IN THE COURT OF APPEALS OF IOWA

No. 6-500 / 05-1856
Filed August 23, 2006

IN RE THE MARRIAGE OF BARBARA LOUISE SCHULTZ AND GLENN RALPH SCHULTZ

Upon the Petition of
BARBARA LOUISE SCHULTZ,
Petitioner-Appellee/Cross-Appellant,

And Concerning
GLENN RALPH SCHULTZ,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

The respondent appeals and the petitioner cross-appeals from the decree dissolving their marriage. **AFFIRMED.**

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

Alice S. Horneber of Horneber Law Firm, Sioux City, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Glenn Schultz appeals and Barbara Schultz cross-appeals from the decree dissolving their marriage. We affirm.

Background Facts and Proceedings.

Glenn and Barbara were married on July 17, 1976. Two children were born during the marriage, both of whom were in their majority at the time of the dissolution. Barbara is a high school graduate and worked at a farm store at the time of the marriage; however, she left the workforce when their children were born. At the time of the dissolution, Barbara worked for the Woodbury County Conservation Board, earning $29,105.16. Glenn holds a bachelor's degree and was employed as a livestock inspector for many years. When this job was eliminated in 1984, he began working at Gardner Tree Service. Barbara and Glenn then began buying into the business and eventually bought out the entirety of the business. Glenn worked full-time at the tree business, while Barbara maintained all of its bookkeeping activities.

In 1993, the parties bought a home located on Jackson Street in Sioux City. In 1990, Barbara's mother had transferred a rental home to Barbara and Glenn which the parties rented out until 1998, when Barbara moved into it. At that time, the parties had decided to sell the Jackson Street home and move into the rental home. Apparently on the advice of their realtor, Glenn remained in the Jackson Street home until it sold. The parties then separated sometime in 1999.

On June 7, 2004, Barbara filed a petition seeking to dissolve her marriage to Glenn. Following a trial, the court dissolved the marriage and distributed the assets and debts of the parties. Of relevance to this appeal, the court first

granted Barbara's request for alimony, and ordered Glenn to pay her $300 per month until the death of either party or Barbara's remarriage. The court further valued and divided the parties' pension and retirement plans, and tree service business. After awarding the various assets and debts to the parties, it ordered that Glenn make an equalization payment of $100,000.00 to Barbara.[1] Glenn appeals, and Barbara cross-appeals, from the decree entered in this "contentious action," as the district court characterized it.

Scope of Review.

We review this equitable action de novo. Iowa R. App. P. 6.4. We are not bound by the trial court's findings of fact, but we do give them deference because of the district court's trial perspective. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996).

I. Property Settlement.

Iowa is an equitable distribution state. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). This "means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties." *Id.* All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property. *Id.* (citing Iowa Code § 598.21(1) (2003)).

[1] In the original decree, the court ordered Glenn to make an equalization payment of $115,000.00; however, following Glenn's motion pursuant to Iowa Rule of Civil Procedure 1.904(2), the court decreased that amount.

A. IPERS and Mutual of New York. Glenn maintains the court erred in its valuation of his IPERS retirement account and the Mutual of New York (MONY) annuity. He claims the valuations lack the backing of expert testimony, and he requests this court "overrule" or remand to the district court to correct the values.

Prior to trial, Glenn did not comply with either discovery requests or the pretrial order regarding disclosure of the valuation of these accounts. What he offered at trial, a one page letter of his IPERS monthly benefit and a one page MONY document containing hand-written notes, was of little assistance to the district court.[2] However, appended to his combined motion for new trial and rule 1.904 motion, were several exhibits, intended to highlight the asserted inequities in the valuation of these two assets in the decree. Barbara resisted Glenn's motions, arguing that Glenn was attempting to submit additional evidence that should have been offered at trial. The court's subsequent ruling included this explanation:

> Apparently, in order to arrive at the numbers included in [Barbara's] financial affidavit, [Barbara] simply added up the total number of expected payments times [Glenn's] projected life expectancy, with no discount of any kind for present value. While the court on its judgment did discount these things for present value, it did so without the benefit of any expert testimony regarding the actual value. In fact, in its arrival at a figure for property settlement, the court did not have the benefit of a substantial amount of evidence that would have been helpful in arriving at a fair resolution of the issues. The reason for this, as pointed out in the original decree is that [Glenn] seemed to have systematically made an effort to operate certain portions of his business in cash and to avoid keeping records. [Glenn] admitted on the witness stand that the reason he cashed his farm rental check and kept the proceeds

[2] Barbara offered more detailed IPERS documentation, which contained information prior to Glenn's decision to begin drawing IPERS benefits in early 2005.

> in his billfold was to keep it away from [Barbara]. With that in mind then the court does not feel compelled to dramatically change the amount of the property settlement awarded. As pointed out in the decree, [Glenn] will be left with a great deal more income property and ability to earn income than will [Barbara]. Although a portion of that result is because of [Glenn's] inheritance, a portion is also attributable to the intentional effort by [Glenn] to prevent [Barbara] from receiving a fair share of the assets accumulated during the marriage.

Regarding the IPERS and MONY accounts on appeal, Glenn argues that "[n]o evidence was presented as required in account with the present value methodology," and "the law requires presentation of evidence by expert testimony of an accountant or actuary to establish a present value of that future stream of pension benefits." He cites *In re Marriage of Mott*, 444 N.W.2d. 507, 510-511 (Iowa Ct. App. 1989). It is curious that Glenn faults the district court, when it was Glenn who possessed yet failed to offer the very information he now claims was absent from the record. He requested a second chance in his motion for new trial, and now, a third chance on appeal and yet another in his request that we remand to the district court to correct its overall property settlement. We decline to keep the fire burning under this piece-meal litigation, when Glenn had control of the required information and should have produced the necessary information during the trial, if not before trial. *See In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999) (noting that a person in possession of facts necessary to prove an issue should have the burden of proving those facts); *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991) (stating that when a party whose interest is affected fails to produce relevant evidence within the control of that party, a court may infer that the evidence would be unfavorable to that party).

The district court did not award Barbara one-half of her estimated values of Glenn's IPERS and MONY accounts, but did consider her undisputed valuations in making the overall property award. In her cross-appeal, Barbara argues the court erred in revisiting and reducing the valuation of Glenn's retirement accounts in the ruling on motion for new trial and rule 1.904(2) motion. She states that, "Perhaps the trial court, because of the passage of time, did not recall the pretrial discussion of valuation of retirement accounts which led it to correctly value Glenn's accounts at $70,000." There is no record of any "pretrial discussion" for us to review. After our review of the record preserved for our review, we concur in the district court's observation that its ability to arrive at a final property settlement figure was hampered by the lack of substantial evidence "that would have been helpful in arriving at a fair resolution of the issues." We find no basis to remand nor reverse the district court's determination.

B. Gardner Tree Service. Both parties contest the $194,000 valuation placed on the Gardner Tree Service by the district court. First, Glenn maintains the court improperly valued the "good will" of the business at $20,000. Next he claims the court erred in attributing a value of $10,000 to the business as a result of the possible future expansion of the road on which it is located and in attributing a value of $10,000 based on the value of new equipment which did not appear on an appraisal given to the court. Barbara, on the other hand, argues the court should have found the business' value to be $222,055.

The only expert testimony regarding the business was provided by Ron Kounkel, an appraiser with Brock Auction Company. Kounkel valued the business equipment at $102,055 and the real estate at $80,000, totaling

$182,055. This is $11,945 less than the district court's valuation of $194,000, The court appears to have attributed $10,000 to future road construction and $10,000 to additional equipment purchased after the appraisal, and allowed an unknown amount for good will. Future road improvements are not an appropriate consideration, as assets are valued at the time of the dissolution not anticipating a future event. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997) (noting the value of assets are ordinarily determined as of date of trial). However, the addition for the 2004 equipment was appropriate, bringing the value up to $192,055. We cannot say the district court's valuation of $194,000 was outside the permissible range of the evidence, as the court also noted that Glenn elected to operate largely on a cash basis, hiding assets from Barbara.

Both parties challenge other asset and debt valuations of the district court. Although we do agree that certain specific figures noted in the decree are perhaps difficult to reconcile with the evidence, we believe the district court's overall valuations and resulting equalization figure falls within a range of discretion which our highest court has afforded trial courts on these issues. *In re Marriage of Wegner*, 434 N.W.2d 397, 400 (Iowa 1988) (dissent). Because the values and ultimate settlement figure fall within the permissible range of the evidence and do equity between the parties, we affirm it.

Spousal Support.

Glenn argues the court should have not granted Barbara's request for alimony, while Barbara asserts the award should be increased. "Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support." *In*

re Marriage of Probasco, 676 N.W.2d 179, 184 (Iowa 2004). Such an award is not an absolute right; whether it is awarded depends on the circumstances of the particular case. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). When deciding to award alimony, the district court must consider the factors in Iowa Code section 598.21(3). We will disturb the district court's alimony determination only when there has been a failure to do equity. *Id*.

Clearly, inherited and gifted property can be considered on the issue of alimony. *See, e.g., In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979). Thus, the district court correctly considered Glenn's superior financial status in its award of alimony. The court found that Glenn has at least $30,000 to $35,000 in annual income potential, in addition to the $1000 per month that his inherited property produces after real estate taxes. Moreover, this was a long-term marriage, the parties having been married since 1976. Finally, Barbara is leaving the marriage at a financial disadvantage. In view of these findings, which are fully supported in the record and which we adopt, we think the spousal support award of $300 per month in traditional alimony until the death of either party or until Barbara remarries is equitable and should not be disturbed.

Attorney Fees.

Glenn maintains the court erred in ordering him to pay $2000 worth of Barbara's attorney fees. In her cross-appeal, Barbara contends the award should be increased. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). The controlling factor in awards of attorney fees is the ability to pay the fees. *In re*

Marriage of Muelhaupt, 439 N.W.2d 656, 663 (Iowa 1989). We conclude the trial court correctly assessed the respective abilities of the parties and affirm the award of attorney fees to Barbara.

Barbara further requests an award of appellate attorney fees. In considering such a request, we look to the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We deny the request for appellate attorney fees. Costs on appeal are taxed against Glenn.

AFFIRMED.