IN THE COURT OF APPEALS OF IOWA

FILED
DEC 26 1984
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARY JORGENSEN AND VINCE JORGENSEN

Upon the Petition of)
MARY JORGENSEN,) Filed December 26, 1984
Petitioner-Appellant,)
And Concerning)
VINCE JORGENSEN,) 4-429 / 84-127
Respondent-Appellee.)

409

Appeal from the Iowa District Court for Cerro Gordo County - Ralph F. McCartney, Judge.

Petitioner appeals the property division of her dissolution decree and the trial court's ruling on her posttrial motion. VACATED AND REMANDED.

Anna I. Shinkle and Jean B. Schustek, Des Moines, Iowa, for petitioner-appellant.

Phillip J. Stone, Clear Lake, Iowa, for respondent-appellee.

Considered by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Petitioner, Mary Jorgensen,. appeals the property division of her dissolution decree and the trial court's ruling on her posttrial motion. She asserts: (1) the property division was inequitable, and (2) the trial court abused its discretion in refusing to allow her to present evidence in support of her rule 179(b) motion to enlarge or amend the findings and conclusions of the decree. She also requests that her award for attorney fees be increased and that she be awarded attorney fees for this appeal. We vacate and remand.

I. Background. Mary and the respondent, Vince Jorgensen, were married in 1973. Mary was 26; Vince was 49. Both had high school educations. On January 16, 1981, Mary filed a petition to dissolve the marriage.

At the time the parties married, Vince owned several small business corporations. Some of the corporations owned subsidiaries. Vince was the sole stockholder, and he served as the sole director and officeholder of those corporations. During the marriage Mary worked in some of the business ventures, doing some managing of hired help, some bookkeeping, and other tasks. Apparently, she was compensated for her work.

While the parties were married one of the corporations owned by Vince built two houses. Vince and Mary lived in one of the houses.

Shortly before Mary filed the dissolution petition, Vince sold two of his corporations, whiched owned the major part of Vince's assets, to his son. The final price was $48,383, to be paid over twenty-two years at 8% interest.

After the parties separated, Mary opened her own business. She also made a $5,000 down payment on a house valued at $43,500.

A trial was held in April, 1983. The trial court issued a decree on August 4, 1983. On August 15, 1983, Mary, represented by different counsel, filed a rule 179(b) motion. A hearing was held on the motion, but the trial court refused to

hear evidence Mary wanted to present. The trial court ultimately decided to deny the motion to enlarge or amend the decree. Mary then appealed.

Our review of this equity action is de novo. Iowa R. App. P. 4. Although we give deference to the trial court's findings of fact, we are not bound by those factfindings. Iowa R. App. P. 14(f)(7).

II. The Property Division. The trial court determined that the transfer of the two corporations to Vince's son was done in contemplation of the prospective divorce, and that the value of the two corporations should be included in the marital assets subject to division. The court then valued the corporations at $747,500. Other property owned by Vince was valued at $172,500. The total value equaled $920,000.

In dividing the marital assets, Mary was awarded her business and the home she purchased, which were both acquired after the parties had separated. She was also ordered to pay all debts she had incurred after the separation. Both parties were allowed to keep personal property in their possession. Out of the remaining $920,000 of marital assets, Mary was awarded a lump sum of $60,000, to be paid over a six-year period with 10% interest.

On appeal, Mary asks that we modify the award and increase her share of the marital assets. In the alternative, she asks that we find the evidence presented insufficient to determine the value of the marital assets and remand the case for further evidentiary hearings.

We begin by affirming the trial court's decision that the marital assets should include the value of the two corporations sold to Vince's son. The timing of the sale, the relatively small sale price, and the fact that Vince continued to serve as sole director and officeholder of the corporations, when considered together, lead us to the conclusion that Vince's testimony regarding the reason for the sale is not credible.

In determining what portion of the marital assets Mary should receive, we look to the factors set forth in Iowa Code section 598.21(1) (1981). Our statutorily mandated goal is to divide the property equitably. Iowa Code § 598.21(1) (1981). Some factors to consider include: length of the marriage, property brought to the marriage by each party, and the contribution of each party to the marriage. Id. § 598.21(1)(a)-(c). In this case, the value of the property brought into the marriage by Vince is very important because that property constitutes the bulk of the marital assets. Mary is entitled to an award that compensates her for her contributions to any increase in value of that property. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa Ct. App. 1982).

Unfortunately, the record is almost entirely devoid of credible evidence relating to pertinent facts. It is impossible to adequately judge the value of Vince's corporations at the time of trial. No experts testified to market value or replacement value. No financial statements were admitted into evidence to show the book value of the corporation's assets. No income statements or corporate tax returns were admitted to allow a determination of value by the capitalization of earnings valuation method. The only evidence on point was testimony by Vince and a financial statement submitted to a bank when Vince was getting a loan for one of the corporations. Absent any corroboration, we do not find Vince's testimony to be credible. We also doubt the accuracy of the financial statement. The bank officer who testified about the statement said Vince was less than forthcoming with financial information when he would apply for loans.

Evidence of the value of Vince's property at the time of marriage is also nonexistent. No balance sheets were submitted into evidence. Vince's testimony about the specific past value of his property was limited to value at the time the property was acquired. He did not testify about the property's value at the time he married.

We face a similar problem in valuing Mary's contributions to the businesses and to the marriage. Although she testified she worked in the businesses during the marriage, we have no specific information on the amount of time she contributed. Nor is there evidence about the compensation Mary received for her work.

We also have questions about the evidence presented relating to the income of the parties. When asked how much he made from his business in past years, Vince replied, "Oh, roughly 75, 100 a year." The trial court interpreted that to mean $75,000 to $100,000. Vince claims in his brief that he meant $7,500 to $10,000. His personal tax returns appear to support his claim. Yet, it is not outlandish to believe that Vince's various business arrangements afforded him ample opportunity to shelter his income for tax purposes. Moreover, the record contains an affidavit filed with the rule 179(b) motion that indicates Vince's jukebox and video game business was taking in substantial sums of money. That same affidavit raises questions about Mary's income.

In short, we have a record that is almost devoid of credible evidence relating to pertinent matters. In such situations the following comments from Lessenger v. Lessenger are appropriate:

> We have carefully read and searched the record. . . . The evidence is inadequate as to the essentials to be considered in determining what is "right" (section 598.14). We are convinced the questions of child support and property division or lump sum alimony cannot be properly adjudicated under the record before us. As argued by plaintiff's counsel, who did not represent her at the trial, equity can only be done by remanding this controversy to the trial court for reopening and further evidence on these two vital issues.
>
> The general rule is where an equity case is not in a condition for a final decree, none will be made by this court, but the case will be remanded. Byington v. Bookwalter, 7 Iowa 512, 74 Am.Dec. 279; Webster County v. Taylor, 19 Iowa 117; Jones v. Dunkelberg (Iowa) 260 N.W. 717.

258 Iowa 170, 175, 138 N.W.2d 58, 61 (1965). The equitable principle set forth in Lessenger has been followed several times. E.g., In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978); In re Marriage of Hitchcock, 265 N.W.2d 599, 607 (Iowa 1978); Locke v. Locke, 246 N.W.2d 246, 253 (Iowa 1975). We therefore remand this case for more evidence on the value of Vince's property at the date of marriage, on the value of that property at present, and on the value of Mary's contribution to the businesses and to the marriage. Further, because there is some question about the incomes earned by the parties, there should be evidence taken on that matter. The trial court should also redetermine whether alimony payments are justified in light of the incomes of the parties and the eventual property settlement.

III. The 179(b) Motion. Because of our decision to remand this case, we need not address Mary's appeal of the trial court's ruling on her 179(b) motion. See Marriage of Hitchcock, 265 N.W.2d at 599.

IV. Attorney Fees. Mary was awarded $1,000 attorney fees by the trial court. She asks that we increase that amount and award her attorney fees for this appeal. Applying the factors set out in In re Marriage of Castle, 312 N.W.2d 47, 150 (Iowa Ct. App. 1981), we deny her requests.

VACATED AND REMANDED.