IN THE COURT OF APPEALS OF IOWA

No. 2-434 / 11-1393
Filed October 3, 2012

IN RE THE MARRIAGE OF BRENDA J. CORNWELL AND DOUGLAS R. CORNWELL

Upon the Petition of BRENDA J. CORNWELL,
Petitioner-Appellee/Cross-Appellant,

And Concerning DOUGLAS R. CORNWELL,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

The husband appeals and the wife cross-appeals the provisions of the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

David L. Brown and Jay D. Grimes of Hansen, McClintock & Riley, Des Moines, for appellant/cross-appellee.

Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, and Timothy G. Pearson of Laden & Pearson, P.C., Des Moines, for appellee/cross-appellant.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Douglas Cornwell appeals and Brenda Cornwell cross-appeals the provisions of the decree dissolving their marriage. Doug asserts the district court erred in (1) failing to grant him more visitation with the children, (2) inadequately accounting for the assets he owned prior to the marriage in the division of property, and (3) awarding an excessive amount of alimony. Brenda cross-appeals contending the district court erred in failing to require Doug to pay the property equalization payment with after-tax funds. For the reasons stated herein, we affirm the district court's decree of dissolution as modified and affirm its denial of Brenda's post-trial application.

I. BACKGROUND AND PROCEEDINGS.

Doug and Brenda were married in 1995. This was Doug's third marriage and Brenda's first. Three children were born to the marriage, with ages ranging from thirteen to seven at the time of the dissolution trial. All of the children were healthy,[1] well-adjusted, and doing well in school.

Doug was fifty-six and in good health at the time of trial. He has been employed at the Adventureland Amusement Park since he was sixteen. He has a degree in economics and is currently responsible for the operations of the park. His busiest time at work is between Memorial Day and Labor Day, during which time he estimates he works approximately eighty hours per week. During the off-season he estimates he works approximately forty to forty-five hours per week and has some flexibility. His income in 2010 was $281,163, which included an

[1] The eldest child was diagnosed with a mild form of cerebral palsy. She does have some physical limitations and is required to wear bilateral leg braces, but this challenge has not impacted her social or intellectual performance.

annual salary and a regular bonus. Prior to the marriage, Doug purchased a condominium in Florida and received a home in Des Moines as a gift from his parents. He also had various investments and an employer profit-sharing plan. The investments were eventually consolidated into one account, and the profit-sharing plan was converted into a 401K.

Brenda was forty-four and also in good health at the time of trial. Brenda initially met Doug when she worked at Adventureland, after obtaining a bachelor's degree in fashion merchandising in 1991. After the couple married, she continued her employment at Adventureland until she accepted a sales position with AT&T. She took a leave of absence from her job in 1998, when the eldest child was born, and eventually left AT&T in 1999, after the second child was born. She assumed the primary duties of caring for the children and the home, while Doug was the main source of income. Brenda worked part-time in the office at the children's pre-school from 2002 to 2005 and was working approximately four to eight hours per week at a local fitness center at the time of trial. She also returned to school in 2010 with the intent of obtaining a master's degree in special education. She anticipated completing the degree in the spring of 2013 and projected she could earn between $37,000 and $40,000 per year as a special education teacher.

Brenda filed a petition for dissolution of marriage in June 2010. The court appointed a guardian ad litem for the children and also ordered a child custody evaluation to be done at the joint request of the parties. The case proceeded to trial in July of 2011, and the court issued its decree August 8, 2011. Brenda filed an application for an order nunc pro tunc on August 26, 2011, seeking for the

district court to state "what [its] actual intentions were" regarding whether the property equalization payment was to be made with pre-tax or after-tax funds. This application was denied by the district court on September 6, 2011. Both parties appealed.

II. SCOPE OF REVIEW.

Our review of the district court's decree of dissolution is de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012). While we decide the issues anew, we give weight to the district court's factual findings, particularly those pertaining to the credibility of witnesses. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). Because our determination depends on the facts of each particular case, precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

Our review of the district court's denial of an application for an order nunc pro tunc is for correction of errors at law. *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995).

III. VISITATION.

Doug's first claim on appeal is that the district court failed to take into consideration his work schedule in setting his visitation. He asserts the visitation ordered is appropriate during his busiest season, between Memorial Day and Labor Day. However, he seeks for us to grant him additional visitation during his off-season, from Labor Day to Memorial Day, and more than one uninterrupted nine-day period per year. The basis for his request is that it would provide the children with maximum contact with their father and would be in their best interests.

In setting a visitation schedule, Iowa courts are guided by the principle that liberal visitation should be ordered where appropriate to "assure the child the opportunity for the maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a) (2009). Our focus is on, as it should be, the best interest of the children, not the best interest of the parent seeking visitation. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994).

The district court ordered visitation each Monday and Thursday from 5:00 p.m. until the start of the next school day, along with every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. In addition, the parties were ordered to alternate holidays, and the decree provided each party with an uninterrupted, nine-day period every year. To modify this schedule by adding even one more overnight every other week would transform this visitation arrangement into what Doug requested of the district court—a "modified shared-care" arrangement. The court found Doug's proposal amounted to essentially alternating the physical care of the children, which would not be in the children's best interests due to Doug's work schedule and the parties' inability to communicate, especially as it concerns the needs of the children. The court concluded this arrangement was "unworkable, and would only further the convenience of the parties (most notably [Doug]) at the expense of the children." We agree with the district court's rationale and decision, and decline to further expand the already liberal visitation ordered by the district court.

IV. PROPERTY DISTRIBUTION.

Next, Doug challenges the district court's division of the parties' property. Specifically he asserts the district court failed to award him an adequate credit for

the value of the Florida condominium he purchased before the marriage and the parties' first marital home—the 43rd Street home—which was a gift from his parents before the marriage.

The parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). In dividing the property, the focus is on what is fair and equitable, not on an equal or percentage distribution. *Id.* The first task is to determine what property is subject to division. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). Under Iowa Code section 598.21(6), gifted or inherited property is not subject to division, "except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." Allocation of premarital property is guided by the principles in Iowa Code section 598.21(5), and the court "may not separate the asset from the divisible estate and automatically award it to the spouse that owned the property prior to the marriage." *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Instead, the fact an asset was acquired by a party prior to the marriage is simply a factor to consider, along with all the other circumstances, in making an equitable division. *Id.*

A. Florida Condominium.

In 1991, approximately four years before the parties' marriage, Doug purchased a condominium in Florida for $124,000. He financed the purchase with a note secured by a mortgage. The note was refinanced in 1993, and the outstanding balance on the note after the refinance was $92,411.57. At trial, the only evidence of the value of the condominium at the time of the parties'

marriage came from the parties' testimony, as there was no appraisal in 1995 and no record of the outstanding balance on the note at that time. Doug asserted in the four years he owned the property before the marriage, the condominium increased in value from $124,000 to $275,000. Brenda on the other hand believed the condominium increased to $150,000 in those four years. As to the balance remaining on the note, Brenda estimated $60,000-$70,000 remained to be paid in 1995, while Doug thought the balance was $85,000-$90,000. The note was paid in full and mortgage released when the 43rd Street home was sold in 2000, as the proceeds from the sale of that home paid off the balance due on the condominium note.

Contrary to Doug's claims on appeal, we find the district court properly valued the Florida property and awarded him an appropriate amount of credit in the property distribution. The district court disagreed with Doug's estimate that the property had more than doubled in value in the four years Doug owned the property before the marriage. The court found, based on the objective documentation of the county assessor's records, the property's value did not begin to increase until 2000. As it did not have any other objective evidence, such as an appraisal of the property near the time of the marriage or a statement of the balance remaining due on the note, the court found the property was worth at the time of the marriage precisely what Doug paid for it four years earlier—$124,000.

The court allowed for a small reduction in the principle of the loan as the debt had been refinanced in May of 1993 and the marriage occurred in October 1995. The court ultimately concluded Doug should be entitled to a credit of

$32,500[2] for the premarital value of the Florida property and reduced the current value of the property by this amount before awarding the remainder of the property's value to him in the property division. As the district court's valuation of the net equity in the Florida property at the time of the marriage was "well within the permissible range of the evidence, and we will not disturb [it] on appeal." *See in re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa Ct. App. 1993).

B. The Current Marital Home.

Doug next claims the district court erred in its calculation of the value of the current marital home in its allocation of assets. Five years into the marriage, the 43rd Street home, which was assessed in 1995 for $90,590, sold for approximately $128,000. Doug estimated he used $78,000 from the proceeds of the sale as a down payment on the parties' current home. The remaining funds paid off the note on the Florida condominium discussed above. The current marital home in Ankeny was valued by the district court at the time of trial as having a net value of $96,400. The house with its equity was awarded to Doug. Doug asserts the district court should have further reduced the equity value attributed to him by the $78,000 down payment he made from funds that were generated from the sale of the 43rd Street home, his gifted property.

Generally, gifted and inherited property acquired before or during marriage is not subject to division in the divorce and should be set aside to the party that received the property. *Miller*, 552 N.W.2d at 463; *see also* Iowa Code §

[2] The court found the property was worth $124,000 at the time of marriage and had a premarital net value of $32,500. Based on these figures, we conclude the district court found the outstanding balance on the note at the time of the marriage was $91,500 (124,000-32,500=91,500).

598.21(5) ("The court shall divide all property, except inherited property or gifts received or expected by one party, ..."). While Doug contends he was not given a proper credit for the down payment made on the current marital home from funds generated from gifted property, upon our review of the district court's decree, we find the district court did give Doug full credit for the sale price of the home on 43rd Street when it divided the Wells Fargo investment account.

In a footnote in the decree, the district court explained that prior to dividing the current value of the investment account at Well Fargo, it removed not only the premarital value of the accounts, but also an additional $128,000 to account for the value of the 43rd Street home. It was only after removing both the premarital value of the account and the $128,000 from the sale of the 43rd Street home, setting those amounts aside to Doug, that the court then divided the remaining value of the Wells Fargo investment account between the parties. To give Doug another $78,000 allocation for the down payment on the current home would be to give him double credit for the value of the 43rd Street home. We find the district court properly set aside the value of the gifted property in its overall division of assets in this case, and we affirm the district court's property division.

V. SPOUSAL SUPPORT.

In Doug's final claim on appeal, he asserts the district court awarded an excessive amount of spousal support to Brenda. He asserts Brenda received substantial property totaling close to $450,000 of mostly liquid assets, is entitled to an equalization payment of $264,811, and is now able to obtain a master's degree in special education without any debt, as Doug was ordered to pay all of

Brenda's tuition costs, estimated to total approximately $26,700.[3] With these financial resources and child support of approximately $2900 each month, Doug contends it was inequitable to order him to pay Brenda spousal support in the amount of $3000 per month for forty-eight months. He argues Brenda had a bachelor's degree before the marriage and was employed full-time before the children were born. He claims Brenda has had the opportunity to work but has intentionally self-limited her employment, artificially decreasing her income.

Alimony is not an absolute right, but depends on the circumstances of each case. *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). In determining what, if any, spousal support should be ordered, we look not only at the parties' earnings, but also their earning capacity. *Id.* "[I]f both parties are in reasonable health, . . . they need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for support." *Id.* We consider the property division in connection with the alimony award. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). But we will not disturb the district court's determination unless we find there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

At trial both parties put forth alimony proposals. Doug argued the amount should be $1000 per month for two years, while Brenda proposed ten years of alimony at varying amounts starting with $3500 per month for the first three years

[3] Brenda testified at trial that she anticipated needing to attend five more semesters to complete her degree. She anticipated taking twelve credit hours per semester at a cost of $436 per credit hour. There was an annual technology fee of $240 for the fall and spring semesters and a $60 technology fee if she takes classes in the summer. This would amount to a total of $26,700 to complete her degree (12 credit hours $436 per credit hour 5 semesters=$26,160 tuition+$540 technology fee=$26,700).

and ending with $2000 per month in the final two years. The court found both proposals inequitable. The court concluded a four-year award of $3000 per month allowed Brenda to focus on completing her education, which she anticipated completing in the spring of 2013, and gives her time to establish herself as an educator.[4] It concluded the amount awarded to Brenda, along with the income left to Doug, allowed both parties to meet their anticipated expenses.

While we agree spousal support is appropriate, we find the amount awarded by the district court excessive and inequitable when reviewing the total financial picture of the parties. We modify the award to provide Brenda $3000 per month for the first year and $1000 per month for the next three years. We believe this amount of support, along with the substantial property distribution award, adequately provides for Brenda's living expenses while she completes her degree, at no cost to her, and while she establishes herself in her new career. This award also ensures Brenda does not unduly lean on Doug for support, as she soon will be capable of self-support.

VI. PROPERTY EQUALIZATION PAYMENT.

On cross-appeal, Brenda raises only one issue. She asserts the district court erred in failing to require Doug to pay the property equalization payment of $264,811 with after-tax funds. She asserts it is inequitable to allow Doug to pass on to her the tax consequences of the equalization payment, as he is much more

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[4] Absent from the district court's decree is any explanation of how the tuition obligation and the alimony award work together to harmonize the financial positions of the parties. If the tuition and alimony payments, as awarded by the district court, are considered together, Doug's monthly support obligation during the time Brenda completes her education increases to approximately $4300 ($26,700 total tuition÷20 months of school=$1,335 per month+3000 alimony per month).

able to pay the taxes due. She also claims permitting him to pass on the tax will result in a payment to her that is significantly less than the amount ordered by the court. She asks us to modify the decree to require Doug pay the equalization payment with after-tax funds.

Doug asserts Brenda failed to preserve error on this claim. He points out the first time this issue was raised was in Brenda's application to the district court for an order nunc pro tunc. The district court denied Brenda's application stating:

> This issue was never brought to the court's attention during trial; no evidence was offered or received on the tax consequences associated with either party's proposal for the overall property division each sought. As a result, it would be inappropriate to revisit this issue under the guise of a nunc pro tunc order.

Brenda asserts the issue was preserved for appeal and points to Doug's testimony where he informed the court his 401K plan was income-tax deferred and there would be some tax consequences to taking money out of his investment account at Wells Fargo. While Doug did offer this testimony, Brenda fails to indicate where in the record she asked the district court to order the equalization payment to be made with after-tax funds. The district court provided in its conclusions of law, "In order to balance out the property division, the respondent shall be required to make an equalization payment of $264,811 to the petitioner." The court then ordered, "[Doug] shall make an equalization payment to [Brenda] in the amount of $264,811 within sixty (60) days from the entry of this decree." No mention of the source of the funds was made.

We agree with the district court that this issue was not presented during the trial for the court to resolve and an order nunc pro tunc is an improper vehicle to attempt to address this issue after the final decree was filed. An order nunc

pro tunc is not to be used "to modify or correct a judgment but to make the record show truthfully what judgment was actually rendered." *Freeman*, 541 N.W.2d at 893. It is to be used to correct obvious errors or to make the order conform to the judge's original intent. *Id.* "It 'is not an alternative to the established procedures to alter, vacate, or modify judgments under our procedural rules.'" *Weissenburger v. Iowa Dist. Ct.*, 740 N.W.2d 431, 434 (Iowa 2007) (citation omitted).

As we find Brenda's application was an attempt to modify or alter the dissolution decree, we agree with the district court's denial of the application for an order nunc pro tunc. Brenda did not file a motion to enlarge or amend the decree under Iowa Rule of Civil Proceedure 1.904(2) within the proscribed time, nor did she otherwise bring the issue of the tax consequences of the equalization payment to the district court's attention. Therefore, we find the issue of whether the equalization payment should be paid from pre-tax or after-tax funds was not preserved for our review. *See In re Marriage of Gensley*, 777 N.W.2d 705, 719 (Iowa Ct. App. 2009) (declining to address a claim regarding the payment of the children's health insurance where it was not presented to or ruled on by the district court).

VII. APPELLATE ATTORNEY FEES.

Brenda seeks an award of appellate attorney fees and submits an affidavit from both attorneys representing her on appeal, which itemizes their fees and totals approximately $12,000. She claims she was forced to defend the district court's decision and Doug is in a better financial position to bear the expense. Doug resists this request asserting Brenda unnecessarily retained additional

appellate counsel and had two separate law firms working on this appeal. He also asserts, based on the property division and alimony awarded, Brenda is capable of paying for her attorneys' bills.

An award of appellate attorney fees rests within 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 the party was required to defend the district court's decision on appeal." *Id.* After considering these factors, we decline to award appellate attorney fees to Brenda.

VIII. CONCLUSION.

In conclusion, we affirm the district court's decision on custody as it provided for liberal visitation and properly considered the best interests of the children. We find the district court's property division properly accounted for Doug's premarital and gifted property. However, we modify the alimony award to require Doug to pay Brenda $3000 per month for the first year and $1000 per month for the next three years. Finally, we find Brenda failed to preserve error on her claim that the district court's order should be modified to require Doug to pay the equalization payment with after-tax funds, and we decline to award Brenda appellate attorney fees.

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

AFFIRMED AS MODIFIED.

Danilson, J., concurs, Mullins, J., concurs in part and dissents in part.

MULLINS, J. (concurring in part and dissenting in part)

I respectfully dissent in part. Given Doug's income exceeds $280,000 a year, I would find that the short-term rehabilitative spousal support ordered by the district court should not be disturbed. I would affirm on that issue. I concur in all other respects.