IN THE COURT OF APPEALS OF IOWA

No. 1-216 / 10-1445
Filed August 10, 2011

IN RE THE MARRIAGE OF JOHN T. ERPELDING AND GINA L. ERPELDING

Upon the Petition of

JOHN T. ERPELDING,
Petitioner-Appellant/Cross-Appellee,

And Concerning

GINA L. ERPELDING,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Kossuth County, David A. Lester, Judge.

The petitioner appeals and the respondent cross-appeals from the decree dissolving their marriage. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Eldon J. Winkel of Eldon J. Winkel Law Office, Algona, for appellant.

Jacqueline R. Conway of Heiny, McManigal, Duffy, Stambaugh, & Anderson, P.L.C., Mason City, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.* Decided by Vaitheswaran, P.J., and Doyle, J., and Miller, S.J.*

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

MILLER, S.J.

John Erpelding appeals and Gina Erpelding cross-appeals from the decree entered by the district court dissolving their marriage. Each challenges economic provisions of the decree, including the valuation of certain assets, the treatment of premarital property, and the alimony award. Gina also challenges the court's denial of her request for additional attorney fees and requests appellate attorney fees. We affirm in large part, reverse as to one issue, and remand for further proceedings.

I. Background Facts and Proceedings.

Gina and John were married in 1998. At the time of trial, Gina was age forty-one and John was age thirty-three, and each was in good mental and physical health. Gina had previously been married and had two children, who were ages nineteen and fourteen. She has physical care of the younger child and receives child support from his father. Gina and John also had two children, who were ages eleven and five.

At the time they were married, each party had a high school diploma and had worked in the farming and livestock industry. During their marriage, they purchased land and built two hog confinement facilities, which they referred to as the Murphy Site and the Christensen Site.

John ran the hog confinement facilities, farmed 160 acres, and had a manure hauling business. Gina quit her job as a farrowing supervisor, after which she helped with the parties' farming operations and cared for their children. She had a few other jobs throughout the years, including in-home daycare and

sales for a cosmetic and jewelry company. In March 2009, Gina began working for a livestock supply company. Although she initially worked full-time, she felt the children were spending too much time in daycare and cut back her hours to twenty per week.

The parties owned two houses, with Gina residing in the marital home and John residing in a house purchased after the parties separated.

In September and October 2009, a trial was held on the dissolution petition. The parties agreed as to the custody and physical care of the children, and as to visitation, but disagreed concerning economic issues. On July 9, 2010, the district court entered a decree of dissolution. Gina and John were awarded joint legal custody of the children, with Gina having physical care and John visitation. For alimony and child support purposes the court used a three-year average to find John's net monthly income was $12,393.26, and based upon full-time employment imputed net monthly income of $1,355.95 to Gina. The court awarded Gina alimony in the amount of $1000 per month for forty-eight months. John was also ordered to pay $2192.61 per month in child support for the two children.

The court divided the marital assets and debts. The court set off $23,263 to Gina, which she had inherited following the death of her father during the marriage. Each party was awarded the home the party currently occupied; John was awarded the two hog confinement facilities and the equipment and machinery; and each party was made responsible for the debts corresponding to the assets awarded to that party. In order to equalize the property distribution,

John was to pay Gina a cash settlement in the amount of $348,102, payable in semi-annual installments over a period of ten years. Thus, after taking into consideration the cash settlement, John was awarded $313,812 and Gina was awarded $313,813 in net property. The court denied Gina's request for additional attorney fees.

John appeals and Gina cross-appeals, each challenging the economic provisions of the decree.

II. Standard of Review.

We review dissolution actions de novo. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009).

> However, we recognize that the district court was able to listen to and observe the parties and witnesses. Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them.

In re Marriage of Gensley, 777 N.W.2d 705, 713 (Iowa Ct. App. 2009) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("[The district court] is greatly helped in making a wise decision about the parties by listening to them and watching them in person. In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.")).

We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006).

III. Equitable Distribution.

Iowa law requires that marital property be divided equitably between the parties. Iowa Code § 598.21(5) (2009). In order to make an equitable

distribution, the court must first identify and value the property. *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). The property includes both the parties' assets and debts. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980); *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996).

The court must next divide the property. Section 598.21(5) sets forth the factors to consider in dividing the property, including:

> (a) The length of the marriage.
> (b) The property brought into the marriage by each party.
> (c) The contribution of each party to the marriage . . . .
> (d) The age and physical and emotional heath of the parties.
> . . . .
> (f) The earning capacity of each party . . . .
> (g) The desirability of awarding the family home . . . to the party having physical care of the children.
> (h) The amount and duration of an order granting support payments to either party pursuant to section 598.21A [Orders for spousal support] . . . .
> . . . .
> (j) The tax consequences to each party.
> . . . .
> (m) Other factors the court may determine to be relevant in an individual case.

An equal or percentage distribution is not required. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). Rather, "[t]he determining factor is what is fair and equitable in each circumstance." *Id.*

A. Hog Confinement Facilities.

Each party challenges the valuation of the hog confinement facilities. John first asserts the facilities should have been given a lower value.[1] He argues

[1] Although John argues the facilities should have been given a lower value, the proper approach would be to value the assets at fair market value and consider the tax consequences when dividing the property. *See* Iowa Code § 598.21(5) (providing that the court shall divide the property after considering numerous factors, including the tax

the district court did not adequately consider the tax consequences in valuing the facilities, namely (1) there was little depreciation left, which would cause him to pay higher income taxes in the future; and (2) if the facilities were sold there would be significant tax consequences.

In dividing the property, one factor the court is to consider is the tax consequences to each party. Iowa Code § 598.21(5)(j). We first consider John's claim regarding depreciation. The depreciation deductions the parties took on their previous years income tax returns did not affect the fair market value of the property. *See In re Marriage of Gaer*, 476 N.W.2d 324, 328 (Iowa 1991) (explaining depreciation "'represents additional cash available to the defendant by permitting substantial tax deductions and, ultimately, tax savings'" (quoting *Stoner v. Stoner*, 307 A.2d 146, 152 (Conn. 1972)). Rather, it is possible that John may be required to pay a higher amount of income tax in the future. This would affect his income, and not the value of the property. *See id.* at 329 (discussing how a party's net income should be calculated with regard to depreciation deductions). Further, the district court specifically considered the depreciation deduction issue in determining John's income. We find the district court properly considered the depreciation deductions in determining John's income, but was not required to consider it in determining the fair market value of the facilities.

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consequences to each party); *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("In ascertaining the value of property, its owner is a competent witness to testify to its market value."); *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002) (stating assets should be given their value as of the date of trial).

We next examine John's claim regarding the tax consequences of a sale. Where sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate, and where sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. *See, e.g.*, *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991) ("But where there is no evidence to support a discounting based on a sale and the trial court has not ordered a sale, the effect of considering income tax consequences on a sale is to diminish the asset value to the nonowning spouse."); *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989) (explaining that where the property distribution "will in all probability require the liquidation of capital assets, the income tax consequences of such a sale should be considered by the trial court in assessing the equities of the property and alimony award"). There was no evidence that John even contemplated a sale, and in fact all evidence demonstrated that he would continue operating the hog confinement facilities. We find the district court did not need to consider the tax consequences of a sale.

Next, Gina asserts the facilities should have been given a higher value, arguing no adjustment should have been made based upon the status of the hog production industry. The parties obtained appraisals, which indicated the land and facilities had a fair market value of $589,000 for the Christiansen Site and $831,500 for the Murphy Site. Ken McKenny, a consultant with Central Iowa Farm Business Association, testified as to the current state of the hog production industry. He explained that the industry was suffering "heavy losses," which had

occurred over the past eighteen months and he saw no improvement "on the horizon in the near future." McKenny's testimony occurred eight months after the appraisals of the confinement facilities, a period during which the industry, and presumably the value of the facilities, had declined.

McKenny also explained how the state of the industry affected the value of hog confinement facilities. This was because a farmer normally has a contract with a producer, who supplies the hogs and pays the bills. With the industry in trouble, the producers were not renewing contracts and some facilities were left empty. Thus, it was somewhat speculative as to what a facility could sell for. In the present case, the parties had a contract on the Christiansen Site that was to expire in 2010 and on the Murphy Site that was to expire in 2016.

In determining the value of the parties' assets, the district court stated it was based upon what it found to be the most reliable evidence in the record. The district court found the date-of-trial fair market values for the Christensen Site was $531,000 and the Murphy Site was $785,841. The court explained, "These values are based primarily on the appraisals prepared by Benchmark Agribusiness, which were then discounted based on other evidence in the record concerning the date-of-trial state of the hog confinement feeding industry, and the depressed hog market." Essentially, the district court reduced the appraised value by approximately ten percent for the Christiansen site with a contract to expire in one year and five percent for the Murphy site with a contract to expire in seven years.

We will not disturb the district court's valuation of asserts if it was "within the range of permissible evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007); *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973). Further, we uphold a district court's valuation of property when it is accompanied by supporting credibility findings or corroborating evidence. *See Hansen*, 733 N.W.2d at 703 (citing *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999)). The district court implicitly found the testimony regarding the industry and speculative nature of the appraisals credible and made reasonable reductions to the values. We find the district court's valuation of the facilities is supported by credible evidence and within the permissible range of the evidence.

B. Equipment and Machinery.

Gina asserts the district court erred in valuing the equipment and machinery, arguing the value found by the court is not supported by the evidence.[2] Each party had an expert value the equipment and machinery. Gina's expert valued the equipment at $109,250. John's expert testified he had done over 1000 farm equipment sales and was knowledgeable about the condition of the equipment and machinery. He explained that providing a range of what an item might sell for was more accurate than providing a single value. He valued each piece of equipment separately, giving it a low, average, and high value. The total was a low value of $84,760, an average value of $90,702.50, and a high value of $96,645. Included in this valuation was a Mustang 940 skid

[2] John also challenges the valuation of the equipment and machinery, raising the same depreciation deduction argument he made with respect to the hog confinement facilities. We reject his position for the same reasons discussed above.

loader, which had a low value of $3250, an average value of $3625, and a high value of $4000. The expert testified that this was not on the list of items to be appraised, but John added it when he was inspecting the items. The skid loader was not included in the distribution of the equipment and machinery and was separately listed in the property distribution. Thus, John's expert valued the equipment, without the Mustang 940 skid loader, at a low value of $81,510, an average value of $87,077.50, and a high value of $92,645.

The district court found the value of the equipment and machinery was $83,625. Although Gina claims the district court's valuation of the machinery was not supported by evidence, the district court was presented evidence that the equipment and machinery was worth less and more than its valuation. As discussed above, we will not disturb the district court's valuation of asserts if it was "within the range of permissible evidence." *Hansen*, 733 N.W.2d at 703; *Bare*, 203 N.W.2d at 554. We find that is the case here and affirm on this issue.

C. Growing Crops.

Gina asserts the district court erred in not treating a growing corn crop as an asset that was part of the property subject to equitable division. She argues the value of the expected yield, less the anticipated cost of harvest, should have been included in the court's property division. *See, e.g.*, *In re Marriage of Martin*, 436 N.W.2d 374, 376 (Iowa Ct. App. 1988) (approving consideration of value of growing crops as marital asset subject to property distribution in dissolution of marriage action).

John rented 160 acres from Clara Smith. The 160 acres included 153.79 tillable acres. In 2009, as in the preceding few years, John was raising corn on the tillable acres. Trial occurred on September 30 and October 1, 2009, near the end of the corn growing season. In his testimony John opined that "if [he] obtain[ed] regular price for [his] corn that exists" he would not make any money from the 2009 corn-growing operation. The district court found his testimony to be reliable and credible on the issue. It found that the parties had always treated the income from crop-growing as John's income; found that the more appropriate way to treat the growing crop would be to consider the earnings from the growing crop as income to John, "against which his input costs must be balanced;" and denied Gina's request that it treat the growing crop as an asset. For the reasons that follow, we reverse the court's decision on this issue and remand for further proceedings.

John believed the corn would produce 175 to 180 bushels per tillable acre. An expert witness for Gina used the figure of 186.5 bushels per tillable acre, based on an examining agronomist's measurements in the fields, resulting in an anticipated yield of 28,681.84 bushels. John had contracted to sell and deliver 20,000 of the bushels in October 2009. There were four contracts, for 5000 bushels each, at $6.47 per bushel for one contract, $6.15 per bushels for two contracts, and $6.30 per bushel for the fourth. Market price at the time of trial was $3.03 per bushel. Based on the four contracts and $3.03 per bushel for the anticipated additional 8681.84 bushels, Gina's expert estimated the value of the growing corn, at harvest, at $151,655.96. Utilizing John's slightly lower yield

estimates and the $3.03 per bushel for corn in excess of the contracted-for 20,000 bushels, John's estimate of the value of the growing corn would be $148,627 (at 180 bushels per acre) or $146,927 (at 175 bushels per acre). The nearly-mature growing corn thus clearly had a substantial value.

To determine an appropriate value for a growing crop that might be subject to distribution as part of an equitable division of property, a court must determine not only the crop's value in matured condition but also the reasonable expense of harvesting and marketing. *Martin*, 436 N.W.2d at 376 (holding that a proper measure of the value of a growing crop is the crop's value in a matured condition less the reasonable cost of harvest). We believe that if any such expenses exist or will be incurred a court must also reduce the value of the growing crop by any production expenses that have been incurred at the time of trial but not included in debts allocated by the court as part of property division and by any other yet-to-be-incurred expenses. We say this because any such expenses will reduce the value of the crop that would otherwise be available for division. Finally, consideration of any income taxes that will result from the production and sale of the crop may be appropriate. *See* Iowa Code § 598.21(5)(j) (stating that tax consequences should be considered in equitably dividing property).

The record does contain evidence about the expenses incurred in producing the 2009 corn crop, as well as evidence of anticipated harvest expense. For example, rent for the 160 acres was $32,000, $8595 of which was unpaid, due in December, and included in the debts allocated by the district

court. The expense for seed corn ($16,000) and chemicals totaled $32,000. Crop insurance cost $3500, and $2217 of crop insurance premium for 2009 was owed in the fall. John does not have the equipment necessary for crop farming, and hires a Mr. Snakenberg to custom farm the tillable acres. John testified his 2009 expenses for custom farming would be $13,629. An expert witness called by Gina estimated that harvest expenses, including combining, drying, and hauling, would total $14,491.47.

It appears likely that any 2009 production expenses that had been incurred by the time of trial but had not been paid were included in the many debts allocated by the district court. If so, the corn crop represents an asset with a value of approximately $150,000, subject only to anticipated harvest-related expense of $13,000 to $14,000 and any income tax consequences. John urges, however, that certain additional crop-related expenses, including but not limited to gas and fuel, were yet to be incurred. Further, his brief seems to imply, while not directly stating, that other outstanding expenses were shown by the evidence but not included in the property division.

The fact that a growing crop results in income does not mean that it is not, or should not be treated as, an asset subject to equitable division. We conclude the 2009 corn crop is such a substantial asset that the district court should have included it as an asset in its property division. For the reasons stated above, however, we find the record is insufficiently clear for us to determine the value that should be subject to division. We reverse the trial court's decision to not include the crop as an asset in its property division, and remand to the district

court to determine a proper value and reflect that value in a modified property division. *See Locke v. Locke*, 246 N.W.2d 246, 248 (Iowa 1976) (remanding to trial court where record is inadequate to decide an issue on appeal in a dissolution case); *Lessenger v. Lessenger*, 138 N.W.2d 58, 61 (Iowa 1965) (same); *see also Cablevision Assocs. VI v. Bd. of Review*, 424 N.W.2d 212, 215-16 (Iowa 1988) (remanding for additional evidence where de novo review did not allow an accurate valuation). Because of our concern that the record may not be clear as to whether all pre-harvest production expenses have either been paid or included in the district court's property division, the district court on remand may in its discretion consider not only the existing record but also any additional evidence necessary to clarify the record on that question, and to determine whether any income tax consequences need to be taken into consideration.

D. Pre-Marital Property.

Gina asserts that the district court did not give adequate consideration to the property she brought into the marriage. Premarital property is not automatically excluded from the marital estate like gifted or inherited property. Iowa Code § 598.21(5)(b). Rather, it is subject to division and its status is merely one factor to be considered along with all the other circumstances when dividing the marital property. *Id.*; *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007); *Miller*, 552 N.W.2d at 465.

In this case, Gina argues that she brought into the marriage a vehicle valued at $9000 and household personal property. John replies that the value of the vehicle was consumed during the marriage and Gina received the majority of

the personal property items. The nature of the property and the fact that this was a long-term marriage resulted in the premarital property being less of a factor in the distribution than in the case of a short-term marriage. Gina was given credit for property she inherited during the marriage. We find the overall distribution, with the exception of the omission of the growing crop from the property division, was fair and equitable and decline to change it.

IV. Spousal Support.

The district court awarded Gina alimony in the amount of $1000 per month for forty-eight months. Each party takes issue with the award—John argues the district court should not have awarded alimony to Gina; Gina argues the award should have been $1500 per month for five years.

Iowa Code section 598.21A provides for spousal support and the factors to consider in determining such an award. Those factors include,

> (a) The length of the marriage.
> (b) The age and physical and emotional health of the parties.
> (c) The distribution of property made pursuant to section 598.21.
> . . . .
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
> (g) The tax consequences to each party.
> . . . .
> (j) Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A. In applying the statutory factors, the courts have set forth three different types of spousal support—traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). Each type has a different purpose: (1) traditional is payable for life or until the spouse becomes self-supporting; (2) rehabilitative is payable for a period of time to permit a spouse to obtain education or training; (3) reimbursement spousal support "allows the spouse receiving the support to share in the other spouse's future earnings in exchange for the receiving spouse's contributions to the source of that income." *Id.* However, an award of spousal support need not strictly fall into one of the defined categories, but can be a combination of types. *Id.* "Whether spousal support is justified is dependent on the facts of each case." *Hazen*, 778 N.W.2d at 61.

A number of factors support an award of spousal support in this case. The parties were married for ten years. They had two children and at the time of trial, Gina was working part-time in order to care for the children. John had a higher earning capacity than Gina—the district court found that John earned $12,393.26 per month and Gina had imputed present income of $1355.95 per month. In determining their incomes, the district court imputed income to Gina based upon full-time employment at her current job. The duration of alimony gives Gina time to become fully employed. She has experience in the same line of work in which John is engaged. Upon our de novo review, we find the alimony award to be fair and equitable and affirm on this issue.

V. Attorney Fees.

Gina asserts the district court should have awarded her additional trial attorney fees. Trial courts have considerable discretion in determining whether to award attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (quoting *Guyer*, 522 N.W.2d at 822). Additionally, an award must be fair and reasonable. *Guyer*, 522 N.W.2d at 822.

Gina argues that John was earning significantly more and had more liquid assets. Gina testified that she did not have money to pay a retainer and had paid $8000 by credit card. This debt was included in the property division. Pursuant to a temporary order, John had paid $5000 toward Gina's attorney fees. At the time of trial, Gina owed $6022.04 for trial attorney fees, and incurred additional fees for the trial itself. John had paid $5000 toward his attorney fees. Ultimately, a larger portion of Gina's attorney fees would be paid from the marital assets. Further, in denying Gina's request for attorney fees, the district court considered the parties' financial circumstances as they will be at the conclusion of the proceedings. John had alimony and child support obligations, and would be responsible for a greater portion of the marital debt. We find no abuse of discretion.

Gina also requests that we award her appellate attorney fees.

> Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. Factors to be considered in determining whether to award attorney fees include: "the needs of the party

> seeking the award, the ability of the other party to pay, and the relative merits of the appeal."

Sullins, 715 N.W.2d at 255 (quoting *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005)); *see also Guyer*, 522 N.W.2d at 822 (stating the court considers "whether the party making the request [for attorney fees] was obligated to defend the trial court's decision on appeal" in awarding appellate attorney fees). In the present case, each party appealed from the district court's decision, resulting in reversal as to only one of many issues present by each party. We decline to award appellate attorney fees.

Costs on appeal are assessed two-thirds against John and one-third against Gina.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.