value on the date of trial. While Cynthia's expert determined the clinic's current value to be $206,000 and Keith's expert valued it at $100,000, the court assigned it a value of $200,000, with an offset of $68,186 as its premarital value. Keith asserts for the first time on appeal that the premarital value should be $100,000 as that was the "judicially established value" in his prior dissolution of marriage decree in 1987. While that decree was made part of the record, nothing in the record reflects it was argued before the district court as a consideration in setting the premarital value. Moreover, at trial, Keith asserted the 1987 value of his share of the clinic was $51,709. The district court analyzed all the information,

testimony, and expert valuations presented, and placed Keith's premarital valuation at $68,186 and date-of-trial valuation at $200,000. Because both valuations are within the reasonable range of the evidence we affirm both findings. *See In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973).

Fairacre Lots. Keith further claims the court undervalued the "Fairacre lots" he brought into the marriage. The court accepted Cynthia's position that the lots purchased before the marriage by Keith should be valued at their $5000 purchase price for purposes of computing Keith's premarital assets. We affirm the court's valuations of what Keith bought the lots for and reject his claim that the court should set aside to him the lots' appreciated valued of $35,000 at the time of trial. Because the purpose of this valuation was to assess Keith's *premarital* asset values, we affirm the trial court's methodology and valuation.

Corvette. The court awarded to Keith a 1963 Corvette, which Cynthia now claims should have been set aside to her as inherited property or in the alternative, as a divisible asset. The vehicle was purchased by Cynthia, using her inherited funds, as a birthday gift for Keith in 1995. After the purchase it was titled and placed in joint ownership.

Gifts received by either party prior to or during the course of the marriage are the property of that party and are not subject to property division except 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). This rule is followed even when the gifted or inherited asset has been placed in joint ownership, or replaced with another asset. *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa Ct. App. 1992). However, the requirement to set aside to a party the property which has

thus been inherited or received as a gift is not absolute, and division may nevertheless occur to avoid injustice. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). 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.*

We agree with the district court that the evidence establishes the Corvette was a completed gift from Cynthia to Keith. In *In re Marriage of Fall*, 593 N.W.2d 164, 167 (Iowa Ct. App. 1999), we noted that whether the inheritance was placed in joint ownership is not controlling and that "the manner a married couple titles or holds inherited or gifted property is not a controlling factor in assessing its treatment as a gift or inheritance." As a gift, the district court appropriately set it aside to Keith and did not include it in the property distribution calculations.

IV. Attorney Fees.

The district court ordered Keith to pay $24,000 of Cynthia's attorney fees, basing this decision on Keith's greater earning potential and "the financial situation of the parties." Keith requests that this court order be modified so that each party pays for their own attorney fees. On cross-appeal, Cynthia asserts the district court should have awarded her an additional $26,000. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 821 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees and the fees must be fair and reasonable. *Id.* Under the circumstances present in this case, we affirm the award of trial attorney fees to Cynthia without modification.

Appellate Attorney Fees. Cynthia seeks an award of appellate attorney fees. On a request for appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We decline to award Cynthia appellate attorney fees.

V. Conclusion.

We affirm the decree dissolving the marriage between Cynthia and Keith, except for two particulars. We modify the decree so as to award Keith all the platted roadways owned by the parties in the Fairacre subdivision except to the extent they are physically contiguous to the home and acreage property. We modify to strike the nonexistent employment checks from consideration in distribution of assets. To that extent, an equalization payment from Cynthia to Keith shall be made in the amount of $23,425. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.