IN THE COURT OF APPEALS OF IOWA

No. 8-686 / 97-1046
Filed May 26, 1999

IN RE THE MARRIAGE OF MICHAEL H. IRVINE AND DIANE E. IRVINE

Upon the Petition of
MICHAEL H. IRVINE,
Appellant,

And Concerning
DIANE E. IRVINE,
Appellee.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Michael Irvine appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

James H. Carter of Terpstra, Terpstra & Epping, Cedar Rapids, for appellant.

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ. Mahan and Zimmer, JJ., take no part.

HUITINK, P.J.

Michael Irvine appeals various economic provisions of the parties' dissolution decree. We modify and affirm.

I. Background Facts and Procedure.

Michael and Diane Irvine were married November 21, 1980. Michael was fifty-three years of age at the time of trial and Diane was forty-five. The welfare of their children is not implicated in this appeal.

Michael is an attorney practicing law with the firm of Irvine & Robbins, L.L.P., in Cedar Rapids. Diane is employed as a retail manager by The Kitchen Experts, also in Cedar Rapids.

At trial, the disputed issues included valuation and division of the parties' substantial assets, Diane's alimony entitlements, and attorney fees. The district court determined Michael's annual earning capacity was $138,000, and Diane's was $26,000-27,000. Citing the substantial disparity in the parties' earning capacities, the court awarded Diane monthly alimony of $2250, payable until Diane reaches age sixty-five, dies, remarries, or Michael's death, whichever event first occurs. The court also secured Michael's alimony obligation by requiring him to purchase and maintain a $350,000 life insurance policy naming Diane as the beneficiary as long as she is entitled to alimony.

As the attached schedule indicates, the parties' disputed assets were substantial and diverse.[1] The court awarded Diane her recently acquired condominium, four rental properties, Michael's entire share of the Irvine & Robbins, L.L.P. profit sharing plan, a 1995 Isuzu automobile, and other property. Michael was also ordered to pay Diane an additional $50,000 as part of the property division. The court valued Diane's net property division at $392,668.45.

Michael was awarded the parties' home, the Irvine Building and its improvements, his share of Michael Irvine, P.C., two annuities, and other miscellaneous assets. The court valued Michael's net property award at $429,629.30. The district court set off to Michael an additional $80,000 of equity in the Irvine Building after finding this amount was a gift from his father. Michael was also ordered to pay $10,000 of Diane's trial attorney fees.

On appeal, Michael challenges the equity of the district court's alimony award and property division. He contends the court overstated his earning capacity, understated Diane's earning capacity, and the obligation to maintain life insurance is unjustified. Michael also argues the amount and duration of his alimony obligation is excessive.

Michael cites numerous inequities in the district court's disposition of the Irvine building. He argues the entire value of the Irvine Building should be set off to him because it was acquired before the marriage and, in part, as a gift from his father.

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[1] See attached schedule for an itemization of the district court's property distribution.

Michael also challenges the necessity of the judicial lien imposed on the building to secure his obligation under the decree.

Other issues Michael raises include valuation of his professional corporation, the parties' home, liability or credit for the expenses incurred for plumbing improvements to the home, division of Michael's qualified retirement plan, and attorney fees awarded to Diane. Michael additionally argues the district court ignored the tax consequences of transferring corporate rental property to Diane and the advantages of filing a joint tax return for calendar year 1996.

II. Scope of Review.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa App. 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Alimony.

When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996)(citation omitted). Alimony is an allowance to the

former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

We consider property division and alimony together in evaluating their sufficiency. *In re Marriage of Hardy,* 539 N.W.2d 729, 732 (Iowa A.. 1995); *In re Marriage of Hogeland,* 448 N.W.2d 678, 682 (Iowa App. 1989); *In re Marriage of Griffin,* 356 N.W.2d 606, 608 (Iowa App. 1984). They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughin,* 526 N.W.2d 343, 345 (Iowa App. 1994); *In re Marriage of Griffin,* 356 N.W.2d at 608.

Alimony is awarded to accomplish one or more of three general purposes. Transitional alimony serves to support an economically dependent spouse with an eye toward self-sufficiency. *In re Marriage of Smith*, 573 N.W.2d 924, 926-27 (Iowa 1998); *In re Marriage of Francis*, 442 N.W.2d 59, 63-64 (Iowa 1989). An award of reimbursement alimony is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other. *Id.* Traditional alimony is payable for life or for so long as a dependent spouse is incapable of self-support. *Id.* The amount of alimony awarded and its duration will differ according to the purpose it is designed to serve. *Id.*

Our review of the record indicates Michael's earning capacity has been overstated. William Schnieder, C.P.A., examined Michael's earnings history and tax returns for the years 1991-1996 and estimated Michael's average annual adjusted gross income was $111,504. We believe Schnieder's testimony is more credible than

other evidence on this issue and find Michael's average annual earning capacity is $111,504.

We, like the district court, reject expert testimony claiming Diane's annual earning capacity is $44,800. Testimony from Diane's former employer concerning the value of Diane's B.A. in general studies and the local job market is more persuasive. Based on Diane's $22,600 current earnings in retail management and expected passive income from her substantial property award, we find her earning capacity is $26,000-$27,000.

This is an eighteen-year marriage during which the parties enjoyed the comfort and security of Michael's substantial earnings and financial acumen. Diane, at age forty-five, has recently re-entered the job market after a marriage largely devoted to domestic matters rather than a career. While her current earnings, degree, and considerable talents offer a high probability of self-sufficiency, they are not sufficient to sustain a lifestyle reasonably comparable to that she previously enjoyed. Diane is entitled to an award of traditional alimony.

Michael's ability to pay alimony cannot be seriously disputed. His earning capacity is more than four times greater than Diane's. Despite this disparity, we find an award of $2250 monthly alimony is excessive. We accordingly reduce Diane's alimony award from $2250 to $1500 per month subject to termination on the conditions established by the district court.

Payment of future alimony obligations may be secured by imposition of a judicial or equitable lien on the obligor's property. Iowa Code § 598.22; *In re Marriage of Hettinga*, 574 N.W.2d 920, 922-23 (Iowa App. 1997)(citations omitted). We have used life insurance to secure future alimony payable for a limited term and ascertainable total amount. *See In re Marriage of Lytle*, 475 N.W.2d 11, 12 (Iowa App. 1991). The amount of coverage is generally limited to the amount necessary to cover unpaid alimony. *Id.; see also In re Marriage of Mouw*, 561 N.W.2d 100, 102 (Iowa App. 1997).

Although life insurance is among the security guarantees contemplated by section 598.22, its use in this case is not justified. The amount of benefits ordered is grossly disproportionate to Michael's potential liability. Additionally, there is nothing in the record to suggest statutory liens or other remedies are inadequate in the event of Michael's default. Moreover, there is no evidence of Michael's insurability or the premium necessary to acquire a policy in the amount ordered. We modify the decree by striking Michael's obligation to purchase or maintain life insurance for Diane's benefit and any judicial lien imposed on his property to secure his obligation under the decree.

IV. Property Division.

The parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or

percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* When distributing property, we take into account the criteria codified in Iowa Code section 598.21(1) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). Property brought into the marriage by one party need not necessarily be divided. *In re Marriage of Oakes*, 462 N.W.2d 730, 731 (Iowa App. 1990) (citations omitted). Property brought to the marriage by each party is but one factor of many we are to consider. *See* Iowa Code § 598.21(1).

A. Irvine Building.

Michael purchased the Irvine Building in 1978 for $367,250. He borrowed all but $7500 of the purchase price and made monthly contract payments on the balance. Michael's February 1980 financial statement valued the building at $467,000 and listed a remaining $305,000 contract balance.

Michael's gift theory is based on the sale of a one-half interest in the Irvine building and its subsequent gift back to him by his father, Howard Irvine. Under Howard's version of this transaction, he acquired a one-half interest in the building in 1981 in exchange for canceling a $60,000 loan he made to Michael in 1980. On his 1981 tax return, Michael reported a $218,225 sale price for a one-half interest sold to Howard with a resulting net taxable gain of $23,756. Thereafter, both deducted net losses from rental of the Irvine Building on their respective tax returns.

In 1990, Howard reconveyed his "one-half" interest to Michael as a gift. Gift tax returns filed by Howard and his wife valued the net amount of the gift at $80,000.

Howard testified this amount roughly equaled the total of the canceled $60,000 obligation and real estate taxes he advanced for Michael. Howard made a corresponding change in his will, reducing Michael's share of his estate by $76,000.

Our attempt to reconcile the testimonial version of this transaction with Michael's and Howard's tax returns was futile. We find Howard's express intent was to forgive Michael's approximately $80,000 in obligations by reducing Michael's expected inheritance. There is no evidence Howard claimed one-half interest in the Irvine Building or intended to give Michael one-half of its fair market value in 1990. Howard gave Michael $80,000, not one-half of the Irvine Building.

We also reject Michael's claim that the Irvine Building should be set off to him because he purchased it before the marriage and Diane made no tangible contribution to its equity. A recitation of Diane's contributions to the increased value of the Irvine Building would unnecessarily prolong this opinion. We find it sufficient to note the district court's findings of fact on this issue find abundant support in the record and we adopt them as our own. Any premarital equity Michael claims has been more than adequately accounted for by the set off of the gift from his father and the amount of property awarded to him.

Michael's claim that the Irvine Building equity must be further reduced by a $100,000 liability to his law partners for improvements made to the building by the firm is also without merit. Under the terms of the firm's lease, Michael, as lessor, retained these improvements at the expiration of the lease in August 1996. In the

absence of other evidence establishing the firm's legal or equitable interest in the Irvine Building, we decline to reduce Michael's equity for any potential liability to his law partners.

B. Irvine's Home.

Expert testimony concerning the value of the parties' home ranged from $138,200 to $150,000. Michael initially agreed $150,000 was the home's fair market value, but at trial offered a $138,000 appraisal. The court rejected the lower appraisal citing Michael's relationship with the appraiser and other evidence of the home's greater value. Because the district court's valuation is within the range of permissible evidence, we will not disturb it on appeal. We also decline to disturb the district court's treatment of the plumbing improvements made to the home.

C. Michael Irvine, P.C.

Michael Irvine, P.C. owns the four rental properties awarded to Diane and serves as recipient of Michael's income from Irvine & Robbins, L.L.P. The district court, citing an appraisal by Diane's expert witness, valued the P.C.'s personal property and notes receivable at $102,000.

Michael's accountant testified the P.C.'s personal property included two ten-year-old cars, a sun bed, and some office furniture. Michael testified the notes from his partners have no value and the furniture was included in the valuation of his interest in Irvine & Robbins. Michael valued the P.C.'s personal property at $1186, plus $10,000 for a 1986 Mercedes Benz.

Diane's expert conceded all corporate assets were included in his appraisal at original cost without considering their individual age, usefulness, or condition. Michael testified most of the furniture and equipment was obsolete or no longer existed. Michael's testimony on this issue was more reliable than Diane's expert. We accordingly reduce the value of Michael Irvine, P.C.'s personal property to $37,871 ($102,000 - $75,315 + $1186 + $10,000). We are less confident in Michael's valuation of the notes from his law partners and decline to make further reduction in the value of Michael Irvine, P.C.

The net result of this adjustment is a $69,129 reduction in Michael's property award. Equity requires a proportional adjustment in Diane's award. Michael's obligation to make an additional $50,000 cash payment to Diane is therefore stricken.

D. Pension Plans.

Michael contends the balance of his qualified retirement benefits contained in the Irvine & Robbins, L.L.P. profit sharing plan should be divided equally. He argues an equal division is essential to reasonable retirement security for both parties.

Pension benefits are treated as marital property subject to equitable division. *In re Marriage of Mott*, 444 N.W.2d 507, 510-11 (Iowa App.1989). They are considered in formulating an equitable distribution of property. *In re Marriage of Miller*, 475 N.W.2d 675, 677 (Iowa App.1991); *In re Marriage of Curfman*, 446 N.W.2d 88, 89 (Iowa App.1989). On review, we view all economic aspects of a dissolution decree as an integrated whole. *In re Marriage of Imhoff*, 461 N.W.2d 343,

344 (Iowa App.1990). The fact the pension is considered marital property does not necessarily mean it must be divided. *In re Marriage of O'Connor*, 584 N.W.2d 575, 576-77 (Iowa App. 1998). Our critical mandate is to achieve equity between the parties. *Id.*; *In re Marriage of Benson*, 495 N.W.2d 777, 781-83 (Iowa App.1992).

Rather than dividing Michael's share of the Irvine & Robbins, L.L.P. profit sharing plan between the parties, the district court awarded all of Michael's benefits to Diane and awarded Michael other property of equal value. This approach has been approved in other cases. *See In re Marriage of Scheppele*, 524 N.W.2d 678, 679 (Iowa App. 1994); *In re Marriage of Johnston*, 492 N.W.2d 206, 208 (Iowa App.1992); *In re Marriage of Hansen*, 465 N.W.2d 906, 909-10 (Iowa App.1990); *Imhoff*, 461 N.W.2d at 344-45.

The district court's property division awarded Michael the parties' two largest single assets: the Irvine Building and the marital home. To avoid the sale of either asset, the court offset the large disparity in its distribution by awarding Diane the entire profit sharing plan. We find the district court's treatment of the profit sharing plan is equitable when viewing the economic impact of the property distribution scheme in its entirety.

E. Income Tax Consequences.

Ordinarily a transfer of property between divorcing spouses is not a taxable event. I.R.C. § 1041(a); Iowa Code § 428A.2(16)(1997). The exclusionary provisions of section 1041(a) may not apply in this case because the decreed transfer

is directly from a corporation to a nonshareholder. Michael contends the substantial tax consequences resulting from this transfer can be minimized or avoided by an appropriate corporate reorganization.

The parties' interests are jointly served by accomplishing the transfer of rental properties to Diane with minimal tax consequences. We accordingly affirm the award of these properties to Diane subject to the corporate reorganization necessary to avoid the tax consequences of a direct transfer. Michael shall within thirty days of the date procedendo issues, file a proposed plan of reorganization with the district court for approval. Additionally, Michael shall bear sole responsibility for all costs of reorganization and hold Diane harmless for any resulting tax liabilities. In the interim, Michael Irvine, P.C. shall continue to collect the rental income from the properties and apply them to ordinary and necessary expenses, excluding costs or reorganization, and distribute the net proceeds to Diane.

We also find Diane's reasons for filing an individual 1996 income tax return persuasive and deny Michael's request for an order compelling her to file a joint income tax return.

V. Attorney Fees.

Michael lastly asserts the trial court erred in ordering him to contribute $10,000 towards Diane's attorney fees. He argues he had already given Diane $5000 for attorney fees during their separation. He contends Diane is capable of paying her own

attorney fees given the property she received pursuant to the decree. Diane also requests an award of appellate attorney fees.

A. Trial Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). The affidavit of attorney fees submitted by Diane's attorney totaled $26,675. The record indicates this matter included several complex valuations and deciphering of convoluted business entities and record keeping. The district court also recognized that Michael failed to cooperate with several discovery requests made by Diane. Based upon the record we cannot find the district court abused its discretion in awarding trial attorney fees. We affirm the award.

B. Appellate Attorney Fees.

Diane requests attorney fees for defending this matter on appeal. We are to consider 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 district court's decision on appeal. *Id.* Each party shall pay their own appellate attorney fees.

AFFIRMED AS MODIFIED.

Property Distribution - MICHAEL Description	Value	Encumbrance	Net Value
Marital Home	$150,000	($ 94,941)	$54,059
Irvine Bldg & Improvements	$550,000	($360,143)*	$189,857
Note to Al Willet	$ 3,625	$ 0	$ 3,625
Note to Tom Pence	$ 1,700	$ 0	$ 1,700
Note to Hugo Burdt	$ 5,000	$ 0	$ 5,000
Debt from Steven Warbasse**	$ 10,000	$ 0	$ 10,000
Share of Irvine & Robbins, L.L.P.	$ 27,500	$ 0	$ 27,500
Michael Irvine, P.C. (exclusive of RSC Properties)	$102,726	$ 0	$102,726
Irvine Building Art	$ 8,315	$ 0	$ 8,315
Co-Tenant Assoc. Assets	$ N/A	$ 0	$ N/A
Debts from Kelly Moynihan	$ N/A	$ 0	$ N/A
McMenomy Annuity***	$ 13,473	$ 0	$ 13,473
Minar Annuity***	$ 61,688	$ 0	$ 61,688
Household Property	$ 23,725	$ 0	$ 23,725
Life Insurance Policy	$ 5,935	$ 0	$ 5,935
TOTALS	**$963,687**	**($456,084)**	**$507,603**
*Mortgage + $80,000 Setoff **Debt Forgiven after 5 Years ***Present Value			
Description of Debt	**Value**		
Boiler Bill	($ 11,021)		
MBNA Gold	($ 3,846)		
MBNA Platinum	($ 3,106)		

Property Distribution - MICHAEL Description	**Value**	**Encumbrance**	**Net Value**
GDC Debt	($ 0)		
Nat'l Credit Corp.	($ 0)		
IRS	($ Unknown)		
Premiums for COBRA	($ Unknown)		
Attorney Fees	($ 10,000)		
Property Settlement	($ 50,000)		
TOTAL	($ 77,973)		
NET DISTRIB. - MICHAEL	$429,629		

Property Distribution - DIANE Description	**Value**	**Encumbrance**	**Net Value**
Condominium	$82,000	($ 83,427)	($ 1,427)
RSC Properties	$226,500	($29,838)	$196,662
Irvine & Robbins, L.L.P. Profit Sharing Plan	$141,119	$ 0	$141,119
Household Property	$ 9,250	$ 0	$ 9,250
Antique Wedding Set	$ N/A	$ 0	$ N/A
Mirror and Computer	$ N/A	$ 0	$ N/A
Artwork	$ 4,550	$ 0	$ 4,550
Porsche 914	$ 5,000	$ 0	$ 5,000
Isuzu	$ 17,725	($18,075)	($350)
Property Settlement	$ 50,000	$ 0	$ 50,000
TOTALS	$536,144	($131,340)	$404,804

Property Distribution - DIANE Description	**Value**	**Encumbrance**	**Net Value**
Description of Debt	**Value**		
Visa	($ 7,241)		
Von Maur	($ 500)		
Younkers	($ 905)		
Appraisal Fee	($ 400)		
CPA Fee	($ 3,090)		
TOTAL	($ 12,136)		
NET DISTRIB. - DIANE	$392,668		

No. 97-1046. [8-686] IN RE MARRIAGE OF IRVINE

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge. **AFFIRMED AS MODIFIED.** Considered by Huitink, P.J., and Streit and Vogel, JJ. Mahan and Zimmer, JJ., take no part. Opinion by Huitink, P.J. (17 pages $6.80)

Michael Irvine appeals various economic provisions of the parties' dissolution decree. The district court's property division was based on an erroneous valuation of Michael's interest in a professional corporation. Because that valuation was excessive, we modify the property division by reducing the value of Michael's interest in the professional corporation and make a corresponding reduction in the amount of property awarded to Diane. The property division is further modified to accommodate the tax consequences of transfers of corporate property to Diane. Although the record supports an award of traditional alimony, the amount awarded by the trial court exceeds Diane's needs and Michael's ability to pay. The amount of alimony awarded by the district court is accordingly reduced from $2250 to $1500 per month. The duration and other conditions of the alimony award are affirmed.