FILED
SEP 23 1980
CLERK, SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

EDNA PHILLIPS,	)	
Plaintiff-Appellant,	)	Filed September 23, 1980
vs.	)	
HARLAN PHILLIPS,	)	0-275 2-64452
Defendant-Appellee.	)	

Appeal from Crawford District Court - George F. Davis, Judge.

Petitioner wife appeals from final property settlement in divorce proceedings, asserting 1) that evidence was insufficient to support trial court's finding that a property settlement was reached in 1956 and that a letter purportedly showing lack of an agreement was erroneously excluded from evidence; 2) that the doctrine of laches is inapplicable in this case; 3) that because divorce was granted prior to adoption of no-fault concept, evidence of fault should have been admitted; 4) that she was entitled to a new trial on the grounds that respondent gave false and misleading testimony on material matters, and 5) that respondent caused unnecessary material to be included in appendix and should be assessed cost thereof. AFFIRMED.

Brian L. Gruhn, Cedar Rapids, for plaintiff-appellant.

D. R. Franck of Raun, Franck, Murdt & Nepper, Denison, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Petitioner, Edna Phillips, appeals from a final property settlement in which the trial court determined that the parties had reached an agreement in 1956 as to the disposition of certain real estate and that the claims of both parties as to property not covered by that agreement were barred by laches. On appeal, petitioner asserts 1) that there was insufficient evidence to support a finding that an agreement had been reached in 1956 concerning the real estate and that a letter purportedly showing lack of such an agreement was erroneously excluded from evidence; 2) that the doctrine of laches is inapplicable in the instant case; 3) that because the parties' divorce had been granted prior to adoption of the no-fault concept, evidence of fault should have been considered in making the final property settlement; 4) that she was entitled to a new trial on the grounds that supplemental evidence cast doubt on respondent husband's credibility; and 6) that respondent husband caused unnecessary material to be included in the appendix and that he should therefore be assessed a share of the resulting additional costs. Respondent contends that the petition should be dismissed pursuant to Iowa R. Civ. P. 215.1 for failure to prosecute. We reject respondent's failure to prosecute claim, affirm the final property settlement arrived at by the trial court, and decline to assess a share of additional printing costs against the respondent.

Our scope of review in this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine rights anew from the credible evidence on those propositions properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While weight is given to the findings of the trial court, particularly with regard to the credibility of witnesses, we do not abdicate our function as triers de novo on appeal. Id.; In re Locke, 246 N.W.2d 246, 249 (Iowa 1976).

I.

Petitioner and respondent were married in 1928 and lived on a farm rented from petitioner's parents. Petitioner inherited this farm later in the marriage. In 1949, the parties bought a second farm for their daughter and her husband to live on. Only respondent's name appeared on the deed to this second farm.

The parties separated sometime around 1954 and in 1956 the parties met in the office of petitioner's attorney, since deceased, to discuss a property division. At this meeting, they agreed to divide their existing assets and, according to respondent, an agreement was reached whereby petitioner would keep the farm she had inherited and

respondent would keep the second farm. Petitioner denies that any such agreement was ever reached with respect to the two farms.

Petitioner filed for divorce in 1958 and, after several continuances, the divorce was finally granted in 1967 on the grounds of cruel and inhuman treatment. The decree specified that all questions pertaining to alimony, property rights, attorney fees, suit money, court costs, award and division of property and claims for accounting were continued for further determination. The decree also impressed a lien on the second farm, enjoining respondent from selling or encumbering it until further determination by the court, which retained jurisdiction of the matter.

In December, 1978, petitioner filed an application for final settlement, to which respondent resisted. Following a hearing on petitioner's application, the trial court agreed with respondent's claim as to the existence of a 1956 agreement concerning ownership of the two farms. The court found respondent to be the sole owner of the second farm and quashed the lien thereon. With respect to property not covered by the 1956 agreement, the court held that any claims made by either party to such property were barred by the doctrine of laches. In response to a motion by the petitioner, the record was reopened and both parties were allowed to present additional evidence. A supplemental decree followed, in which the trial court essentially reaffirmed its original order. Petitioner then moved for a new trial and an amendment and enlargement of findings; both motions were overruled and petitioner now brings this appeal.

II.

Petitioner first contends on appeal that the evidence was insufficient to support respondent's claim that the parties had reached an agreement in 1956 as to ownership of the two farms. Additionally, she alleges error from the trial court's failure to admit into evidence a letter written by respondent that allegedly shows that respondent himself did not believe that such an agreement had been reached. We hold that the existence of an agreement is supported by the evidence and that the letter was properly held inadmissible.

There are at least two factors that indicate that in 1956 an agreement had been reached to the effect that petitioner would keep the farm inherited from her parents and respondent would keep the second farm as his own. First, on the list of assets to be divided at the 1956 meeting, the two farms were designated as "home place" and "his farm." While this factor alone may not be controlling on the question of ownership, it

becomes extremely persuasive when combined with the fact that respondent received the deed and abstract to the second farm through the mail shortly after the meeting in the office of petitioner's attorney. According to the respondent, both the deed and the abstract were in the petitioner's possession before the meeting took place. It is therefore logical to assume, as the trial court did, that the deed and abstract were sent to respondent by either the petitioner or her attorney. Petitioner suggests that the respondent may have falsely testified about receiving the deed and abstract in the mail. However, the trial court found respondent's testimony on the matter convincing, and, although we are not bound by the fact findings of the trial court in equity cases, this court will give weight to those findings, particularly when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

Furthermore, the trial court did not err in excluding from evidence a letter that allegedly refutes respondent's claim that in his opinion the parties had reached an agreement as to division of the farms. Petitioner maintains that the remark "I would like to get settled up some way" in the letter written by respondent indicates that he did not think a property settlement had yet been reached. We find respondent's statement ambiguous at best. It does not necessarily indicate that he wanted a property settlement to be made; it may instead only reflect his desire to resolve the parties' differences through divorce. This interpretation is particularly reasonable in view of the fact that respondent's remark about getting "settled up" is followed by the words "you can have [a] divorce." It should be noted that only part of the letter was offered into evidence; the remainder of the letter may support an interpretation favorable to the respondent. Moreover, the portion of the letter offered into evidence bears no date and petitioner cannot otherwise establish that the letter was written after the meeting in her attorney's office. For these reasons, we agree with the trial court that the letter is inadmissible on the question of the existence of an agreement.

III.

As to property other than the two farms, the trial court held that the claims of both parties were barred by laches. Petitioner contends that the trial court erroneously applied the doctrine of laches in this case or, alternatively, that the court erroneously applied laches against her. Although we think that laches is an inappropriate designation for the principle of law that operates to bar the parties' claims, we affirm the holding of the trial court that the claims are barred.

Because the defense of laches is available only where it would be inequitable to allow recovery by the plaintiff, Lovlie v. Plumb, 250 N.W.2d 56, 63 (Iowa 1977), it is well recognized that one of the elements of laches is injury or prejudice to the defendant. Chicago, Rock Island and Pacific Railroad Co. v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980); Johnston v. Percy Construction, Inc., 258 N.W.2d 366, 371 (Iowa 1977); Schmidt v. Schurke, 238 Iowa 121, 125-26, 25 N.W.2d 876, 879 (1947). Mere passage of time does not constitute injury or prejudice. Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 41 (Iowa 1979). At least with regard to property other than the farm land, respondent has not convinced this court that he has been injured by petitioner's delay in filing for a final settlement. Accordingly, we decline to apply laches to this case.

However, while a showing of injury or prejudice is necessary for laches, it is not an element of the defense of estoppel by acquiescence. Merrifield v. Troutner, 269 N.W.2d 136, 137 (Iowa 1978); Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978). For this reason we find, as respondent has in fact pleaded in resistance to petitioner's application for final settlement, that estoppel by acquiescence is the applicable doctrine in this action. Unlike laches, which focuses on the position of the defendant, estoppel by acquiescence applies where a plaintiff knows or ought to know that a right is enforceable but neglects to do so for a period of time long enough to imply an intent to waive or abandon the right. Davidson, 266 N.W.2d at 438-39. There is no evidence to indicate that the petitioner has attempted to bring about a final property settlement at any time since 1967; nor has she attempted to justify this delay. Respondent is in the same situation with respect to his claims. Therefore, we hold that estoppel by acquiescence operates to bar the claims of both parties to property other than the farm land.

IV.

Petitioner next argues to this court that evidence of fault was erroneously excluded by the trial court. Petitioner contends that such evidence is admissible as relevant to a property settlement in cases where the divorce decree was issued prior to the adoption of the no-fault concept and she cites as authority Wilson v. Wilson, 197 N.W.2d 589 (Iowa 1972). It is our opinion that the petitioner has misstated the issue.

Petitioner did not attempt to introduce evidence of fault as a factor to be considered by the trial court in making a property settlement. Instead, the record shows that she attempted to introduce evidence of fault because she thought it was

relevant to explain why she waited from 1967 to the end of 1978 to apply for a final property settlement. In ruling the evidence inadmissible as irrelevant and immaterial to any property settlement, the trial court informed petitioner's attorney that he would be allowed to present evidence of fault on rebuttal in the event that the respondent raised the matter of petitioner's delay in applying for a final settlement. We think it clear from the record that the respondent raised the delay issue, thus giving petitioner ample opportunity to present evidence of fault on rebuttal. That she did not do so may be unfortunate but cannot be remedied by this court.

V.

Petitioner also asserts that she is entitled to a new trial because respondent gave false and misleading testimony on material matters, thereby prejudicing petitioner's case and denying her a fair trial. The trial court overruled her motion and we affirm.

Where it clearly appears that the prevailing party gave perjured testimony on material matters and where the court is unable to say that the same conclusion would probably have been reached without the testimony, a new trial is appropriate. Maland v. Tesdall, 232 Iowa 959, 971, 5 N.W.2d 327, 333 (1942). We find that the petitioner has failed to make a clear showing that respondent offered perjured testimony on material matters. In so concluding, we are particularly mindful of the fact that the trial court was convinced of the respondent's credibility when he testified before it, and we therefore deny petitioner's motion for a new trial.

VI.

Finally, petitioner asks that the respondent be required to share additional costs resulting from his inclusion of allegedly unnecessary matter in the appendix. Although petitioner's brief mentions eighty pages of trial transcript, in actuality respondent's portion of the appendix amounted to less than twenty pages. Petitioner asserts that much of this material was unnecessarily included because respondent's brief made little reference to it. However, material included in the appendix is unnecessary only if it has no bearing on any of the issues on appeal. Hegtvedt v. Prybil, 223 N.W.2d 186, 190 (Iowa 1974). The material included in the appendix by respondent does not satisfy this criterion, and therefore we deny petitioner's request that respondent be assessed part of the costs of printing the appendix.

VII.

Respondent alleges that this case should have been dismissed pursuant to Iowa R.

Civ. P. 215.1 for failure to prosecute. The trial court rejected this argument and respondent did not appeal or cross-appeal the issue. Although our review in the instant case is de novo, only such matters as are properly presented to this court may be considered on appeal. In re Marriage of Novak, 220 N.W.2d 592, 598 (Iowa 1974); In re Marriage of Williams, 199 N.W.2d 339, 346 (Iowa 1972). Respondent's failure to appeal or cross-appeal from the trial court's ruling precludes review of this issue on appeal. Novak, 220 N.W.2d at 598.

The judgment of the trial court is affirmed.

AFFIRMED.