IN THE COURT OF APPEALS OF IOWA

No. 3-650 / 12-2291
Filed September 5, 2013

IN RE THE MARRIAGE OF TINA MARIE MARTIN
AND RICHARD GLEN MARTIN

Upon the Petition of
TINA MARIE MARTIN,
Petitioner-Appellant,

And Concerning
RICHARD GLEN MARTIN,
Respondent-Appellee.

Appeal from the Iowa District Court for Fayette County, Richard D. Stochl, Judge.

Tina Zimmerman appeals from the district court's property division in its dissolution decree. **AFFIRMED.**

John Hofmeyer, Oelwein, for appellant.

Linda Jensen Hall, Waterloo, for appellee.

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

EISENHAUER, C.J.

Tina Zimmerman[1] appeals from the property division in her dissolution decree.

I. Background Facts and Proceedings

Richard Martin is forty-eight years old and has two children from a previous marriage. After graduating high school, he served in the Army for four years before spending a year studying automotive technology at Hawkeye Tech. Richard currently works as an inspector for John Deere. In 2003, he bought an acreage in Oelwein.

Tina Zimmerman is forty-four years old and also has two children from a previous marriage. She graduated from Northeastern Iowa Community College in May 2007 and currently works as a nurse. Before she married Richard, Tina lived in a home in Stanley. Although the home is in her name, she is holding the property for the benefit of her niece and has not invested any money in it. Both parties agree the home was not a part of the marital estate.

When Richard and Tina married on August 18, 2007, Tina moved her personal property onto the Oelwein acreage, which became their marital home. In 2010, as they nearly finished renovating the acreage home, it was destroyed by fire. The insurance proceeds were used to pay the mortgage balance and replaced some items lost in the fire. Richard and Tina purchased a home in Oelwein, which they used as their marital residence. They have no children together.

[1] At trial, Tina elected to revert to her premarital surname.

In 2011, Richard earned $75,159 and Tina earned $39,402. Richard owns a pension through John Deere, and Tina owns a 401(k) plan worth $1412. Although Tina's 401(k) is through her employer, only she has contributed to the fund, which was opened during the marriage.

On April 3, 2012, Tina filed a petition for dissolution of marriage. Trial on the sole issue of division of marital property and debts was held, and the court entered its judgment and decree, largely dividing the marital property according to Richard's asset and debt worksheet and refusing Tina's request for a $30,000 equalization payment. After the district court denied Tina's post-decree motion, she appealed, challenging multiple aspects of the decree.

II. Scope and Standard of Review

We review dissolution of marriage proceedings de novo, examining the entire record, and adjudicate the issue of property distribution anew. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). While we give weight to the district court's findings, especially concerning witness credibility, we are not bound by them. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). We will disturb the district court's ruling only if there has been a failure to do equity. *In re Marriage of Kimbro*, 826 N.W.2d 696, 698 (Iowa 2013).

III. Analysis

A. Property Distribution

Tina argues she is leaving the marriage with less than she came in with, while Richard is parting with more. Her main contention regards the district court's awarding Richard the acreage without providing an equalization payment. Richard bought the acreage in July 2003 for $50,000. The real estate included a

garage, shed, and house. Five months before Richard married Tina, he refinanced the property with a $77,600 mortgage and a $10,000 home equity loan.

Richard testified he refinanced the acreage to make improvements to the home, including new windows, siding, an addition, a new roof, and updated wiring. Tina testified a portion went to pay off premarital debt. The parties maintained separate financial accounts, with Tina transferring money into Richard's account to help pay the acreage's monthly mortgage, tax, and homeowner's insurance payments. Tina provided no records showing what amount she transferred to Richard's account. In 2010, as they nearly finished remodeling, a fire destroyed the home. Although the insurer satisfied the acreage's remaining $77,600 mortgage, it refused to pay the $10,000 home equity loan.

Tina argues the district court did not do equity when it set aside the acreage as nonmarital property because Richard held no equity in the property before the marriage, the appreciation in equity was due to the parties' joint efforts, and the acreage's current equity is in part created by her efforts.

Richard highlights the short term of their marriage and asserts he brought the property into the marriage. He notes the balance of the home equity loan was rolled into the debt on their Chevrolet Impala, which he was awarded, decreasing its equity. He argues any sweat equity by either party was destroyed at the time of the fire, after which they moved to a separate home, and Tina has contributed no equity to the acreage since. Richard considers the enhanced

value of the real estate to be caused by fortuitous circumstances rather than their joint efforts.

In dissolution proceedings, we divide property, except for inherited property and gifts expected or received by one party, equitably between both parties after considering:

> a. The length of the marriage.
> b. The property brought to the marriage by each party.
> c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
> d. The age and physical and emotional health of the parties.
> e. The contribution by one party to the education, training, or increased earning power of the other.
> f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
> g. The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of the children, or if the parties have joint legal custody, 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 and whether the property division should be in lieu of such payments.
> i. Other economic circumstances of each party . . . .
> j. The tax consequences to each party.
> k. Any written agreement made by the parties concerning property distribution.
> l. The provisions of an antenuptial agreement.
> m. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21(5) (2011).

An equitable property division does not require an equal division of each asset. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). Our concern is what is equitable, given the circumstances of the case. *Id.* We

remain mindful "there are no hard and fast rules governing economic issues in dissolution actions," and since precedent is of minimal value when framing a distribution, a particular property division must ultimately depend on the particular facts before us. *McDermott*, 827 N.W.2d at 682.

Property a party brought into the marriage is merely a factor for the court to consider, alongside all other factors, in exercising its role as an "architect of an equitable distribution of property at the end of the marriage." *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Each party is entitled to a just and equitable share of assets accumulated through their joint efforts. *In re Marriage of Hagerla*, 698 N.W.2d 329, 334 (Iowa Ct. App. 2005).

The district court found, "[i]t is unclear from the evidence how much equity existed in the property at the time the parties married." The inconsistent testimony and lack of documentary evidence lends credence to the court's finding. At the time of trial the property was appraised at $36,900. In his testimony, Richard disputes this figure but acknowledges the acreage holds equity.

Both parties classify the acreage as appreciated property. Richard cites *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852–53 (Iowa Ct. App. 1998), which lists four factors to consider when premarital property appreciates during a marriage: (1) each party's tangible contributions to the marital relationship, which includes "homemaking"; (2) whether the property's appreciation was caused by fortuitous circumstances or the parties' efforts; (3) the length of marriage; and (4) the statutory factors listed in section 598.21. Tina embraces these four

factors and argues they lead to the conclusion the increase in value should be split equally between her and Richard.

Attempting to shoehorn the present circumstances within these factors exemplifies why "precedent is of little value" due to the varying facts of each case. *See In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). In a more typical asset-appreciation case, the court considers whether an asset appreciated in value because of the parties' efforts in the marriage. In *Grady-Woods*, the court determined a business appreciated because of the husband's hard work, but the wife's homemaking efforts "made [the husband's] life outside work easier, allowing him to concentrate his efforts on his work," and she "provided marital companionship and contributed to the marriage in every way she was capable." 577 N.W.2d at 853. The court concluded even if the wife's contribution was indirect, she still contributed to the business's growth. *Id.*

Richard and Tina dispute the amount of relative effort spent renovating the home before the fire. But they agree after the fire the insurance proceeds did not fully compensate their loss. The equity in the property was not a product of their hard work, but rather their homeowner's insurance payout satisfying the remaining balance of the acreage's mortgage. At the same time, the fire cannot be described as a "fortuitous circumstance."

Because the parties purchased the Oelwein home rather than rebuild on the acreage, what remains is a parcel of real estate and the home equity loan. It would not be inequitable to assign the property to Richard, whose car debt includes the remaining home equity loan. The marriage was of relatively short duration, and the appreciation in value was caused by an unfortunate incident

rather than the efforts of each party. We do not doubt both parties labored to improve the home before the blaze, and do not attempt to determine the relative effort of each spouse, but this effort did not decrease the balance of the mortgage eventually paid off by insurance proceeds. And by relocating rather than rebuilding, there was no additional equity brought in by Tina's and Richard's joint efforts to lead to the land's current valuation.

Additionally, the insurance policy was paid from Richard's account. Tina testified to contributing to the account, but did not provide documentary evidence at trial showing a single monthly contribution. The court's award follows its overall approach to divide property according to what both parties brought into their marriage.

Tina also challenges the court's use of Richard's exhibit MM to distribute the remaining property. She contends the exhibit contains several errors, such as including her non-marital Stanley home, crediting Richard for premarital debts, omitting various assets Richard retained, and failing to recognize Richard's appliance valuations were based on each item's purchase price rather than depreciated value.

Richard argues though Tina criticizes his values in exhibit MM, she did not provide expert testimony or appraisal of the property to contest the amounts. He contends the court's division is equitable and notes the items she took upon separation amount to roughly half of what the insurance proceeds paid to replace the appliances destroyed by fire.

Respondent's exhibit MM is Richard's spreadsheet listing martial and premarital real estate, vehicles, accounts, other personal property, retirement

plans, and debts. For each item, Richard provides a description; its ownership; its gross value; any encumbrance; the net value; and whether the property should be awarded to Richard, awarded to Tina, or be sold.

Richard lists the acreage, valued at $36,900, to be awarded to him. The Oelwein home, which is valued at $112,810, is encumbered by a $110,505 mortgage. The parties plan to sell the home and split the proceeds, if any.[2] Until then, Richard has been living in the house and paying the mortgage. The Stanley property is the last real estate listed on the spreadsheet, which Richard recognizes as being worth $22,240, owned by Tina, and to be awarded to Tina.

In its judgment and decree, the court clarified it was not including the Stanley home in the marital estate, explaining: "Both parties agree it is not a marital asset." We doubt Tina's contention the district court accepted "carte blanche" Richard's worksheet. The court ordered each party "receive all property presently in [his or her] possession identified in Respondent's Asset and Debt Worksheet." Considering the court's recognition of the Stanley property as a premarital asset, we do not perceive its division as adopting the Stanley home to be part of the marital estate.

The court determined the division of assets was equitable not based purely on Richard's valuations, but rather "based on the evidence presented at trial." The court found Tina "presented little or no evidence as to her net worth at the time of the marriage to support her financial decline." She continues to hold the roughly $22,000 in student debt she brought into the marriage. Many of her

[2] In the following subsection, we address Tina's challenge to the court-ordered $200 monthly credit to Richard for paying the mortgage before sale.

premarital home furnishings were kept in the basement of the acreage home and destroyed by fire, alongside Richard's own premarital property. The parties dispute the extent to which each other's possessions were replaced, but when they separated, they divided the replacement appliances between them.

Richard's premarital property included a 1971 Monte Carlo, a 1983 Chevrolet truck, and a skid loader he valued at $100 since it is disabled and worth only its weight in scrap metal.[3] His home was furnished, and he also owned some guns. Before marriage, Richard also owned a four-wheeler he valued at $2000 with a $3502 encumbrance, and a lawnmower and snow blower he valued at $2500 with a $2995 encumbrance. Tina brought in a 1998 Ford Mustang, clothes, and various household items and furnishings.

Testimony and evidence submitted included debt shifting at the time of and throughout marriage, which, at trial had been rolled into various marital assets. Tina testified a portion of the $21,559.11 loan on a 2011 Dodge Avenger was a debt rolled over from another vehicle, which was originally taken out to pay for her Lasik surgery, but was actually used to pay off bills, including Christmas purchases. She eventually had Lasik surgery when Richard received a bonus. Richard testified the $9056 loan on the 2008 Chevrolet Impala includes the remaining balance of the $10,000 unpaid home equity loan.

The court divided the assets according to those brought into the marriage by each party, including each party's separate accounts. The court also used the

[3] Richard testified he purchased a second skid loader during the marriage, but because it is also inoperable, its value is only in scrap metal as well.

Benson formula[4] to divide Richard's account during the term of the marriage, set off by the amount of Tina's 401(k). It awarded Richard the Impala with the associated loan and Tina the Avenger with its loan. The court ordered both parties responsible for their personal debts.

Perhaps in part because the fire destroyed the records, evidence of property values, previous debts brought into marriage, and other information was lacking at trial. The court's division, considering the short duration of marriage and the impact of the fire on both parties' finances and property, sought to award each spouse property brought into marriage while maintaining an equitable division of the estate. We believe the court has properly done so.

Tina criticizes Richard's exhibit for not including all his property, including guns bought before and during the marriage, which she contends were overlooked. But the district court did not disregard items not listed on the exhibit. The court was cognizant of the guns and other property, highlighting the lack of evidence to determine value: "Some testimony was presented about other assets the parties possess that may be marital property such as guns owned by Richard but insufficient evidence was offered to establish whether they effect the equitable nature of the current division."

We recognize our review of dissolution proceedings is de novo, and we have reviewed the record in full. *See McDermott*, 827 N.W.2d at 676. In doing so, we are faced with sparse documentary evidence to support the contentions of the parties. Given the factors in section 598.21, including the short duration of their marriage, dividing the property so parties leave with the items brought in

[4] *See In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

and splitting remaining marital property between them, while not necessarily equal, is an equitable disposition. *See Hazen*, 778 N.W.2d at 59 (holding "[a]n equitable division does not necessarily mean an equal division of each asset," but instead, "the issue is what is equitable under the circumstances"). Thus, no equalization payment is necessary.

B. $200 Monthly Credit Toward Oelwein Property Mortgage

The district court ordered a split of the proceeds of the Oelwein home sale, if any exist, and a share in the obligation to pay any remaining balance. Additionally, Richard would receive credit for $200 per month since the date of separation to offset his monthly mortgage payments.

Tina asserts this $200-per-month credit appears to be based on an agreement between the parties stating Richard would make the mortgage payments but would receive the $200 monthly credit upon sale, so long as he made no direct or indirect contact with her. She acknowledges Richard did not read the contract but knew about it when he sent her a text message two days later.

Richard asserts the agreement was ratified by the court in its July 16, 2012 order and again in its decree. He argues this credit compensates him for the increasing equity he was contributing by maintaining the mortgage payments until the house is sold.

A stipulation entered into during dissolution proceedings is a contract between parties that is not final until accepted and approved by the court. *In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa Ct. App. 1995). The court is not bound by the stipulation until its approval but may consider the stipulation in

rendering its decree. *Id.*; *see* Iowa Code § 598.231(5)(k) (including written agreements between parties concerning property distribution among factors to consider when equitably dividing property).

A fax from Tina's attorney commemorates the parties' agreement to the $200 monthly contribution and dropping her motion for contribution in exchange for the no-contact order. Aside from the text message, the parties presented contradicting evidence at trial whether Richard made any other contact with Tina.

On July 16, 2012, the court approved an attached no-contact stipulation between parties, which made no reference to the $200 monthly credit. The parties filed a pretrial stipulation on November 21, 2012, in which Tina disputes the $200-per-month agreement: "Regarding the $200 per month, Tina only agreed to that credit in Richard's favor if he had no contact, directly or indirectly with Tina after the agreement, and Richard breached that agreement and so forfeited any right to that credit, especially where Tina had to pay rent after the separation."

As Tina notes in her reply brief, because the court's July 16 approval does not expressly include the $200 agreement, regardless of Tina's later refusal to consent to a $200 payment, the court is not bound by the $200 credit. But this does not preclude the court's considering the agreement in its decree. *See Gordon*, 540 N.W.2d at 291.

Our court has previously credited a spouse living in the marital residence who maintains mortgage payments, though we do not recognize a precise formula to determine this credit. *Compare Hagerla*, 698 N.W.2d at 335 (finding $1000 monthly credit to spouse living in house until sale was equitable) *with In re*

Marriage of Smith, 351 N.W.2d 541, 542 (Iowa Ct. App. 1984) (dividing mortgage payment based on rent paid by non-residing spouse). It is not inequitable to incorporate the $200 credit to offset Richard's $875.04 monthly payment on the home while he continues to make mortgage payments.

C. Trial and Appellate Attorney Fees

Tina argues the district court's $1000 award for her trial attorney fees was insufficient since Richard's annual income is substantially greater than her own. She asserts either Richard should pay her total trial fees or each party should pay attorney fees relative to their income levels.

Richard contends Tina did not preserve error on this issue since she presented no evidence of her attorney costs at trial. He asserts Tina failed to show the $1000 award was an abuse of discretion.

An award of trial attorney fees rests within the discretion of the district court. *In re Marriage of Nielsen*, 759 N.W.2d 345, 350 (Iowa Ct. App. 2008). Absent an abuse of discretion, we will not disturb the court's award on appeal. *Id.* Whether to award attorney fees depends on the parties' respective abilities to pay. *Kimbro*, 826 N.W.2d at 704 (internal quotation marks omitted). This determination requires a review of their entire financial picture, including respective earnings, liabilities, and expenses. *Id.*

Richard's attorney fees were paid by his Hyatt plan. Before the court entered its decree, Tina submitted her attorney fee affidavit, including $5359.43 in fees. Assuming without deciding error was preserved, given the evidence presented at trial, we do not believe the court's $1000 award was an abuse of discretion.

Richard requests we award him appellate attorney fees since he defended the district court's decision and his Hyatt legal plan does not cover appellate attorney fees.

Tina asserts Richard's income is sufficient to cover his own appellate fees and he should be ordered to pay at least a portion of her appellate fees.

Appellate attorney fee awards are not a matter of right, but rest within our discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). In determining whether an award is appropriate, we consider the needs of the requesting party, the other party's ability to pay, and whether the requesting party was required to defend the trial court's decision on appeal. *Id.*

While we uphold the district court's ruling in full, Tina's challenges were not frivolous. Given the outcome of the appeal and the disparity in each party's earnings, we decline to award either party appellate attorney fees. We assess the costs of the appeal to Tina.

AFFIRMED.