IN THE COURT OF APPEALS OF IOWA

No. 3-677 / 12-2005
Filed September 5, 2013

IN RE THE MARRIAGE OF RENEE MICHELLE BISCHOF AND MICHAEL LARRY BISCHOF

Upon the Petition of
RENEE MICHELLE BISCHOF,
Petitioner-Appellant,

And Concerning
MICHAEL LARRY BISCHOF
Petitioner-Appellee.

Appeal from the Iowa District Court for Iowa County, Sean W. McPartland, Judge.

A wife appeals from aspects of the dissolution decree involving distribution of retirement funds and alleged dissipation of marital assets. **AFFIRMED.**

James Claypool, Williamsburg, for appellant.

John Wagner, Amana, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Renee Van Hoe[1] challenges the distribution of the parties' assets and debts in the decree dissolving her marriage to Michael Bischof. She argues the district court improperly awarded their retirement funds and failed to find Michael dissipated assets from retirement accounts.

Deferring to the district court's findings that both parties lacked credibility in certain respects, and with no documentary evidence of the premarital value of Michael's retirement plan, we find it equitable to award each party their respective retirement accounts in full. Moreover, no credible evidence shows Michael dissipated marital assets through the proceeds of a 401(k) loan or by liquidating his Iowa Public Employees Retirement System (IPERS) account.

I. Background Facts and Proceedings

Renee and Michael married in November 2001. Both are now fifty-four years old. Since 2006, Renee has worked as an office coordinator with the University of Iowa Hospitals and Clinics. Michael is employed as an inspector at Whirlpool, where he has worked since 1977.

On October 11, 2010, Renee filed a petition for dissolution of marriage. The district court held trial on May 8, 2012, to resolve the sole contention of the dissolution—property valuation and division. Specifically, the parties disputed the value of the following: (1) real estate, including the parties' marital residence and their rental property, both in Marengo, Iowa; (2) debt, including mortgages on

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[1] The district court restored Renee's last name to Van Hoe in response to her request.

both parcels and credit card debts;[2] (3) retirement funds, including Michael's 401(k), Renee's retirement account, and Michael's liquidated IPERS account; and (4) miscellaneous assets.

The district court entered its findings of fact, conclusions of law, and decree of dissolution of marriage on August 6, 2012. Before dividing the marital estate, the court described the evidence offered by both Michael and Renee as lacking credibility. After listing examples in which the parties offered unbelievable or contradictory testimony, or acknowledged the absence of documentation to determine values at the time of trial, the court concluded:

> In short, despite the fact that the parties prepared for a trial involving only financial issues, the parties submitted incomplete, confusing, or inaccurate information with respect to certain of those very financial issues. The Court found the evidence of both parties related to financial matters to lack credibility in certain respects. Accordingly, to the extent that the Court has arrived at allocations of assets and liabilities in accordance with the authorities, the Court has done so considering deficiencies in the credibility of the evidence of both parties related to such matters.

Proceeding to divide the marital estate, the district court awarded both homes to Renee, along with their mortgages, and ordered Renee to pay Michael $9750 to equalize the distribution. The court held each party responsible for half of the remaining marital debts and ordered any property not specifically awarded in its ruling to be sold in a mutually agreeable manner or at auction, with parties splitting the net proceeds.

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[2] The parties listed the following debts, in addition to the mortgages: $2800 owed on a Sears credit card, $4500 on a Home Depot credit card, $1800 on a Menards credit card, and $700 debt to Brown's Hardware.

Regarding the retirement funds, the district court again noted the scarcity of evidence on record: "Neither party provided documentation of the use that was made of the funds from the liquidation of the IPERS account. Neither party provided documentation indicating the breakdown of the Whirlpool 401(k) value as a premarital versus marital asset." The court concluded, "each of the parties is entitled to retain those retirement accounts that are in their names. Although the evidence in connection with these matters was not strong either way, the Court concludes that such distribution is fair and equitable in the circumstances here."

Renee filed a motion for additional findings of fact and conclusions of law. The court issued additional findings and clarifications on various aspects of its decree, but affirmed the original distribution. Renee now appeals.

II. Scope and Standard of Review

We review dissolution of marriage proceedings de novo, examining the entire record, and adjudicate the property distribution issue 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. *McDermott*, 827 N.W.2d at 676.

III. Analysis

Renee challenges the district court's rulings regarding the parties' retirement accounts—namely Michael's 401(k) and his depleted IPERS account.

In addressing her challenge, we strive for an equitable division of the martial property based on the criteria codified in Iowa Code section 598.21(5) (2011). We apply these factors mindful there are no hard and fast rules that govern economic issues in dissolution proceedings. *Id.* at 682. Although an equitable distribution of marital property under the section 598.21(5) factors does not require the division be equal, equality is generally recognized as most equitable. *In re Marriage of Kimbro*, 826 N.W.2d 696, 703 (Iowa 2013). We value the property at the time of dissolution; it is the parties' net worth at the time of trial that is relevant in determining an equitable division. *In re Marriage of Decker*, 666 N.W.2d 175, 181 (Iowa Ct. App. 2003).

The court may assign varying weight to premarital assets, but should not automatically award them to the party who owned the property before the marriage. *McDermott*, 827 N.W.2d at 678. Property a party brought into the marriage is merely one factor for the court to consider 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); *see In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996) ("In some instances, this factor may justify a full credit, but does not require it.").

A. Michael's 401(k) Retirement Account

Renee first challenges the district court's decision to award Michael the entire balance of his 401(k) retirement account. In its decree, the court referenced the sparse 401(k) documentation to illustrate the pattern of incomplete information available throughout the trial:

> As only one further example, the parties asked the Court to value a previously identified pension plan which had, by the time of trial, been turned into a 401(k) plan through Whirlpool. [] The parties acknowledged at the conclusion of the evidence, however, that there were no documents offered for the consideration of the court which would indicate to the Court the breakdown of such asset as a premarital versus marital asset. That is, none of the extensive exhibits offered by the parties document the pre[marital] versus after-marital valuation of either the pension plan or the 401(k).

Michael enrolled in his employer's pension plan before he met Renee in 2001. The pension plan "had been in existence for some time before 2005," when it was converted into a 401(k). Michael submitted one document showing the 401(k)'s balance as of 2006 at roughly $34,000 and one document listing a March 31, 2012 balance of $81,196.50. Renee provided no evidence of the account's value before the marriage. Parties acknowledge they have taken out multiple 401(k) loans to finance various expenses since 2005.

Renee first asserts the district court improperly placed the burden on her to show the accounts were marital assets. She contends it was Michael's burden to show the value of the account before marriage for the property to be set off to him, and absent the required information, the funds should be equally divided between them.

The district court clarified its language and reasoning in its post-decree ruling:

> Although the Court did find and conclude that Petitioner had not provided sufficient evidence to establish that all accounts were marital assets, by doing so, the Court did not mean to imply that the Court placed the initial burden upon Petitioner to provide such information in the absence of proof from Respondent. As noted by Respondent, Respondent provided testimony that he started work in Amana in 1977; that the parties were married in November of 2001; that the parties were separated for a period prior to trial; and

> that he had made contributions to his 401(k) account prior to the marriage and throughout transitions in his employ[ment]. Petitioner produced no credible evidence to dispute such evidence of Respondent.

Deferring to the court's credibility findings, we do not believe it would be equitable to lump an entire retirement account established before the ten-year marriage into the marital estate because no documentary evidence shows its value at the time of marriage. To encourage us to divide the 401(k) account, Renee cites *In re Marriage of Benson*, 545 N.W.2d 252, 254–55 (Iowa 1996), where our supreme court sets out the formula to divide pension plans. But the record contains insufficient evidence to employ the *Benson* formula.

The parties married in their mid-forties and brought property into the marriage. The court awarded Renee her TIAA-CREF retirement account in full, even though it accumulated entirely during the marriage.[3] As of March 31, 2012, her retirement account grew to $32,088.61. Without evidence to establish the pre-marital value of Michael's 401(k), we believe it was equitable to award both parties their retirement accounts in full, including gains obtained while the parties were married.

Renee points to language in the post-decree ruling suggesting the court valued the retirement accounts as of the date of separation. Renee is correct that ordinarily the proper time to value property is as of the date of trial rather than separation. *See Decker*, 666 N.W.2d at 181. But Renee is incorrect in

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[3] As Michael notes, the district court decided to award each party their own retirement account. In arguing that Michael's 401(k) account should be included in the marital estate, Renee at no point suggests her own account should also be divided between parties.

asserting the district court breached that protocol. In its decree, the court stated: "Under the facts of this case, it is neither practical nor equitable to use the date of separation to value the assets." It then valued various assets "at the time of trial" and "as to their current value." At no point did the court determine the actual value of the retirement accounts. The court based its decision not to divide the accounts on the lack of documentation presented. Finding no failure to do equity, we opt not to disturb the distribution.

B. Dissipation of Funds

Renee next asserts the district court erred in failing to find Michael dissipated marital assets by taking out a loan against his 401(k) and liquidating his IPERS account.

In deciding the distribution of property, the court should consider whether either party dissipated assets. *In re Marriage of Fennelly*, 737 N.W.2d 97, 704 (Iowa 2007). The dissipation doctrine calls for a two-pronged approach:

> Under the first prong, a court must decide whether the alleged purpose of the expenditure is supported by the evidence. When a spouse claims the other party dissipated assets and can identify the assets allegedly dissipated, the burden shifts to the spending spouse to show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence. It is not enough for a spouse to merely show the incurrence of expenditures during the period of separation. The spouse also must show a nexus between the payment of the expenses and the use of the marital assets at issue.

Kimbro, 826 N.W.2d at 700–01 (quotation marks and citations omitted).

If the record establishes an evidentiary basis for the expenditure, the court moves to the second prong: whether the purpose amounts to dissipation given the circumstances. *Id.* Dissipation is identified by answering the following

questions: (1) was the expenditure close in time to the separation? (2) was the expenditure typical of outlays by the parties before the breakdown of the marriage? (3) did the expenditure benefit the joint marital enterprise or did it benefit one spouse to the exclusion of the other? and (4) what was the amount and the need for the expenditure? *Id.*

Renee first contends Michael used the 401(k) loan proceeds to pay for items he retained after the parties separated. Michael counters that the parties took out many 401(k) loans during the marriage and the most recent loan was used immediately after they separated to address lingering marital debts.

In its post-decree ruling, the district court explained why it ordered both parties to split the 401(k) loan:

> Although [Renee] contends that the loan was withdrawn at the time of separation and before the filing of the dissolution petition, such that the debt clearly was incurred during the period of the marriage, [she] offered no evidence of the use of the loan proceeds, while [Michael] offered evidence that the proceeds were utilized for improvements to the real estate awarded to [Renee].

Michael testified to obtaining the most recent 401(k) loan in the amount of $19,000. He testified he paid off the debt on his Mustang, which had served as collateral to pay for marital real estate expenses and other debts, including some marital property he was awarded at dissolution.

The scant credible evidence available on this issue indicates portions of the loan paid for real estate expenses and portions went toward debts accumulated by the parties. Because these debts were incurred during the marriage, we do not believe paying them off, even for property Michael would eventually be awarded, constitutes dissipating assets.

Renee next focuses on Michael's IPERS account—arguing its value accumulated during their marriage and that he liquidated the account during the pendency of trial, spending the proceeds on himself. She does not support her argument with documentary evidence. Instead she complains Michael "has not adequately explained his use of the proceeds from the IPERS account," citing inconsistencies in his testimony regarding which debts he repaid with the funds.

Michael acknowledges he liquidated the IPERS account during the marriage, but asserts he used the money to pay off various marital debts, including a bank loan and insurance.

The district court cites the IPERS account as an additional example of the deficiency in the parties' proof:

> [A]lthough the evidence indicated that there had been liquidation or "cash-out" of certain funds in an IPERS account, neither of the parties provided documentation of the use that was made of the funds from the liquidation of the IPERS account during the period of the marriage.

The first prong of the dissipation analysis is "an evidentiary matter and may be resolved on the basis of whether the spending spouse can show how the funds were spent or the property disposed of" through testimony, receipts, or similar evidence. *Fennelly*, 737 N.W.2d at 104. Because it is the only evidence concerning the use of the IPERS cash-out, we find Michael's testimony satisfies the burden to show no dissipation of marital assets occurred.

AFFIRMED.

Vogel, P.J., concurs; Danilson, J., concurs specially.

DANILSON, J. (specially concurring)

I specially concur as I agree with the result reached by the majority, but reach this conclusion for different reasons. Suffice it to say that the property distribution entered by the district court was equitable to both parties and should be affirmed.