IN THE COURT OF APPEALS OF IOWA

No. 4-163 / 93-1159

IN RE THE MARRIAGE OF LINDA GAIL KAVALE AND KENNETH ANTON KAVALE

Upon the Petition of
LINDA GAIL KAVALE,

Appellee,

And Concerning
KENNETH ANTON KAVALE,

Appellant.

FILED
SEP 16 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Thomas M. Horan, Judge.

Respondent appeals from various economic provisions of the parties' dissolution decree. **AFFIRMED.**

Joseph C. Johnston of Johnston, Larson, Potterfield, Zimmerman & Nathanson, Iowa City, for appellant.

Randall B. Willman of Leff, Haupert & Traw, Iowa City, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

This is an appeal by Respondent, Kenneth Kavale, from the economic provisions of his dissolution of marriage decree. Kenneth contends the district court erred in its accounting of the parties' assets and consequently made excessive awards to Petitioner, Linda Kavale. Kenneth also challenges the district court's award of attorney fees to Linda. Both parties seek attorney fees for this appeal. We affirm the district court's decree, and decline to award either party appellate attorney fees.

Linda and Kenneth were married on August 21, 1976. They have one child, Christine, born in 1978. At the time the parties married, Linda was pursuing a master's degree in special education at the University of Georgia. Kenneth was an assistant professor of special education at the university. Shortly after the marriage, Linda and Kenneth moved to Colorado. A year later they moved to Riverside, California after Kenneth obtained a position as an associate professor of special education at the University of California. Linda was employed with Security Pacific National Bank, where she ultimately became an assistant vice-president.

In 1985, Linda and Kenneth moved to Iowa City, where Kenneth obtained a position as professor and department chair of special education. Linda worked at the First National Bank for nine months. She then started her own retail business, which she sold in 1991 for $2,000.

Linda and Kenneth separated in 1992. Linda moved to North Carolina with Christine shortly after the separation. Linda and Kenneth divided part of their assets at that time. Linda received $10,000 in cash and $21,000 in investments. Linda eventually moved to Georgia and was unemployed at the time of trial.

Linda and Kenneth entered into a partial stipulation of settlement prior to trial. The agreement provided for joint custody of Christine, with physical custody to Linda. Kenneth agreed to pay monthly child support of $1,065. Linda also received a portion of Kenneth's TIAA/CREF retirement account.

The district court found Linda received no financial help from Kenneth during the separation and in order to support herself and Christine nearly depleted the $31,000 given to her at the separation. In contrast, the court found Kenneth continued to accumulate large sums of money during the separation which he used to purchase investments and a new car. The court also found Kenneth tried to hide some of these assets or explain them away as "losses." The district court awarded each party marital property in the sum of $153,462.57. This was achieved by awarding Linda $49,148.07 of the parties' $49,980.15 joint investment account and awarding Kenneth several investments he made after the parties separated. The district court also awarded Linda $1000 per month alimony for three years. Lastly, the district court awarded Linda $500 in attorney fees. Kenneth appealed.

Kenneth claims the district court erred in its accounting of the value of the parties' assets. He claims each party should have received $142,790. Kenneth additionally claims the district court erred in awarding Linda attorney fees. Kenneth does not appeal the district court's failure to award him attorney fees at trial, but does request attorney fees on appeal. Linda also seeks appellate attorney fees.

I. Scope of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

II. Property Accounting

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russel, 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 particular circumstance. In re Marriage of Hoak, 364 N.W.2d 185, 194 (Iowa 1985). The property distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1993); In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

Kenneth asserts the trial court made three errors in its accounting of the parties' assets. First, the court should have evaluated the net value of the parties' assets at the time of separation, rather than at the time of trial. Second, the court made significant miscalculations, creating phantom assets. Finally, the court's miscalculations resulted in an uneven distribution of the parties' assets.

A. Valuation Date. Kenneth asserts the value of the parties' assets should be fixed at the time of separation rather than the time of trial. According to Kenneth, this would eliminate problems of determining whether joint assets or subsequent income were used to purchase items during separation.

Our Supreme Court previously addressed this issue in In re Marriage of Moffatt, 279 N.W.2d 15, 20 (Iowa 1979). In Moffatt, the court stated "the fact that assets were acquired subsequent to the breakdown of a marriage does not preclude their consideration." Id. The date of trial is the relevant time for assessing the parties net worth in adjusting their property rights. Id.; See also In re Marriage of Muelhaupt, 439 N.W.2d 656, 661 (Iowa 1989). Furthermore, valuating property as of the date of marital breakdown often creates a herculean task in determining the actual date of the breakdown. Moreover, following the separation, many other issues continue to evolve which directly impact the division of property. Separation can

place the parties on different financial footing. Consequently, the value of the assets divided at separation can rapidly deteriorate when one spouse is forced, as in this case, to use them as living expenses. We believe the valuation date must be decided on the circumstances of each case. See In re Marriage Gaer, 476 N.W.2d 324, 326 (Iowa 1991). Here, the district court was correct in determining the net value of the parties' assets at the time of trial.

B. Miscalculations.

Kenneth claims the district court made miscalculations regarding certain investment transactions, debit memos, a Dreyfus Family of Funds investment, the value of his vehicle, the $31,000 Linda removed from her account prior to the separation, and the value of Linda's vehicle.

1. Investments. The district court found Ken purchased $11,125.00 in investments on October 1992 from funds accumulated in his bank account and sold some of these in January 1993 for $9,195. The court also concluded that Kenneth was not credible when he testified the $9,195 were used to pay off investment losses on fuel oil futures and IBM stock to family members. Thus, the court included the $9,195 in the property awarded to Kenneth.

On appeal, Kenneth argues the investments he sold in January were made with income he accumulated after the parties' separation and he adequately accounted for the use of the money. After reviewing the record anew, we believe

the district court properly included the $9,195 in the parties' assets. The only evidence, outside his own testimony, Kenneth provided of these familial transactions was a Prudential Securities fuel oil account statement. This statement was made out in his brother-in-law's name and the dates had clearly been altered. Furthermore, the claimed losses from the fuel oil and IBM investments were not on the parties' 1991 tax returns nor on Kenneth's trial affidavit of financial status.

2. Dreyfus Investment, Debit Memos, Kenneth's Vehicle. The district court determined the three cash withdrawals totaling $12,000, the $8,127 Dreyfus Family of Funds investment, and Kenneth's $15,000 car were properly included in the parties' assets for purposes of property distribution. Kenneth argues the dealings involving these assets were "in and out" transactions and to include them in the parties' assets amounts to triple counting. At trial, Kenneth explained he made two cash withdrawals totaling $8,000 to purchase a car while visiting his family in New York. Not finding a car, he left the cash with his family and returned to Iowa. Kenneth later located the car he wanted in Iowa City. He then needed the $8,000 he had left in New York, so his father sent him a check for $8,552.76. However, this check did not arrive in time so Kenneth had to take money from his Dreyfus account to cover the $8,127 balance due on the car. Kenneth subsequently wrote a check to the Dreyfus account for $8,127. Thus,

Kenneth argues only the car should be considered in calculating the parties' net worth.

Kenneth withdrew the remaining $4,000 on January 26, 1993. He testified this money was needed for Europe trips he and Christine were taking in the upcoming summer. However, the evidence indicated Kenneth had already written Christine an $1,800 check for her trip to Europe and he was not traveling until the summer.

Once again, Kenneth failed to offer any proof of these transactions and Linda testified his explanations for the use of the $8,000 debits changed several times prior to trial. Consequently, the district court found Kenneth's testimony implausible and included the debit memos, the Dreyfus investment, and the car in Kenneth's property award.

Upon reviewing the record, we find the parties presented conflicting testimony regarding the existence and use of their assets following the separation. The district court's decision to include each of the controverted items in its determination of the parties' net worth reflects its assessment of the credibility of the witnesses on this issue. The district court was in the best position to evaluate the credibility of the witnesses and we give weight to its fact finding. See In re Marriage of Hanson, 475 N.W.2d 660, 662 (Iowa App. 1991). Its decision is supported by credible evidence and we will not disturb it on appeal. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

3. Linda's $31,000. Linda took $31,000 to support herself and Christine when the parties separated. At the time of trial, Linda had spent all but $2,773 of this money. She presented a detailed accounting of her expenditures. The trial court included the remaining $2,773 in Linda's property award.

Kenneth argues the court should have included the entire $31,000 in its determination of the joint marital property.

Spouses have a duty to support one another. In re Marriage of Cerven, 335 N.W.2d 143, 146 (Iowa 1983). Therefore, in determining the economic provisions of a dissolution decree the amount of such support is immaterial. Id. The decree can not contain provisions for the recovery of support payments which were the duty of a spouse. Id. Moreover, Iowa Code section 598.21(1) (1991) does not include expenses in support of a spouse as a factor to be considered when determining a property division.

In light of this authority, the district court acted properly when it refused to include the bulk of the money used for Linda and Christine's support in determining the parties' joint marital property.

4. Linda's Vehicle. On appeal, Kenneth contends the district court undervalued Linda's vehicle. We find the value placed on Linda's vehicle by the court is well within the permissible range of evidence and will not disturb it on appeal. See Griffen, 356 N.W.2d at 608.

IV. Attorney Fees

At trial Linda requested Kenneth be ordered to pay reasonable attorney fees. The district court found some of Linda's fees were attributable to the need to pursue discovery through a motion to compel and a motion for sanctions and consequently awarded her $500. Kenneth argues the court erred in granting the attorney fees because the motion to compel was unnecessary. He contends Linda was already in possession of the documents she sought in her motion to compel when she filed that motion.

An award of attorney fees is not a matter of right. In re Marriage of Elbert, 492 N.W.2d 733, 736 (Iowa App. 1992). It rests within the discretion of the court and is essentially based on the parties' financial positions. Id. To overturn an award the complaining party must demonstrate the trial court abused its discretion. In Re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983).

After examining the entire record, we cannot conclude the award of attorney fees is an abuse of discretion. The award of attorney fees was fair and reasonable considering Kenneth's superior economic status.

We decline to award either party attorney fees on appeal. Costs of this appeal are assessed to Kenneth.

AFFIRMED.