IN THE COURT OF APPEALS OF IOWA

No. 7-314 / 06-0319
Filed October 12, 2007

IN RE THE MARRIAGE OF LAURA LYNN BECKER AND FRED HAROLD BECKER

Upon the Petition of
LAURA LYNN BECKER,
Petitioner-Appellant/Cross-Appellee,

And Concerning
FRED HAROLD BECKER,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Laura Becker appeals and Fred Becker cross-appeals from the economic provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

Daniel L. Bray of Bray & Klockau, P.L.C., Iowa City, and Stephen Scott, Dubuque for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Laura Becker appeals and Fred Becker cross-appeals from the economic provisions of a dissolution decree. We affirm as modified.

I. Background Facts and Proceedings

Laura and Fred married in 1983. When they met, Fred and his father were partners in a stone quarry business known as Becker & Becker Stone Co. Soon, Fred bought his father out of the business and the company came to be known as Becker & Becker Stone Co., Inc.

In 2004, Laura petitioned to dissolve the marriage. The district court awarded her $5000 per month in temporary spousal support and $7000 in temporary attorney fees. Prior to trial, Fred was sanctioned for his failure to comply with discovery and was ordered to pay $500 of Laura's attorney fees.

The case proceeded to trial on financial issues. As part of the property distribution, the district court ordered Fred to pay Laura $1,203,759 within six months of the decree. The court also granted her $5000 per month in spousal support for a term of forty-eight months and $30,000 in attorney fees.

Fred moved for enlarged findings and conclusions pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court partially granted the motion, removing a $132,000 note from the assets subject to distribution. This resulted in a reduction of Laura's property settlement award to $1,137,759. The court also granted Fred a $7500 credit towards the $30,000 in attorney fees owed to Laura. Laura appealed and Fred cross-appealed.

II. Property

A. Valuation of Becker & Becker Stone Co., Inc.

Laura contends the district court should have valued Becker & Becker Stone Co., Inc. at $5,704,240 rather than $3,100,000. She maintains (1) the court undervalued the un-quarried limestone, (2) the business valuation was based on incorrect tax assumptions and simple math errors, (3) the court should not have reduced the value for professional goodwill, and (4) the court improperly treated evidence regarding the $132,000 note.

1. Un-Quarried Limestone

Fred individually owned two limestone quarries used in the operation of his business. For several years, Fred leased the quarries to his company and received royalty payments from the company. One of Laura's experts assigned a $2,000,000 value to these leasehold interests. The district court did not adopt this expert's valuation. Laura maintains the district court acted inequitably in failing "to assign any value to the leasehold interest owned by the parties individually for which the corporate entity pays a royalty each and every year." Frank counters that Laura's expert relied on speculative income, based his opinion on "a myriad of false assumptions," and did not consider "the value of substitution."

We find it unnecessary to address Fred's criticisms of Laura's key expert, an expert whose opinion was not mentioned in the decree. Instead, we focus on the opinion of Fred's expert, Shannon Shaw, whose testimony the district court found "persuasive."

Shaw prepared a pre-trial report containing a final capitalization of earnings valuation for the corporation of $3,068,962. *Northwest Inv. Corp. v. Wallace*, ___ N.W.2d ___, ___ (Iowa 2007) ("Capitalization of earnings involves an estimation of the company's ongoing net earnings and a determination of the risks associated with generating those earnings (capitalization rate).") The district court did not adopt this valuation, but instead relied on Shaw's trial testimony espousing a previously unarticulated "operating entity" valuation. Under this approach, Shaw arrived at a final valuation of $3.1 million for the company and the quarries. Shaw reasoned as follows:

> If you hold the land outside of the operating entity, the correct way to value this would be to look at the operating entity's income stream, and if that income stream takes into account the economic reality of paying rents and/or paying royalties for the underlying product, which is the rock, then you should add back to your value of the operating entity the fair market value as appraised by a real estate appraiser to the total value.
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> If, in fact, you combine the land inside the operating entity and there is no effect on the income stream now because you're not paying royalties, you're not paying rent, your ultimate income stream that you're valuing will go up accordingly and your ultimate value conclusion will go up accordingly, and -- -- that conclusion, since you have not taken into account the economic expense since they're combined now should -- that value conclusion would include not only the underlying real estate but also the value of the operations.

This new valuation glossed over the fact that the land and buildings used in the business were not owned by the corporation but by Fred individually. For this reason, we are not persuaded by Shaw's "operating entity" approach to valuation espoused at trial or the district court's adoption of that approach.

In reaching this conclusion, we acknowledge that the district court found "Shaw's investigation and evaluation to be the most thorough and his testimony

to be the most well-documented." We also recognize that, although our review is de novo, we are to defer to the district court when valuations are accompanied by such supporting credibility findings. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). Given this standard, we return to Shaw's written report.

Shaw's report recognized that the quarries "are owned outside of the Company." The report also explained the effect of this outside ownership. First, Shaw noted that "[t]he Company pays a royalty fee each year for the depletion of the quarries." Second, he noted that because "[t]he land and the building the company operates out of are owned personally by Fred Becker," the company had rent expenses. Finally, according to Shaw, Fred's ownership of the quarries and buildings resulted in the following tax allowance to Fred:

> Mr. Becker owns the land personally and takes a depletion deduction on his personal income tax return at an amount that is allowed by the Federal government. The Company pays Mr. Becker an amount to reimburse him for the depletion allowance. At some point in the future, the land will be depleted and Mr. Becker will have to purchase a new parcel of land.

In his report, therefore, Shaw considered and accounted for the fact that the corporation did not own the quarries and buildings used in the business.

Shaw proceeded to value the company using both an asset approach and a capitalization of earnings approach. Under the asset approach, Shaw excluded the quarry values because they were "outside of the Company." He arrived at an adjusted net book value of $2,553,814 on a control, marketable basis. Under the earnings approach, Shaw examined five years of statements recording the company's adjusted earnings. The statements revealed that the corporation regularly and consistently made payments to Fred based on his ownership of the

land and buildings. These expenses reduced corporate earnings. Shaw factored the reduced earnings into his final valuation figure of $3,068,962.

Shaw next compared his valuation under the asset approach with the valuation under the capitalization of earnings approach. He selected the figure obtained under the capitalization of earnings approach over the net book value of $2,553,814 because, in his view, "the capitalization of earnings method captures the intangible value present in the Company." His conclusion was as follows:

> The marketable value of the subject shares of Becker & Becker Stone Company was $3,068,962. A discount for lack of marketability of 10 percent is appropriate in this case, and when applied to the marketable value above, results in a fair market value of approximately $2,912,000.

The $3,068,962 valuation figure Shaw obtained before application of the pre-marketability discount was consistent with the district court's concern that the business be valued "as a functioning whole." As Shaw noted, this was in fact a "going-concern" value.

The $3,068,962 figure was also consistent with the court's determination that there was "no basis for an assumption that the business will be sold." The record supports this determination and calls into question Shaw's use of a marketability discount. *Cf. Wallace*, ___ N.W.2d at ___ (stating that in action by minority shareholders, discounts for "lack of marketability or minority status" are not allowed under section 490.1301(4)).

Although we are not persuaded that Shaw's marketability discount was supported by the evidence, we believe his $3,068,962 was supported by the evidence. Considering the district court's credibility finding in favor of Shaw and the evidentiary corroboration of Shaw's capitalization of earnings valuation, *see*

Vieth, 591 N.W.2d at 640, we conclude the appropriate valuation for the stock of Becker & Becker Stone Co., Inc. was $3,068,962. As the stock was owned entirely by Fred, this figure would be listed as an asset to Fred.

This brings us back to Laura's contention that the district court did not consider the value of the leasehold interests in the quarries. As explained, Shaw's written valuation accounted for the royalty payments to Fred. What remained was the land value of the quarries. One of Fred's experts valued one quarry at $470,000 and the other at $110,000. As the quarries were assets of Fred, the land value of these quarries should have been added to Fred's asset total.

We turn to the question of how these additional assets should be distributed. Iowa is an equitable distribution state. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007). The district court stated, "[i]n this case, a fair distribution is one that is more or less equal." We agree with this assessment. The marriage lasted twenty years. *See* Iowa Code § 598.21(1)(a) (2003). Laura contributed to the marriage by sacrificing a career to stay home and raise the parties' children, which enabled Fred to focus on business activities. *Id.* § 598.21(1)(c) As a result, Laura's earning power was adversely affected. *Id.* § 598.21(1)(f). For these reasons, we conclude an equal division of Fred's additional assets is warranted.

In sum, the total value of the corporation and the quarries should have been $3,648,962 ($3,068,962 + $580,000) rather than $3,100,000. This figure adds $548,962 to Fred's assets and would require an additional $274,481 equalizing payment to Laura.

2. Incorrect Tax Assumptions/Mathematical Errors

Laura next contends Shaw (1) failed to adjust his income figures for bonus depreciation and (2) used an excessively high tax rate of forty-four percent. She maintains the actual federal and state taxes paid by the Beckers were significantly lower, and Shaw's use of the higher figure had the effect of "seriously understating the net income of the business."[1] In light of these claimed errors, Laura asks this court to reject the district court's finding that Shaw was a more credible expert. She also contends the business should be revalued at $3,700,000.

Turning to the record, Shaw testified that he in fact considered bonus depreciation in his calculation. Given the district court's credibility finding in favor of Shaw, we decline to adopt the contrary testimony of Laura's expert.

As for the tax rate, the record supports Laura's contention that the Beckers' actual tax rate gleaned from their personal tax returns was between 32.0% and 39.8%., "with the average of the five years being 35.7." Fred did not refute this testimony. However, the testimony does not assist Laura, because when her expert was asked how the depreciation and tax rate discrepancies would affect Shaw's valuation, he testified that, with the correct numbers, the figure "comes out to $3,187,594." This figure is close to Shaw's capitalization of earnings valuation without the marketability discount. Again, given the district court's credibility finding in favor of Shaw, we believe his capitalization of earnings valuation is the more appropriate figure. We note, however, that our

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[1] Shaw testified that because the corporation was an S corporation, it did not pay entity level taxes. He stated "the income from that S Corporation passes through and the income is taxed at the individual or shareholder level."

modification above results in a valuation of the business and quarries that is close to the $3,700,000 figure requested by Laura in this portion of her argument.

3. Professional Goodwill

Laura contends the district court "incorrectly reduced the value of the corporate entity below that indicated by [her expert] as it clearly adopted Mr. Shaw's findings that a majority of the goodwill in the business was 'personal' goodwill." On our review of the district court's decree we find no indication that the district court based its valuation on a consideration of personal goodwill. Accordingly, we decline to modify the decree on this basis.

4. Treatment of Note

Laura asserts the district court should not have revised its decree after trial to eliminate a $132,000 note from the list of Fred's assets. We agree. The court's decision to do so was based on the adoption of the "operating entity" approach to valuation, an approach that we have concluded glossed over the actual ownership of assets. As Laura correctly points out, the note from the corporation to Fred was factored into Shaw's written corporate valuation analysis as a liability and was listed on Fred's financial affidavit as an asset. For this reason, the note should have been considered an asset to Fred.

B. Kauffman Quarry

Fred contends the court erred in awarding Laura four lots within the city of Dubuque, collectively known as the Kauffman Quarry. He argues the quarry was a business asset that the court "inexplicably" chose not to include in the business. However, Fred testified no stone had been removed from this quarry for one-and-a-half to two years and one of his experts testified the property was

no longer used as a quarry. Indeed, the expert went even further, stating the quarry was "no longer . . . *allowed to be* used as a quarry right in the city." (Emphasis added). We conclude the district court acted equitably in allocating the Kauffman quarry to Laura.

C. Premarital Property

The district court estimated that Fred had a net worth of $30,000 at the time of the parties' marriage. The court gave Fred an allowance or credit in this amount. Both parties contend this was inequitable. Laura argues Fred should be granted no setoff for his premarital property. Fred argues he should receive a credit of $583,000, the full value of the quarries and equipment he owned at the time of the marriage.

As we have stated, "Property which a party brings into the marriage is a factor to consider in making an equitable division. In some instances, this factor may justify a full credit, but does not require it." *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). We conclude the district court acted equitably in affording Fred a credit of only $30,000 for premarital property, given the length of the marriage and Laura's sacrifice of her career. At the same time, Fred was involved with the quarry and business prior to the marriage and brought the assets of that business to the marriage, entitling him to some credit for those assets. An offset of $30,000 is reasonable under these circumstances.

D. U. S. Bank Account

Fred next contends a checking account at U.S. Bank should have been assigned a value of $0 because it had a negative balance of $10,000 at the time of trial. However, the account had a balance of $178,200.17 as of May 1, 2005,

$164,763.09 on June 1, 2005, $107,164.40 on July 1, 2005, and $99,411.70 on August 1, 2005. By September 30, 2005, the balance had been extinguished. Among the checks written in the intervening two months were one to Fred's law firm for $15,000 and a check to Fred personally for $38,000. The trial began on September 20, 2005.

Our court has stated that, "some conduct of a spouse which results in the loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable division of property." *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997); *see also In re Marriage of Johnson*, 350 N.W.2d 199, 202 (Iowa 1984) (noting the court could not ignore one party's unilateral post-separation disposition of assets).

The district court found, "No satisfactory explanation was provided to explain the change in value. This drop is particularly troubling given the respondent's significant current income. Fairness requires valuing this asset at its prior level." In its post-trial order, the court stated:

> [The court valued the bank account at $150,000] because the Respondent had intentionally created an overdraft when there was no reason to do so in light of his income and other available assets.
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> The bank account was a marital asset. The Respondent used the account to pay his current attorney's fees, fees of his prior attorney, and alimony to the Petitioner. If the Court accepts payment of these items with marital property, the Petitioner ends up in a position of having to contribute towards the Respondent's attorney's fees and her own alimony.

Given Fred's substantial earnings and the timing of the account's depletion, we conclude the district court acted equitably in assigning a value of $150,000 to this account.

E. 2004 Tax Refund

Fred contends the district court acted inequitably in allocating a 2004 tax refund of $186,000 to him. Laura counters that Fred consented to this assignment and he cannot now take a different course. *See McCracken v. Edward D. Jones & Co.,* 445 N.W.2d 375, 378-79 (Iowa Ct. App. 1989). We agree with Laura.

In his statement of requested relief, Fred stated, "if in connection with any joint federal and state, or separate combined income tax returns filed by the parties there is a refund, it will be received by Fred." Additionally, he stated the parties agreed that the 2004 refund would be applied to his personal 2005 state and federal income tax returns. This is consistent with his trial testimony:

> Q. Fred, are you asking that the 2004 tax refund be applied to you for the 2005 tax estimates? A. Yes.
> Q. Why should you receive that and Laura not be entitled to any part of it? A. The reason we're doing that is because historically we've always carried any refunds into the following year. I worked for that money. Those dollars are used to pay the taxes on the funds that – the earnings that I made from the previous year.

Fred cannot now complain that the district court allocated the refund to him. Based on this record, we decline to modify the decree to reallocate the 2004 tax refund.

III. Spousal Support

Both parties appeal the court's award of $5000 per month in alimony for a term of forty-eight months. Laura requests an increase to $8000 per month for a period of ten years. Fred requests the elimination of spousal support. In the alternative, he seeks a reduction of the award to thirty-six months and a reconfiguration of the property distribution.

Beginning with Fred's request to eliminate the spousal support award, this request is inconsistent with his statement of requested relief filed with the district court. There, he expressed a willingness to pay spousal support for thirty-six months and made no mention of the theory for elimination of spousal support that he now espouses. Accordingly, we decline to consider the request. *Id.*

That brings us to Laura's request for an increase of the spousal support award. Given the large property distribution she received, we are not convinced an enlargement of the support award is warranted. One of Fred's experts testified that, assuming a property settlement of $1.1 million and spousal support of $60,000 per year, Laura would have approximately $302,004 of "after-tax spendable income." Although the marriage was long and Fred had significant earnings during the marriage, we believe the property settlement, even without the modifications set forth in this opinion, allowed Laura to become self-sufficient. Additionally, the spousal support was sufficient to allow her to acquire the masters degree in business or communications that she desired. *See* Iowa Code § 598.21(3)(a) – (c); *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996) (stating rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining).

IV. Trial Attorney Fees

The district court awarded Laura $30,000 in trial attorney fees. In a post-trial ruling, the court subtracted from this award the $7500 Fred paid Laura in temporary attorney fees. Laura contends she should be awarded the full $30,000.

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).

Fred was ordered to pay $500 in attorney fees as a discovery sanction. He should not receive a credit for this sum. Therefore, we modify the decree to deduct $7000 rather than $7500. Fred shall owe $23,000 rather than $22,500.

V. Appellate Attorney Fees

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). Laura prevailed on her challenge to the district court's treatment of the note and raised appropriate concerns about the valuation of the corporation. Fred raised a number of issues on cross-appeal, which Laura was forced to defend. We order Fred to pay $2500 toward Laura's appellate attorney fees.

VI. Summary

We modify the valuation of Becker & Becker Stone Co., Inc. to $3,068,962. We add the $580,000 land value of the two operating quarries to Fred's assets. This results in an increase of $548,962 from the district court's valuation. We add the $132,000 value of the note to Fred's assets. These modifications result in an additional $680,962 in assets to Fred, which would result in an additional $340,481 equalizing payment to Laura. This additional sum shall be paid to Laura within six months of the date procedendo issues in this matter.

We modify the trial attorney fee award to reduce the credit by $500.

We order Fred to pay $2500 toward Laura’s appellate attorney fees.

Costs shall be taxed to Fred.

AFFIRMED AS MODIFIED.