IN THE COURT OF APPEALS OF IOWA

No. 0-708 / 99-1710
Filed February 28, 2001

IN RE MARRIAGE OF GLENN DAVID BERGLAND AND CAROLINE FERRIS BERGLAND

Upon the Petition of
GLENN DAVID BERGLAND,
Petitioner-Appellee,

And Concerning
CAROLINE FERRIS BERGLAND,
Respondent-Appellant.

FILED
FEB 2 8 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, William J. Pattinson and Carl E. Peterson, Judges.

The respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Roger J. Hudson, Sr. and Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., Des Moines, for appellant.

Jere C. Maddux of Newbrough, Johnston, Brewer, Maddux & Sotak, L.L.P., Ames, for appellee.

Heard by Streit, P.J., and Hecht, and Vaitheswaran, JJ.

VAITHESWARAN, J.

David and Caroline challenge the property and alimony provisions of their divorce decree. We affirm.

I. Background Facts and Proceedings

David and Caroline married in New Jersey in 1990. This was the second marriage for both. Both entered the marriage with assets, although David's wealth was substantially greater than Caroline's. At the behest of David's father, who intended to bequeath additional assets to David, the parties signed a prenuptial agreement that afforded "protected" status to the gifted and inherited assets of both parties. This status prevented the assets from being included in the property subject to division in the event of a divorce. The agreement further provided that other property brought into the marriage by either party, such as David's pension account and the equity in Caroline's New Jersey home would be deemed unprotected.

Following the marriage, David sold his condominium and moved into Caroline's New Jersey home. Both continued their employment, David as an engineer for AT & T's Bell Labs and Caroline as an occupational health nurse for the same company.

David retired from Bell Labs in 1996. He then accepted a faculty position at Iowa State University after convincing Caroline to take a leave of absence from her job, sell her home, and move to Iowa with her teenage son. The parties bought two lots on which they planned to build a home ("Ridgetop Road home"), and bought a transitional home ("Aspen Road home").

After moving to Iowa, Caroline earned negligible wages. By agreement, she maintained the home, supervised construction of the new home which was ultimately built at a cost of $820,000, and cared for her son. David worked at Iowa State for two two-year terms and also ran a consulting business.

Two years after moving to Iowa, David sought a divorce. Following trial, the district court divided the parties' substantial assets, ordered the sale of the Ridgetop Road home and distribution of the proceeds, ordered David to pay Caroline rehabilitative alimony, and required him to pay $10,000 of her trial attorney fees. The parties filed post-trial motions to address the division of property and sale of the home. The court approved the sale of the Ridgetop Road home for $799,000. Caroline appealed from rulings on these motions and from the original decree. David cross-appealed. We review this equitable action de novo. Iowa R. App. P. 14.

II. Property Distribution

Caroline and David both take issue with the district court's property distribution. Caroline contends the court: (A) failed to credit her for the equity derived from the sale of her New Jersey home; (B) inequitably distributed the proceeds from the sale of the Ridgetop Road home; and (C) erred in approving the sale of the Ridgetop Road home to the first offeror. David argues the court acted inequitably in setting aside to Caroline $71,900 of assets derived from the sale of her New Jersey home.

In reviewing a property distribution, we must determine what is fair and equitable under the circumstances, considering the factors set forth in Iowa Code section 598.21(1). One of the factors is the property a party brings into the

marriage. *Id.*; *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). Equity may justify, but does not require, an award of a credit for such property. *Id.*

A. New Jersey home equity. Caroline maintains the district court should have given her a credit for the equity in her New Jersey home. She concedes that, as an "unprotected asset" under the premarital agreement, the court was authorized to include the home in the property subject to distribution. However, she maintains the court treated her unprotected pre-marital asset differently from David's unprotected pre-marital assets. Specifically, she argues that because the court set aside to David the pre-marital value of his 401(k) account, the court should have set aside to her the amount of her equity in the New Jersey home. For the reasons set forth below, we conclude the court did so.

The district court stated it intended to handle the parties' property as follows:

> [S]egregate the parties' protected assets, credit them for the pre-marital value of the 'other assets' to the extent that the same remain intact or traceable, and . . . divide equally the post-marriage accumulations on the pre-marital assets.

The court made the following findings with respect to Caroline's New Jersey home:

> Caroline's New Jersey home, which was used as the marital residence until 1996, was liquidated when the parties moved to Iowa.[1] Some of the proceeds went to purchase two adjacent bare lots on Ridgetop Road, Ames, and $24,600 was used to cover half the down payment on a home on Aspen Road where the parties resided while a residence was being built on one of the bare lots. The aforementioned lots had a price tag of $75,000 each. Caroline

[1] "Caroline's non-protected assets as listed on the March 1990 disclosure form included $190,000 equity in her New Jersey residence."

> paid one-half of the purchase price for each lot. The balance of the New Jersey sales proceeds (approximately $71,900) went into Caroline's Merrill Lynch account #825-36J95 referred to above.

The court then (1) set aside to Caroline the $71,900 it found had been placed in her Merrill Lynch account and (2) awarded Caroline 13.27 percent of the net proceeds from the sale of the Ridgetop Road home, based on her contribution of $75,000 in premarital assets relative to the total cash contributions of $565,203 to the Ridgetop Road home.[2]

The parties do not challenge the method the court employed to allocate assets. Instead, the parties focus on the $71,900 that was set aside to Caroline. Caroline contends the court's finding that this amount was placed into her account is unsupported by the record. David argues the court's decision to set aside this amount to Caroline was inequitable because the money came from the sale of Caroline's New Jersey home and, accordingly, was unprotected.

We agree with Caroline that she did not place $71,900 of her New Jersey home proceeds into the Merrill Lynch account. Caroline received $171,500 from the sale of her home after payment of the mortgage and real estate fees. Of this sum, Merrill Lynch account statements show Caroline only placed $34,167 into her account rather than $71,900. The latter figure came from David's uncorroborated testimony that we reject in light of the account statements.

This error, however, makes no difference in terms of allocating a credit to Caroline for her New Jersey home proceeds. The district court treated Caroline's account as protected property because it contained other pre-marital gifted or inherited assets. Accordingly, the court set off the entire account value to

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[2] David's pretrial statement indicates David contributed $490,203 in "protected" assets.

Caroline. Although we disagree the New Jersey home proceeds were protected assets, we agree Caroline was entitled to a credit for those proceeds in order to place her on an equal footing with David, whose unprotected pension account value as of the date of marriage was credited entirely to him. The district court gave her this credit, albeit for the wrong reason. We conclude the court acted equitably in setting aside to Caroline $71,900 derived from the sale of the New Jersey home.

As for the remaining equity in her New Jersey home, the district court agreed $75,000 was directly traceable to the Ridgetop Road home and the court compensated her for this contribution by awarding her 13.27 percent of the Ridgetop Road home proceeds. This action was equitable.

The only portion of the New Jersey home proceeds for which Caroline did not receive a credit is the $24,600 used as a down payment on the parties' Aspen Road house. When this home was sold, the parties received $53,800 in proceeds which were placed into a joint account. David testified he used $16,000 for his son's college tuition and left the balance in the account for Caroline. Caroline did not specifically trace the balance in this joint account to the Ridgetop Road property. Therefore, we conclude the district court acted equitably in refusing to allocate to Caroline a larger percentage of the Ridgetop Road home sale proceeds based on this $24,600 downpayment. *Cf. In re Marriage of Sell*, 451 N.W.2d 28, 30 (Iowa Ct. App. 1989) (increasing wife's portion of home sale proceeds based on her contribution of pre-marital assets).

B. Allocation of Ridgetop Road Home Proceeds. Caroline next argues she should have received more than 13.27 percent of the Ridgetop Road

home proceeds for her efforts in helping to build and maintain the home. We agree with Caroline that she received no compensation for these efforts from the Ridgetop Road home proceeds. However, the district court adequately compensated her for her home building and maintenance efforts by allowing her to share equally in the substantial post-marriage accumulations in David's accounts and by awarding her a portion of David's AT& T pension. Additionally, Caroline did not dispute David's assertion that he expended $490,203 in protected funds to purchase the home and she conceded she was not entitled to such funds. A higher allocation of proceeds to Caroline would have cut into these protected funds. For these reasons, we decline to award Caroline an additional payment to compensate her for her time and effort in maintaining the Ridgetop Road home.

C. Premature Sale. Caroline's final argument is that the Ridgetop Road home was sold too soon and at too low a price. We disagree. Although the first offer was substantially lower than the list price, it was nevertheless more than $100,000 greater than the appraised value. In authorizing the sale, the district court accepted the testimony of a realtor with nineteen years of experience who, after performing a comparable sales analysis, concluded the offer was reasonable. We conclude the court's conclusion was equitable.

III. Alimony

Both parties challenge the district court's award of rehabilitative alimony in the amount of $2,000 per month for eight months and $1000 per month for sixteen additional months. Caroline maintains the award should be higher to reimburse her for giving up her high paying job in New Jersey, moving to Iowa,

and supporting David's career. David argues the award should have terminated as of June 2000.

Our courts have considered alimony in conjunction with property awards. *See In re Marriage of Callenius*, 309 N.W.2d 510, 513 (Iowa 1981). We conclude the district court's award was equitable. In making the award, the district court took into account the fact Caroline left a good job in New Jersey and would have difficulty replacing the salary and benefits she received at that job. The court did not make a higher alimony award in partial recognition of the fact Caroline would share David's monthly pension benefits. We agree with this reasoning. Additionally, we note Caroline received half of the substantial post-marital accumulations in certain accounts belonging to David. Accordingly, we decline to modify the alimony award.

IV. Trial Attorney Fees

David challenges the district court's decision to require him to pay $10,000 of Caroline's attorney fees. A court is to consider the financial condition of the parties and their relative ability to pay. *In re Marriage of Goodwin*, 606 N.W.2d 315, 324 (Iowa 2000). Our review of this issue is for an abuse of discretion. *In re Marriage of Fall*, 593 N.W.2d 164, 168 (Iowa Ct. App. 1999). The district court's award was based on a finding that it would be some time before Caroline would maximize her income stream. This finding amply supports the court's award. We accordingly affirm this portion of the court's decree.

V. Appellate Attorney Fees

Caroline seeks an award of appellate attorney fees. An award rests within the sound discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252,

258 (Iowa 1996). After considering the financial positions of the parties, we order David to pay all of Caroline's appellate attorney fees or $1000, whichever is lesser. Costs are taxed equally to both parties.

AFFIRMED.