IN THE COURT OF APPEALS OF IOWA

No. 4-339 / 93-1084

FILED
NOV 28 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEFFREY E. TIGGES AND TINA L. TIGGES

Upon the Petition of
JEFFREY E. TIGGES,

Appellant,

And Concerning
TINA L. TIGGES,

Appellee.

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

Jeffrey appeals from the dissolution decree and from the trial court ruling denying his motion for new trial. **AFFIRMED AS MODIFIED.**

Mark S. Beckman of Fitzsimmons, Beckman & Gilloon, Dubuque, for appellant.

Stephen W. Scott of Kintzinger, Van Etten, Setter, Pearce, Scott & Harmon, Dubuque, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

This is an appeal from the economic provisions of the district court's decree for dissolution of marriage. We affirm with modification of the amount of child support.

Jeffrey and Tina Tigges were married in 1984. They separated for the last time in March 1990. The parties have two children. Matthew was born October 19, 1985, and David was born April 13, 1987. At the time of the dissolution, Jeffrey was thirty-two years old. Tina was twenty-eight years of age. They were in good health.

The parties agreed Tina would receive primary care of the children. Evidence at the dissolution proceeding almost exclusively concerned the parties' financial affairs. It was voluminous and disputed. It also divulged some loose and unorthodox financial transactions.

Jeffrey owned and operated two business enterprises, Quality Auto Sales and Quality Auto Rental. Shortly before the dissolution hearing, he also began operating a U-Haul truck rental outlet. The trial court found Jeffrey used business assets and made cash withdrawals from the businesses for non-business purposes. Jeffrey vigorously maintained his monthly net income from all sources was limited to $702. The trial court, however, found his net income was not less than $1200. Tina was employed as a salesperson at a fashion shop at the time of the divorce. Her net income was $1045. The court set monthly child support at $360, and ordered Jeffrey to provide health insurance for the children.

The focus of the property dispute involved three parcels of real estate. The first was the parties residence located on Muscatine Street in Dubuque. They purchased the house from Jeffrey's parents during the marriage. Jeffrey claimed he made a $10,000 down payment with assets he owned prior to the marriage. Jeffrey and Tina lived in the house for about five years prior to the purchase. Tina testified they paid Jeffrey's parents $200 each month during this time, with the understanding these payments would be applied to the purchase price.

The second disputed real estate was located on Kane Street. Jeffrey claimed this property was never owned by the parties, but was owned by his parents. The trial court found the contrary evidence more convincing, and referred to Jeffrey's evidence showing ownership in his parents as a "sham transaction."

The final parcel of land also included a house, and was located on Valley Street. The trial court found this property was owned by Tina's mother and excluded it from the property division. Tina's mother purchased the property in 1977 and lived in the house until 1991. She then rented the house, and gave Tina the rental proceeds. This was after Jeffrey and Tina separated. The trial court considered the proceeds to be a gift.

Jeffrey and Tina accumulated an abundance of debts during their three year separation prior to the divorce. The joint debts incurred prior to the separation were

minimal, except for $1000 in credit card debt. The parties also owed $3133 in taxes on their marital residence.

The trial court awarded Jeffrey the Kane Street property, the businesses, and the personal property in his possession. He was ordered to pay the debts prior to the separation, except for the credit card debt. Jeffrey was to pay Tina $500 towards the credit card debt. The parties were responsible to pay their debts incurred during the separation. Tina was awarded the Muscatine Street property, together with the personal property in her possession. Jeffrey was ordered to pay $1000 to Tina for attorney fees.

Jeffrey appeals from the economic provisions of the dissolution decree and from the trial court order denying his motion for new trial based on newly discovered evidence. Tina seeks attorney fees on appeal.

I. Standard of Review

Our review is de novo, Iowa R. App. P. 4. Notwithstanding, we recognize the ability of the trial judge to view, first hand, the demeanor and testimony of the witnesses. See In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). For that reason, we give weight to the findings of the trial court, especially as they relate to the credibility of witnesses. Iowa R. App. P. 14(f)(7). This principle of appellate review is particularly noteworthy in this case, since many of the issues for review challenge the findings of the trial court.

II. Child Support

Jeffrey first challenges the amount of his child support obligation. He believes the trial court overstated his net monthly income and understated Tina'a net monthly income in utilizing the child support guidelines.

Child support is based on the net monthly income of the parents. See In re Marriage of Lee, 486 N.W.2d 302, 304 (Iowa 1992). The court is required to determine the parent's net income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). This requires careful consideration of all circumstances which impact the parent's income. Id. The amount of the taxable or net income of a self-employed parent as shown on state and federal income tax returns is normally an important consideration, but is not controlling. See In re Marriage of Cossel, 487 N.W.2d 679, 683 (Iowa App. 1992).

Jeffrey introduced income tax returns and business records at trial indicating net monthly income of $702. The trial judge, however, found Jeffrey regularly utilized business assets and funds for personal use which caused his actual income to be understated. Moreover, Jeffrey submitted loan applications showing his gross monthly income from Quality Auto Sales alone was $1500. We find ample evidence in the record to support the finding of the trial court that Jeffrey's net monthly income was $1200.

We also find Tina's net monthly income was properly established at $1045. This finding, however, has little impact in this case. Once the net monthly income of both parents falls between $1000 and $3000, as it does in this case,the precise amount of the custodian's net monthly income is irrelevant under the child support guidelines. Jeffrey's support obligation under the guidelines is 30% of his net income, regardless of the precise level of Tina's income.

Jeffrey further argues that the court erred in requiring him to provide health insurance for the children. Courts must order medical support as required by statute. See Iowa Code section 598.21 (4) (1991); In re Marriage of Bergfeld, 465 N.W.2d 865, 870-71 (Iowa 1991). See generally Iowa Code § 252E (1991); Iowa Supreme Court Child Support Guidelines. The evidence in the case reflects Jeffrey can add the children to his current health insurance policy at a monthly cost of $83.15. Jeffrey is reasonably able to include the boys in his existing health insurance coverage. It was proper for the trial court to order him to provide health insurance. However, as authorized by the guidelines, Jeffrey's net monthly income should be reduced from $1200 to $1116.85. With that adjustment, Jeffrey's monthly child support under the guidelines should be $335. See State ex rel Dep't of Human Serv. v. Burt, 469 N.W.2d 669, 671 (Iowa 1991). Accordingly, we modify the monthly child support amount to properly reflect Jeffrey's health insurance obligation.

III. Attorney Fees

Jeffrey next claims the trial court abused its discretion in ordering him to pay $1000 towards Tina's attorney fees. Trial courts have discretion to award attorney fees, and the resulting decision by the trial court will not be disturbed on appeal absent a showing that the discretion has been abused. In re Marriage of Craig, 462 N.W.2d 692, 695 (Iowa App. 1990). Discretion conveys the idea of choice, and an abuse of discretion involves a choice based on grounds that are clearly untenable or to an extent clearly unreasonable. See Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990).

We are unable to find an abuse of discretion. Tina's total fees were substantial. The trial court considered the relative ability of each party to pay. This is a recognized consideration. See In re Marriage of Geil, 509 N.W.2d 738, 743 (Iowa 1991). The trial court further considered the amount of attorney fees incurred by Tina prior to trial, and the actual amount of time devoted to litigating the case in court. The reasonableness of the fees is also a proper consideration. Id. Under all the circumstances, it was proper to require Jeffrey to pay a portion of Tina's attorney fees.

IV. Property Distribution

Jeffrey next argues the assets and debts were not equitably distributed. He claims he was saddled with nearly all the debts of the marriage, while Tina received

the bulk of the personal property acquired during the marriage. Jeffrey also argued the real estate and business assets were valued incorrectly, the court erred in including one parcel of real estate as an asset of the marriage while excluding other real estate and assets.

The division of property in a dissolution of marriage is based on each partner's right to a just and equitable share of the property accumulated as a result of their joint efforts. In re Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989). The distribution is made by considering the statutory criteria. In re Marriage of Anderson, 509 N.W.2d 138, 143 (Iowa App. 1993). An equal division or percentage distribution is not required. Id. The determining factors are fairness and equity under the particular circumstances. In re Marriage of Tzortzoudakis, 507 N.W.2d 183, 186 (Iowa App. 1993). The allocation of debts of the marriage inheres in the division of property. In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980). Property subject to division must be valued by the court as part of its objective of making an equitable distribution. In re Marriage of Steele, 502 N.W.2d 18, 21 (Iowa App. 1993). The valuation must be within the permissible range of the evidence. See In re Marriage of Williams, 449 N.W.2d 878, 881 (Iowa App. 1989).

As a whole, we conclude the property distribution of the trial court was equitable under the circumstances. As before, we observe the trial courts findings on the credibility of the witnesses.

The trial court rejected Jeffrey's claim that his parents actually owned the Kane Street property. The evidence supports this finding, and the property was properly considered as part of the overall distribution of assets. Furthermore, the evidence supports the finding that the savings bonds were possessed and controlled by Tina's mother, and were properly excluded from the division. The parties made no contribution towards the purchase of the bonds.

The trial court's finding that the Valley Street property was owned by Tina's mother and excluded from the division was also supported by the evidence. Moreoever, the trial court's valuation of the businesses was within the permissible range of the evidence. See In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). The valuations arrived at by the district court were less than the values Jeffrey utilized on financial statements he submitted to banks prior to the dissolution.

We have considered all the claims asserted by Jeffrey concerning the division of property. We affirm the trial court's decision.

V. New Trial

Appellate review of a ruling on a motion for new trial in a dissolution of marriage action is not de novo. See In re Marriage of Steenhoek, 305 N.W.2d 448, 451-52 (Iowa 1979). In re Marriage of Johnson, 311 N.W.2d 697, 699 (Iowa App. 1981). Although equity standards guide our

review of issues properly raised in an equity action, a post-trial motion for a new trial may be granted only on grounds set forth in the governing rule. See Sparks v. Long, 234 Iowa 21, 23 11 N.W.2d 716, 718 (Iowa 1943). Accordingly, our review is at law. See In re Marriage of Heneman, 396 N.W.2d 797, 799 (Iowa App. 1986).

Trial courts have broad discretion in ruling on motions for new trial. Rule App. Proc. 14(f)(3). The denial of a motion for new trial will not be disturbed unless there is an abuse of discretion. Boehm v. Allen, 506 N.W.2d 781, 784 (Iowa App. 1993).

Courts do not favor motions for new trials based on newly discovered evidence. Wilkes v. Iowa State Highway Comm'n, 186 N.W.2d 604, 607 (Iowa 1971). To support a new trial motion, the movant must show the evidence was newly discovered, could not have been discovered prior to the conclusion of trial in the exercise of due diligence, was material and not merely cumulative or impeaching, and would probably change the result if a new trial is granted. Steenhoek, 305 N.W.2d at 452.

We are unable to conclude the trial court abused its discretion in denying the motion for new trial. We agree with the trial court that the alleged newly discovered evidence existed at the time of trial and could have been discovered. As the trial court observed, Jeffrey was simply unhappy with the result of the trial and wanted another opportunity to present more evidence to bolster his

claims and contradict Tina's evidence. These circumstances do not support a new trial.

In conclusion, we affirm the trial court on all issues raised by Jeffrey, except we modify the decree to change the monthly child support from $360 to $335. We deny Tina's request for appellate attorney fees. Costs to be paid by Jeffrey.

AFFIRMED AS MODIFIED.