

FILED THIS 14th day of March 2001
Jana Blacksmith
Deputy Clerk

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

Deputy Clerk

IN RE MARRIAGE OF:)
CANDACE PEASE NOT AFRAID,)
Petitioner/Appellant,)
vs.)
WAYNE R. NOT AFRAID,)
Respondent/Appellee.)

CIV. APP. DOCKET NO. 97-011
(Tribal Court Civ. No. 96-416)

OPINION

This is an appeal by Candace Pease Not Afraid from the Findings of Fact, Conclusions of Law, and Decree entered by the Tribal Court (Stewart, J.) on February 20, 1997, in the matter of the dissolution of her marriage to Wayne Not Afraid.

For the reasons explained in this Opinion, this court must remand this case to the Tribal Court to determine the amount that Wayne's estate or heirs shall pay to Candace for her equitable share of the parties' home.

Facts and Course of Proceedings

The parties were married in 1964, and their children were grown up when this action was filed. The only issue in the Tribal Court dissolution proceedings was the division of property, specifically the parties' home. According to the pleadings and the documents filed by the parties, the home was purchased through the Crow Tribal Housing Authority pursuant to a Homebuyers Ownership Agreement for HUD Turnkey III Project dated July 1, 1971.

That agreement was signed by Wayne as "Homebuyer" and Candace as "Homebuyer's spouse." The parties resided there and raised their children in the home from the time it was built in 1971.

The home is located on an approximately 1-acre tract within a 5-acre homesite on trust land owned by Wayne and Cyril Not Afraid. The homesite was leased to Wayne under a 25-year

lease dated May 18, 1971, with all rental fees waived. The land, and later the house, were also used in the Not Afraid family's cattle ranching business.

Candace filed her petition for dissolution of marriage on December 3, 1996, requesting that the house be awarded to her. In her petition, verified under oath, Candace stated that the house was valued at approximately \$18,000. Wayne's answer requested that the house be awarded to him because it was located on his trust land and was the headquarters of his family's ranching business.

The Tribal Court held a hearing on January 29, 1997, which was attended by both parties and their lay counselors. The husband's counsel argued that the established procedure for homes on which there was still an outstanding debt to the Housing Authority was to award the home to the landowner. Under this procedure, according to the husband's counsel, the house should be awarded to the husband in this case, and the husband could be ordered to pay the wife for her share of the home. The wife's counsel disputed whether this was the preferred procedure, and argued that the wife's 33 years of contributions to the marriage could not be overlooked pursuant to Crow Tribal Code § 10-1-120, so the home should therefore be awarded to the wife. The wife's counsel also reserved the question of maintenance (alimony) payments to the wife pending disposition of the home. At the close of the hearing, the Tribal Court granted the dissolution of marriage and took the parties' dispute over the award of the house under advisement.

The Tribal Court issued its findings, conclusions and decree on February 20, 1997, awarding the home and the household furnishings to Wayne. The court's findings of fact and conclusions of law did not specifically address or explain why the home and all the furnishings were awarded to the husband. The decree did not award anything to Candace.

Candace immediately filed a motion for disqualification on the grounds of *ex parte* contacts between the court and Wayne's mother. That motion was denied by Chief Judge White

on February 21, 1997. Candace filed her Notice of Appeal on March 5, 1997. On March 10, she filed a motion requesting an order allowing her to remain in the home while the appeal was pending. The Court of Appeals entered an Interim Order¹ on March 11, 1997, directing Candace to pursue her motion as a motion for stay of the decree with the Tribal Court pursuant to Rule 18(b) of the Crow Rules of Civil Procedure. The Tribal Court denied the motion for stay on March 14, 1997.

On appeal, Candace's objection to the substance of the Tribal Court's decree is that it failed to award Candace a fair share of the value of the parties' home in light of the parties' 33-year marriage. Candace also argued that the Tribal Court erred by awarding the household furniture to Wayne, because she paid for it and was still making payments. Wayne never filed a brief or statement in response, and no further proceedings have taken place in the Court of Appeals.

The court takes judicial notice that Mr. Not Afraid passed away on January 17, 2000.

Discussion

The division of property acquired during a marriage when no minor children are involved is governed by Section 10-1-120(1) of the Crow Tribal Code, which provides in pertinent part (emphasis added):

In a proceeding for a dissolution of a marriage . . . , the court, without regard to marital misconduct, shall . . . *finally equitably apportion* between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both[.] [I]n making the apportionment, the court shall consider the duration of the marriage, and prior

¹ The Interim Order also directed Candace to obtain the Tribal Court's approval for an extension of time to file her notice of appeal pursuant to Rule 3 of the Crow Rules of Appellate Procedure. Because of the very short initial period for filing an appeal, this court has held that extension motions should be freely granted, and has deemed them to have been granted when the party has otherwise actively pursued an appeal. See *Lande v. Schwend*, 1999 CROW 1, ¶ 30. There is no record of the Tribal Court having granted Candace's extension motion. However, considering that appellant's notice was only 3 days late, and that she actively pursued her appeal by having the record transmitted and filing a brief, the court deems such an extension to have been granted in the present case.

marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and source of income, vocational skills, employability, estate, liabilities and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

This Tribal law was apparently based on the Uniform Marriage and Divorce Act (the “UMDA”). It is similar to the law in many States, and nearly identical to the Montana law as originally adopted in 1975. *See* Montana Code Annotated Section 40-4-202; *see also*, Clark, Homer H., *The Law of Domestic Relations in the United States* § 15.1 at p. 591 n.12. Thus, in interpreting Section 10-1-120 of the Tribal Code, this court will seek guidance in the general American domestic relations law as developed by the state courts, including Montana Supreme Court,² to the extent that it does not conflict with Crow customs and tradition.

The preferred approach under the UMDA, and followed in the Tribal Code, is to provide for the financial needs of the spouses after dissolution primarily by the division of property rather than by awarding alimony (or “maintenance”). *Id.* § 16.1 at p. 621; *see also*, Crow Tribal Code § 10-1-121 (court may award maintenance only if certain conditions are met). Trial courts generally have broad discretion in deciding how to equitably apportion property between the spouses, and their decisions will not be reversed on appeal unless there was an abuse of that discretion or an erroneous application of the law. Clark, *supra*, § 15.3 at p. 600.

Based on the record in the present case, it appears that the Tribal Court’s decree awarded

² The applicable law provisions of the Tribal Code, Section 3-1-104(4), prohibit the Crow Tribal courts from applying Montana law as the controlling legal authority, unless agreed by the parties. However, this limitation does not prohibit the Tribal courts’ consideration of Montana law “as persuasive but non-binding authority in the context of the common-law jurisprudence of the United States which we are authorized to apply under Section 3-1-104(3).” *Edwards v. Neal*, 1999 CROW 4, ¶ 47 n.8.

essentially *all* the disputed marital property to the husband. Such a disposition of marital property does not appear to be “equitable” in the circumstances shown on the record of this case. The record does not reflect how the parties contributed to the property during the marriage, or their economic prospects following the dissolution, which are two factors that the court is directed to take into account pursuant to Section 10-1-120(1) of the Tribal Code, quoted above. However, the same Code section also directs the court to take a spouse’s contribution into account regardless of whether she earned income by working outside the home, or instead contributed to the marriage as a homemaker.

In addition, the factors mentioned in the Code that are clear from the record – the long duration of the marriage and the lack of any maintenance or alimony award – further support an award of some property to the wife. As for the first of these factors, the parties were married when they were 17 and 18 years old, and were married for almost 33 years. They built their home together and occupied it for more than 25 years before the dissolution. As for the second factor, i.e., the possibility for compensating Candace by monthly payments of maintenance, Candace’s claim for a share of the home is supported by the fact that no maintenance was awarded.

The Tribal Court undoubtedly decided to award the home to the husband because it was located on his family trust land and used for his ongoing cattle business. The Tribal Court clearly had the discretion to decide who should keep the home, and the Tribal Court’s acceptance of the husband’s arguments in this regard was not an abuse of its discretion. However, just because it was appropriate for the husband to keep the home, it was not fair and equitable to completely exclude the wife from receiving any compensation for her contributions to the home.

In cases where it makes the most sense for one spouse to remain in possession of property, especially property used in an ongoing family ranch or business, the other spouse may be compensated with cash or other property. Clark, *supra*, § 15.3 at pp. 602-03. If there is not

sufficient cash or other property to compensate the other spouse at the time of dissolution, then her share may be paid over time, in installment payments. *See In re. Marriage of Manus*, 753 P.2d 1275, 1278 (Mont. 1987) (\$12,448 payment by husband to equalize estate made in monthly payments of \$207 for five years). This may be the only reasonable approach for resolving the property dispute in the present case, where the home was the major asset of the marital estate and, rather than forcing it to be sold, the Tribal Court decided that it was appropriate for one spouse to keep it. This same approach was suggested by the husband's counsel at the hearing.

In order for the court to decide how much the wife should receive as payment for her share of the home, it will be necessary to determine (1) her share of the home and (2) its value. Although there is no fixed rule for dividing property between spouses, one general rule of thumb often used by trial courts is to divide it equally. Clark, § 15.3 at page 601 n.6. Such an equal division would appear to be appropriate in the present case, in the any absence of any reasons and evidence to the contrary.

The value of the home should be determined as of the date of the dissolution hearing. Clark, § 15.3 at p. 601. In the present case, the relevant value is the value of the structure itself, less any debt on the home and any remaining obligations to the Housing Authority. The value of the land on which it sits should not be included, because it is a leasehold on land separately owned by Wayne and granted without consideration.

There is competent evidence of the home's value in the record. The wife's verified petition stated that the home was worth \$18,000. When the economic circumstances do not justify the expense of a professional appraiser, the parties' own testimony on the value of their property may be used to establish a value, subject to the trial court's exercise of its discretion on the credibility of the testimony. *See, e.g., In re. Marriage of Dunn*, 735 P.2d 1117 (Mont. 1987) (district court properly accepted wife's valuation of personal property and applied 25% depreciation factor). In the present case, the wife's valuation was offered in connection with her

request that the home be awarded entirely to her, so there was no obvious incentive for her to inflate home's value.³ Considering that this valuation was made under oath, and no other valuation was offered by the husband, it should be presumed correct unless the husband's estate brings forth credible evidence of a different value.

At the hearing, the wife's counsel stated that the outstanding debt on the home to the Housing Authority was \$2,756 as of early 1997. This figure was not disputed by the husband, who indicated that it would be paid off later in the year, and should be accepted in the absence of other evidence to the contrary.

This court is also mindful that the husband passed away while this appeal was pending. However, obligations stemming from the division of property in a divorce are commonly held to continue after the death of the obligor spouse, and are payable from his estate. *See generally* Clark, *supra*, § 14.2 at page 535. For example, in one reported case, the Montana Supreme Court reversed a property division order and remanded for further proceedings two years after the husband had died. This was the second time the appellate court had reversed the property division order after the husband had passed away, and his estate became a party to the proceedings after his death. *In re. Marriage of Beck*, 661 P.2d 1282 (Mont. 1983).

Thus, the fact that the Tribal Court's property division was pending appeal at the time of the husband's death does not terminate this court's authority to decide this appeal, or the Tribal Court's authority to further review and finally decide the property division on remand. This matter is now between the wife and the husband's estate (or his heirs), who will be substituted as the party Respondent.

On remand, the Tribal Court should presume that Candace is entitled to payment for one-half the net value of the home ($\$18,000 - \$2,756 \text{ debt} = \$15,244$), or the sum of \$7,622 payable

³ At the hearing, the wife's counsel clarified that the \$18,000 value was the construction cost in 1971, and that the home had probably increased in value since it was built.

from the husband's estate, unless his estate or heirs bring forth credible evidence that its net value is something different or that Candace's share should be less than half. In addition to the installment payment plan discussed above, the Tribal Court is also free to consider any other equitable arrangements for Candace to obtain payment for her fair share of the home. If an agreement is worked out between Candace and the husband's estate or heirs, including any agreement whereby Candace might re-occupy the home, that agreement should be honored and confirmed by the Tribal Court.

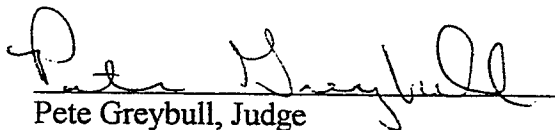
Conclusion

The Tribal Court's decree awarding the home to the husband is AFFIRMED. However, on the record in this case, and without any findings explaining its rationale, the Tribal Court failed to "equitably apportion" the parties' assets when it awarded the home and furnishings to the husband without any payment to the wife. In regard to its failure to award any compensation to the wife for her equitable share of the home, the Tribal Court's decree is REVERSED, and this case is REMANDED to the Tribal Court for further proceedings consistent with this Opinion. Petitioner Candace Pease Not Afraid is entitled to assert a LIEN on the home until this matter is concluded and she receives full payment of whatever amount is finally determined to be due.

DONE AND DATED this 14 day of March, 2001.



Albert L. Gros-Ventre, Judge



Pete Greybull, Judge



William C. Watt, Judge