IN THE COURT OF APPEALS OF IOWA

No. 3-547 / 12-1590
Filed August 21, 2013

GINA L. BORCHARDT, f/k/a GINA L. ERPELDING,
Plaintiff,

vs.

IOWA DISTRICT COURT IN AND FOR KOSSUTH COUNTY,
Defendant.

Certiorari to the Iowa District Court for Kossuth County, David A. Lester, Judge.

Gina Borchardt petitions for a writ of certiorari from the division of assets in her dissolution decree. **WRIT ANULLED.**

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

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

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Gina Borchardt petitions for a writ of certiorari from the division of assets in her dissolution decree after remand by this court. Our supreme court granted the petition and transferred the case to this court. No other party appeared or submitted a brief. We annul the writ, finding the district court properly complied with our instructions on remand.

I. Facts and proceedings.

This is the second time we have heard this case on appeal. We set forth the facts and relevant portions of our prior opinion here:

> 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.
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> 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.
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> 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 . . .
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> 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.
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> . . .

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).

. . .

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.

In re Marriage of Erpelding, No. 10-1445, 2011 WL 3480978 at *1–6 (Iowa Ct. App. 2011).

On remand, the district court held a hearing on the valuation of the crops as an asset. It received testimony from Gina, and reviewed the trial transcript. The court concluded the 2009 corn crop sale value was $151,655.96 and its cost was $14,491.47; it also determined no evidence was presented "of any income tax consequences resulting from the production and subsequent sale of the 2009 corn crop." It noted including the sum into the marital assets increased the net value of assets distributed to John by $137,164.49. However, it declined to modify its award to Gina, stating:

> After now taking into consideration John's current child support, alimony, and medical support obligations as they remain unchanged from the original decree, coupled with the declining hog market, decreased annual depreciation on the confinement buildings awarded to John in the original decree with the resulting increase in tax liability, the court now concludes that John is not going to be financially capable of paying any additional sums to Gina as an equalization payment. Furthermore, the court cannot ascertain any way to otherwise modify its property distribution and debt allocation to more equitably distribute the parties' assets and debts that would not otherwise impair Gina's entitlement to the equalization payment already ordered. Finally, the court cannot overlook the fact that John assumed all of the responsibility for planting, harvesting, and marketing the 2009 corn crop.

Gina argues the district court "failed to modify the property award as directed" and that the $137,164.49 "should be included in the property division as directed" by this court.

II. Analysis.

"Certiorari lies when the district court has exceeded its jurisdiction or has acted illegally. Illegality exists when the findings on which the court has based its conclusions of law do not have substantial evidentiary support or when the court has not applied the proper rule of law." *Whitlock v. Iowa Dist. Ct.*, 497 N.W.2d 891, 893 (Iowa 1993) (internal citations omitted). Our procedure for review on certiorari is governed by Iowa Rule of Civil Procedure 1.411:

> Unless otherwise provided by statute, the judgment on certiorari shall be limited to annulling the writ or to sustaining it, in whole or in part, to the extent the proceedings below were illegal or in excess of jurisdiction. The judgment shall prescribe the manner in which either party may proceed, and shall not substitute a different or amended decree or order for that being reviewed.

On remand, the district court has a limited authorization to "do the special thing authorized by the appellate court and nothing else." *In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000). "The court on remand should interpret the mandate in accordance with the context of the proceedings and should take into account the appellate court's opinion and the circumstances it embraces." *Id.* (internal citations and quotation marks omitted).

The district court was directed on remand to "determine a proper value and reflect that value in a modified property division" and to "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." The district court determined a value, applied it to John's portion of the property division, and found the parties presented no evidence of tax consequences. It considered the modified value of assets in the context of the overall division between the parties. The district court complied with our mandate. *See id.* Because the district court did not exceed its jurisdiction or otherwise act illegally, the writ is annulled.

WRIT ANNULLED.