IN THE COURT OF APPEALS OF IOWA

No. 2-1068 / 12-0287
Filed February 13, 2013

IN RE THE MARRIAGE OF DEBORAH CATHERINE RHINEHART AND RICHARD SCOTT RHINEHART

Upon the Petition of

DEBORAH CATHERINE RHINEHART,
Petitioner-Appellee/Cross-Appellant,

And Concerning

RICHARD SCOTT RHINEHART,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Woodbury County, Kathleen A. Kilnoski, Judge.

A husband and wife appeal the district court's decree following the retrial of some of the provisions of their dissolution. **AFFIRMED AS MODIFIED AND REMANDED.**

Elizabeth Anne Rosenbaum, Sioux City, for appellant.

Stanley Edwin Munger of Munger, Reinschmidt & Denne, L.L.P., Sioux City, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

I. BACKGROUND FACTS AND PROCEEDINGS.

Following a trial in September 2003, Richard Scott Rhinehart and Deborah Catherine Rhinehart's marriage was dissolved by the district court in December 2003 by a partial decree, with the court ruling on the economic issues of the dissolution in a supplemental decree filed in March 2004. This decree was appealed and ultimately affirmed by the Iowa Supreme Court in October 2005. *See In re Marriage of Rhinehart (Rhinehart I)*, 704 N.W.2d 677, 684 (Iowa 2005).

Two months later Deborah petitioned to correct, vacate, or modify the decree alleging Scott committed extrinsic fraud by failing to disclose the existence of certain contingency fee cases during discovery—the value of his law practice was at issue in the dissolution. Scott filed a counterclaim alleging Deborah committed extrinsic fraud by failing to disclose the full value of her IPERS retirement account. In October 2008, the district court granted a new trial after finding Scott committed fraud. It vacated the property division, debt allocation, and alimony provisions of the original decree. The court also concluded Deborah did not commit fraud and dismissed Scott's counterclaim with prejudice. This decision was appealed to this court and affirmed. *See In re Marriage of Rhinehart (Rhinehart II)*, No. 09-0193, 2010 WL 446560, at *1 (Iowa Ct. App. Feb. 10, 2010).

The case then returned to the district court for a new trial on the economic provisions of the dissolution that had been vacated. In a pretrial order, the court limited the issues to be tried to

> determining the value of the [contingency fee] cases Scott failed to reveal by the time of trial September 11 and 12, 2003; the value of his law practice as of September 11 and 12, 2003, if he had disclosed the sexual abuse cases; and how those values should affect property division, debt allocation, and alimony.

The district court limited further discovery to be consistent with this ruling.

The district court filed its retrial decision on December 14, 2011. That ruling repeated the pretrial identification of the limited issues to be considered. Based on the expert testimony from both parties, the court concluded the previously undisclosed contingency fee cases had no effect on the value of the law firm and set the value at $62,568, just as the original dissolution decree had done. The court incorporated by reference all the findings of fact that were included in the March 2004 supplemental decree, which had been affirmed by the Iowa Supreme Court, and incorporated by reference all the findings of fact from the October 2008 fraud ruling, which had been affirmed by this court.

The district court then determined that an equal division of the property was equitable under the facts and circumstances of the case. The court refused to consider any future inheritance or other future economic benefit Deborah would be entitled to from her father's family trust. *See Rhinehart I*, 704 N.W.2d at 682–84 (considering the value of the family trust when awarding Scott a greater share of the marital property); *see also* 2007 Iowa Acts ch. 163, § 2 (amending Iowa Code section 598.21(5)(i) in an apparent response to the *Rhinehart I* ruling to provide that the dissolution court should not consider future interests or expectancies of a party "arising from inherited or gifted property created under a will or other instrument under which the trustee, trustor, trust

protector, or owner has the power to remove the party in question as a beneficiary"). The court divided the property the same way as the original decree but used the corrected values of the retirement accounts of both parties.[1] This resulted in Deborah owing Scott an equalization payment of $11,279.50.

The court found Scott's annual income to be $200,000, an increase of approximately $77,000 from the original dissolution decree. This upward adjustment was based on consideration of the previously undisclosed contingency fee cases. In setting the alimony amount, the court also considered the testimony from Deborah's father that Deborah was removed as a beneficiary from the family trust in 2004 and that Deborah was repaying him for the financial assistance he had rendered to her during the pendency of this lengthy dissolution action. The court increased the alimony amount from $1800 a month to $2000 a month for five years from April 2004 through April 2009. Thereafter, the amount was reduced to $1100 per month until Deborah reaches the age of sixty-five or either party dies. The court determined Scott had accrued alimony in the amount of $51,500. When given credit for the property equalization payment, Scott owed Deborah $40,221.

The court denied Deborah's request to award attorney fees from the initial 2003 trial. But the court did award her attorney fees for the work done by her

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[1] Scott's Prudential account was erroneously reported in the original dissolution decree to be $6700 when the actual value was $67,000. This error was extensively discussed in the first appeal decision. *See Rhinehart I*, 704 N.W.2d at 682–84. The value of Deborah's IPERS account was initially reported to be $49,292 in the original dissolution decree. The district court concluded Deborah had not committed extrinsic fraud with respect to the value of the IPERS account, but on retrial the court used the true value of the account as of the date of the 2003 trial—$145,746.

present counsel from the filing of the petition to vacate through August 18, 2011, just before the retrial. The court found that since Scott's fraud created the need to relitigate the financial positions of the parties, he should bear the cost of Deborah's fees. The court found Scott received substantial attorney fees from the many contingency fee cases he settled after the original dissolution trial, and it was equitable for him to pay Deborah's attorney fees and expenses in the amount of $178,985.52.[2]

From this decree both parties appeal, asserting eleven different claims of error, in addition to asking for appellate attorney fees. Scott claims the district court erred by (1) increasing his annual income to $200,000; (2) increasing Deborah's alimony payments for the first five years; (3) considering legislative changes, alleged facts, and events that occurred after the 2003 trial, while refusing to follow the established law of the case; (4) refusing to reconsider the extrinsic fraud issue; and (5) awarding Deborah $178,985.52 in attorney fees. In her cross-appeal, Deborah asserts the district court erred by (1) failing to award alimony in the amount of $4994 per month; (2) undervaluing the Scott's law practice; (3) failing to use the value of her IPERS account as established at the 2003 trial; (4) finding she owed Scott a property equalization payment even though Scott committed fraud, which violates notions of equity; (5) failing to award her additional attorney fees from the first trial; and (6) granting Scott's

[2] After the court's decree, Deborah filed a motion to modify the amount of attorney fees ordered by withdrawing $12,158.72, which were attributed to a mistaken duplication, a contempt action, and a misallocation. Scott filed his notice of appeal before the district court could rule on this motion, depriving the district court of jurisdiction. Deborah sought a limited remand from the supreme court. Scott resisted, and the supreme court denied the limited remand.

motion for a protective order, which prevented her from discovering Scott's income since 2003.

II. STANDARD OF REVIEW.

Our review of dissolution cases is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We decide the issues anew but give weight to the district court's factual findings, especially determinations of credibility. *Id*. As our decision turns on the unique facts of each case, precedent is of little value. *Id*.

III. THE LAW OF THE CASE.

Scott asserts the district court erred in considering law and facts that occurred after the 2003 trial, including legislative changes to Iowa Code section 598.21 (Supp. 2007), and information about Deborah's removal from the family trust. Deborah asserts the court properly considered this information at the retrial but instead complains the district court erred in considering the corrected value of her IPERS account when that amount had not been challenged in the first appeal. Scott also claims the district court erred in not reconsidering the issue of whether or not he committed fraud.

The law-of-the-case doctrine provides "a decision once made in a case constitutes the law of the particular case, and will not, upon a subsequent appeal in the same case, be overruled or examined, however well satisfied the court may be that it is erroneous." *Barton v. Thompson*, 9 N.W. 899, 899 (Iowa 1881); *see also State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987) (noting the law-of-the-case doctrine provides, "the legal principles announced and the views expressed by a reviewing court in an opinion, right or wrong, are binding

throughout further progress of the case upon the litigants, the trial court and this court in later appeals"). However, there are limitations to this principle. "The principle is not applicable, . . . if the facts before the court upon the second trial are materially different from those appearing upon the first." *Grosvenor*, 402 N.W.2d at 405. In addition, "the law of the case doctrine may not apply when, by legislative enactment, the law has been changed, or where the controlling law has been clarified by judicial decisions following remand." *See Springer v. Weeks & Leo Co., Inc*., 475 N.W.2d 630, 632 (Iowa 1991) (internal citation omitted).

We agree with the district court's well-reasoned decision citing *Grosvenor*, 402 N.W.2d at 405, that the law of the case doctrine did not apply to the value of Deborah's IPERS account as the difference in value between the original stipulated amount and the actual value at the time of the original trial was almost $100,000. Likewise, the district court properly corrected a substantial earlier scrivener's error as to the value of Scott's retirement account. The district court explained:

> [I]n the retrial of the property division and alimony award to this court, this court must make an equitable division of the marital property. The difference between the value of the account as stipulated by the parties and adopted by the court at the time of the original trial, and the value of Deborah's IPERS account considering both her contributions and her employer's is $96,454.00. This is an amount that this court believes to be a material difference in fact. To ignore the true value of the account would simply not be equitable when the court divides the marital property.
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> For the same reasons that this court concludes that it should use the correct value of Deborah's IPERS in determining the equitable division of the parties' marital property, the court also

> concludes that it should use the correct value of Scott's Prudential account, $67,000.00, rather than the typographical error of $6,700.00 used in the original decree. Adding Scott's Prudential account ($67,000.00), his other SEP Prudential account ($12,900.00), SEP Principal account ($16,900.00) and IRA ($12,742), Scott has assets available to him for retirement totaling $109,542.00.

Considering the total value of the divisible estate at the first trial was approximately $500,000, the changes in value of the IPERS and Prudential accounts are material and not merely cumulative. *See* 5 C.J.S. *Appeal and Error* § 991, at 375 (2007) (citing *Lawson v. Fordyce*, 21 N.W.2d 69, 73 (Iowa 1945)).

Scott's claim that the district court should not have disregarded Deborah's family trust is rejected. Between the supreme court's decision in *Rhinehart I*, 704 N.W.2d at 682–84, and the retrial in 2011, the legislature changed the law with regard to the consideration of a party's interest in a trust where the trustor retains the power to remove the party as a beneficiary. *See* 2007 Iowa Acts ch. 163, § 2. Thus, the district court was correct in applying the revised section 598.21(5)(i) and thereby disregarding Deborah's family trust when dividing the marital property. *See Springer*, 475 N.W.2d at 632.

However, the district court erred on retrial to the extent that it considered evidence that in 2004 Deborah's father removed her as a beneficiary and evidence of other changes in her financial arrangements. The time for considering the financial circumstances of the parties was the date of the original trial in September 2003. *In re Marriage of Locke*, 246 N.W.2d 246, 252 (Iowa 1976) ("[T]he date of trial is the only reasonable time at which an assessment of the parties' net worth should be undertaken."). The marriage of the parties was

dissolved by the partial decree in 2003, and retrial in this case must be limited to the facts which existed—some of which were unearthed in the fraud litigation post-trial—at the time of the original trial. Changes in financial circumstances which occurred after the original trial in September 2003 should not have been considered in the retrial.

Finally, Scott claims the district court erred in not reconsidering the issue of whether he committed extrinsic fraud when he did not disclose the contingency fee cases. He asserts Deborah lied when she said she did not know about the cases, and he has the testimony from their daughter to prove it. He claims his daughter's testimony provides materially different evidence satisfying the exception to the law-of-the-case doctrine. *See Grosvenor*, 402 N.W.2d at 405. The district court disagreed, and so do we. The daughter's testimony was not inconsistent with the evidence already addressed in the district court's decision in the fraud action and was merely cumulative. *See Lawson*, 21 N.W.2d at 31–32. The district court was correct in not reopening that issue and neither will we.

IV. PROPERTY DISTRIBUTION.

The parties' next set of claims arise from their displeasure with the district court's property distribution decision. Deborah asserts the court erred in undervaluing Scott's law practice. This undervaluation, along with the court's decision to take the revised value of the IPERS account, led to the court's conclusion that Deborah owed Scott a property equalization payment of $11,279.50. Deborah asserts this ultimate decision was an error because Scott should not be permitted to profit from the fraud he perpetrated. She also asserts

the district court erred in granting Scott a protective order preventing her discovery of the value of his law practice after the 2003 trial. Scott claims the district court erred in admitting evidence pertaining to his law practice that occurred after the 2003 trial.

With respect to Scott's claim, when a case is tried in equity, "the proper procedure is to admit the evidence subject to the objection." *In re Estate of Evjen*, 448 N.W.2d 23, 24 (Iowa 1989). We find no error in the district court's admission of the evidence complained of. In addition, the district court clearly disregarded this post-2003 information as it decided the value of the law firm was the same as determined in the original decision.

Deborah's claim that she should have been permitted to discover more evidence as to the value of the law practice post-2003 decree was correctly denied by the district court. The court limited the issues to be determined to be the true value of Scott's law practice and "[w]hat impact, if any, should any change in the value of the law practice or Scott's income have on the property distribution and alimony provisions of the trial court's supplemental decree filed March 18, 2004." The discovery limitation imposed in this case was consistent with the limitation of issues.[3] We will not reverse the district court's decision absent an abuse of discretion, and no such abuse is found here. *See In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995).

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[3] In his answer to Deborah's petition to vacate, Scott filed a counterclaim seeking to modify the alimony as a result of changes that occurred following the 2003 trial. This modification claim was bifurcated by the district court in 2006. The court proceeded on the fraud action and resultant retrial first, of which this appeal is part. The modification action is still pending.

Deborah claims the district court should have accepted her expert witnesses' testimony as to the value of Scott's practice and rejected Scott's expert. The district court explained the reason it chose Scott's expert was because he used an asset valuation method to value the practice. Both of Deborah's experts used the income-based approach that analyzed Scott's earning capacity to value the law practice. Because the court considered Scott's earning capacity in the alimony award, it chose not to use his earning capacity again in valuing the law practice. *See In re Marriage of Hogeland*, 448 N.W.2d 678, 681 (Iowa Ct. App. 1989) (noting that when the future earning capacity of a party in a professional corporation was considered as part of the alimony award, it was improper to also treat the good will of the corporation as an asset in the property distribution). We agree with the district court's valuation of Scott's law practice.

Finally, Deborah asserts the court erred in ordering her to pay a property equalization payment. Since the whole reason for the new trial was Scott's fraud, Deborah asserts it was inequitable to permit him to profit from his actions. Once the district court concluded that there were material errors in the earlier rulings and appeal decisions concerning the valuation of the IPERS account and in the recitation of the value of Scott's retirement account, it ordered Deborah to pay a property equalization payment of $11,279.50 after determining an exactly equal asset division would be equitable.

While the district court's reasoning has a certain appeal, the only reason that earlier errors were subject to correction, now favoring Scott to the tune of

$11,279.50, was the fraud he committed. The trial court retained the original property division, but after correcting the values of the retirement accounts, determined Deborah would have been favored by $22,559. That represents less than four percent of the nearly $600,000 of assets of the parties subject to division. On our de novo review of the record in this case we determine that a slightly unequal distribution in favor of Deborah would be equitable, and thus modify the property division to remove the requirement that Deborah pay to Scott $11,279.50.

V. ALIMONY.

The parties' next series of complaints attack district court's alimony decision. Scott claims the district court erred in concluding his annual income was $200,000 as opposed to $122,000, which was the amount set in the original dissolution proceeding. He also claims the district court erred in increasing the alimony from $1800 to $2000 per month for the first five years because Deborah never testified at the retrial as to her need for the additional alimony. Deborah complains the district court did not award her enough alimony and claims the proper amount to award was $4994 per month until Scott reaches age sixty-five, which would make their monthly incomes roughly equal.

The increase was primarily the result of the new information from contingency fee cases that was improperly withheld at the initial trial. The initial decree disregarded a large case settlement from the calculation of Scott's earning capacity based on the belief that the case was not likely to repeat itself. The contingency fee cases that were improperly withheld made it clear that the

first case was not an anomaly but signaled the start of number of large contingency fee cases for Scott.

Among the many appropriate factors considered by the district court when it considered alimony on the retrial, it expressly considered Deborah's 2004 loss of trust income in the amount of $129 per month. Having already determined that the court erred in considering the 2004 changes in circumstances concerning that loss of income, we must determine whether our determination requires that the alimony ordered by the court should be modified. Upon our de novo review of the record, we conclude that the district court's finding that Scott's income and income potential were substantially greater than found after the original trial, together with all of the other appropriate factors and analysis made by the district court, support the amount of alimony ordered. In doing so, we have considered and rejected Deborah's request for $4994 alimony per month. We affirm the district court's alimony award.

VI. ATTORNEY FEES.

The final issues raised by the parties deal with the award, or the lack of award, of attorney fees. The district court ordered Scott to pay Deborah $178,985.52 for the attorney fees she incurred from the filing of the petition to vacate through August 18, 2011. The court considered these fees to have been incurred as a result of Scott's fraud. Scott claims the court erroneously admitted the attorney fee statements without permitting him time to review and challenge the amount claimed. He claims the fee claim was inflated and the result of Deborah's choice to continue to pursue the litigation after he disclosed the small

value of the cases originally withheld. He also claims he cannot possibly afford to pay for a judgment of that magnitude.

Deborah defends the court's award but concedes $12,158.72 of the amount should be withdrawn. She also asserts the court should have also granted her the attorney fees she incurred in the original decree in the amount of $34,656.83. She contends Scott's fraud began in the original action, and if the original court had known his annual income was $200,000, the court would have awarded her fees back then.

Both parties also request an award of appellate attorney fees. Scott seeks $13,105.09, which includes work performed by counsel following the district court's retrial decision. Deborah seeks an award of $57,212.45, which includes work performed prior to the retrial up through appeal.

An award of trial attorney fees rests in the sound discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). In order to overturn the award, a party must establish the district court abused its discretion. *Id*. An award of attorney fees depends on the parties' ability to pay and the reasonableness of the fees. *Id*. We find no abuse of discretion in the court's denial of Deborah's request for attorney fees for the original trial. However, the district court was not authorized under existing law to award attorney fees for the petition to vacate. *See Costello v. McFadden*, 553 N.W.2d 607, 614 (Iowa 1996) (finding attorney fees are not authorized on a petition to vacate a final judgment). We determine that attorney fees are permissible on retrial of the dissolution of marriage issues, especially where, as here, the retrial was an expansion and "do

over" of the facts originally presented. *See In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) (stating attorney fees incurred in a dissolution proceeding are not marital debt but finding the district court does have discretion to make an award of attorney fees when equitable); s*ee generally In re Marriage of Shanks*, 805 N.W.2d 175, 181 (Iowa Ct. App. 2011) (striking the district court's award of attorney fees ordered on remand as the remand was limited to enforcing the premarital agreement and addressing the issue of alimony). We remand this case to the district court for a proper determination of attorney fees arising out of the retrial.

An award of appellate attorney fees rests in our discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the party making the request, the ability of the other party to pay, and whether a party was required to defend the district court's decision on appeal. *Id*. We determine that each party shall pay his or her own attorney fees on this appeal.

IV. CONCLUSION.

In conclusion, we affirm the district court's decree following the retrial as to value of law practice and the award of alimony, although we decline to consider Deborah's 2004 loss of trust income as a factor in the increased alimony award. We modify the property distribution to hold Deborah does not owe Scott a property equalization payment. The minor difference in the value of the property distributed to each party is equitable. Finally, we modify the award of trial attorney fees and remand for the district court to determine the amount of fees applicable to the retrial only.

Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.