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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EUGENE E. KRABBENHOFT
AND KAREN L. KRABBENHOFT

Upon the Petition of)

EUGENE E. KRABBENHOFT,)

Petitioner-Appellant/) Filed August 29, 1985
Cross-Appellee,)

And Concerning)

KAREN L. KRABBENHOFT,) 5-320
) 84-1054
Respondent-Appellee/
Cross-Appellant.)

Appeal from the Iowa District Court for Scott County - James E. Kelley, Judge.

The husband has appealed from a dissolution decree, challenging the decree's economic provisions. The wife has cross-appealed, requesting attorney's fees on appeal. AFFIRMED AS MODIFIED; CROSS-APPEAL DENIED.

Elliott R. McDonald, Jr. of McDonald, Stonebraker & Cepican, P.C., Davenport, for petitioner-appellant/cross-appellee.

Michael J. McCarthy of McCarthy & McCarthy, Davenport, for respondent-appellee/cross-appellant.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

The husband has appealed from a dissolution decree, challenging the decree's economic provisions. The wife has cross-appealed, requesting attorney's fees on appeal. We affirm as modified and dismiss respondent's cross-appeal.

The parties were married in 1964. At trial time both were around 40 years old and were in good health. They are the parents of two children, a boy who reached majority shortly after trial and a girl born in 1974. The dissolution decree placed the boy in Gene's custody and the girl in Karen's custody; the custody provisions are not challenged in this appeal.

Gene is employed as the comptroller of the Kartridg Pak Co. He also operates a bookkeeping service with Karen's assistance and owns a semi-truck tractor which he leases to create tax losses. Karen assists with the bookkeeping business but does not otherwise work outside the home. In recent years the parties' income, derived from Gene's salary and from the bookkeeping business, has been around $55,000 per year.

The trial court awarded the parties' house, which is valued at $72,000, to Karen. The court directed Gene to assume the $21,000 mortgage on the house. Gene was awarded two other parcels of real estate, a resort property valued at $35,000 and an island in the Mississippi River valued at $50,000. These two properties were apparently free of debt.

Each party was awarded various vehicles, personal effects, sporting goods, and bank accounts. Gene was awarded the semi-truck tractor, and Karen was awarded an Apple computer used in the bookkeeping business. Gene was directed to assume nearly $20,000 in miscellaneous debts and bills, in addition to the mortgage debt noted above. Gene was also directed to pay Karen $10,600, the court computed this to be the amount which would equalize the parties' property awards.

During the marriage the parties developed a practice of lending money to third persons and accepting in return promissory notes payable to the children Gene characterized this practice as a method of providing for the children's college expenses. At trial time these promissory notes totaled $37,075; the trial court treated them as assets of the parties and allocated them solely to Gene in fashioning a fifty-fifty division of the property.

In addition to these promissory notes payable by third persons, each child also held a promissory note payable by Gene himself. The son's note was valued at $2,500 and the daughter's at $2,600. The trial court declined to treat these notes as liabilities allocated to Gene for the purpose of reaching a fifty-fifty division of property; instead, the court characterized the notes as "evidence of [Gene's] promise to pay those amounts in college tuition."

The trial court directed Gene to pay Karen child support of $110 per week The court also directed Gene to pay Karen alimony of $700 per month for three years and $300 per month for four years thereafter. In addition, the court directed Gene to contribute $2,300 towards Karen's trial attorney's fees.

Gene has appealed from the dissolution decree. He challenges the division of property and the awards of child support, alimony, and attorney's fees to Karen. He also contends the trial court erred by treating the promissory notes payable to the children from third persons as assets of the parties. Finally, he contends the trial court erred by failing to treat the other promissory notes, payable to the children by Gene himself, as liabilities allocated to Gene in determining the division of property.

Karen has filed a notice of cross-appeal. However, her only cross-appeal issue is a request for attorney's fees on appeal.

At the time of the notices of appeal and cross-appeal, both filed in late June 1984, Karen's motion to enlarge the dissolution decree remained pending

in the district court. This motion was pending in district court for six months, but the district court finally ruled on the motion on December 20, 1984. At that time the district court modified the dissolution decree to require Gene to maintain health insurance for the parties' minor child.

Gene filed a separate notice of appeal from the December 20 order enlarging the dissolution decree. However, he later filed a motion asking for permission to amend his brief and appendix in the earlier appeal to address the December 20 order. This motion was granted on March 29. Gene later filed an amended brief challenging the jurisdiction of the district court to enter the December 20 order while an appeal was pending.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Promissory Notes

Gene raises several arguments regarding alleged errors the trial court made in characterizing the promissory notes. Gene entered into a series of transactions with a dual motive: to provide for his children's education and to avoid taxes. To get a flavor of Gene's financial acumen, we shall describe the transactions involving the promissory notes.

The transactions can be viewed in two basic categories. With the first category of notes, Gene would loan money to third parties (non-relatives) and then would have the right to receive payment assigned to his children instead of himself. Gene felt the assignment was a gift to his children. Interest earned on these loans presumably was earned by the children, not Gene. These transactions were evidenced by exhibits 4 through 7.

The second category of notes involved an even more complex scheme whereby Gene would make a "gift" to his children and then would have his children

"loan" these funds back to him. Gene would execute a promissory note and would make payments with interest on this "loan" to his children. Gene, of course, deducted interest paid on this "loan" for income tax purposes.

Gene would have this court believe that as to the notes where third parties repaid loaned money to his children (Exhibits 4-7), the court erred by holding these notes were assets of Gene. Gene maintains these notes were a gift to his children and were his children's assets. Alternatively, he states that if such notes were his assets, the notes were not in existence at the time of trial and were not capable of being part of the assets subject to property division under Locke v. Locke, 246 N.W.2d 246 (Iowa 1976). We are not persuaded by Gene's arguments.

To constitute a gift, a party must have donative intent and deliver the property to another party who accepts the transfer. Woodward v. Woodward, 222 Iowa 145, 217 N.W. 456 (1936). Donative intent is a question of fact which may be determined from the donor's words and acts as well as the conditions surrounding the alleged gift. Apt v. Birmingham, 89 F. Supp. 361 (N.D. Iowa 1950). The record indicates Gene never had the requisite "intent" to make a gift. While such transactions are not shams per se, Gene's handling of these transactions lead us to conclude he never intended to part with complete control over such funds.

As to one note, the debtor made a $10,000 payment to Paula, Gene's daughter, which was deposited in Paula's account. On the same day, Gene withdrew the $10,000 from Paula's account to aid his girlfriend in purchasing a van. Paula, who is 9, was unaware of the transaction. Gene claims a note was executed between Paula and Gene's girlfriend to evidence the $10,000 loan, however, no such instrument was introduced at trial.

Additional evidence shows that Gene used other notes for his personal use. Gene has listed all four notes on a loan application as his accounts receivable. Gene also apparently told Karen during their marriage that these notes would be called to pay off the mortgage.

Given this background, we find that these assets were properly characterized as assets of Gene because he has exercised too much dominion and control over these funds for us to believe he intended to make a gift. As to the issue regarding whether the assets evidenced by exhibits 6 and 7 were in existence at the time of trial, we are unwilling to disturb the trial court's finding.

The notes which were claimed to be "gifts" to the children and were "loaned" back to Gene (Exhibits 2 and 3) were administered in a manner similar to the notes already mentioned. The record is replete with instances where Gene treated the funds as his own and not those of his children. In fact, Gene could not prove that an account for such funds even existed. He admitted these accounts serve as "a clearing account for tax purposes." These loans are not liabilities of Gene's and were properly characterized by the trial court as evidence of a promise to pay college expenses for his children.

II. Property Division

Iowa Code section 598.21(1) does not statutorily sanction a percentage division of property. In re Marriage of Bornstein, 359 N.W.2d 500 (Iowa Ct. App. 1984). Rather, the ultimate issue is whether the distribution is equitable under the circumstances. In re Marriage of Callenius, 309 N.W.2d 510, 511, 514 (Iowa 1981).

Petitioner claims that the trial court's award was excessive because he must pay $10,600 at 12% interest over a five-year period to Karen as part of the property division. The trial court awarded Gene $140,876 and Karen received $130,276. The $10,600 payment to Karen was part of the court's decree to

effectuate an equal property division. Given the length of the parties' marriage and other relevant factors, we find no error in this portion of the property division. We do choose, however, to modify the interest rate to 10% per annum. See Iowa Code § 535.3 (1985); In re Marriage of Steinhoeck, 305 N.W.2d 448, 454 (Iowa 1981).

III. Alimony

Petitioner complains that his alimony payments are excessive and that Karen is capable of finding employment so as to relieve his financial burden. Gene feels the trial court failed to take into consideration his ability to pay balanced against the relative needs of Karen. See Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968).

Gene paints a bleak financial picture. He would have us believe that his annual income in excess of $50,000, when viewed in perspective with losses from his trucking operation and with obligations from the decree of $1,632 per month, leaves him with only $1,300 per month of disposable income. While the $1,632 per month payment to Karen is a substantial amount, this figure drops dramatically as time passes. The $700 per month alimony is reduced to $300 per month after three years and the $225 per month property division amount will be paid after five years. After seven years, Gene will only have to pay child support.

The losses Gene receives from his trucking company serve to reduce his income, which is advantageous to him. Should the losses from the trucking company reduce his cash flow, he should consider going out of the trucking business, instead of seeking to decrease alimony payments.

While the trial court's alimony award will not be disturbed, we are troubled by the allegations raised in petitioner's reply brief that Karen received an offer to work as a bookkeeper at a suitable job. Petitioner claims Karen refused

employment solely to have her financial status look so dire that the alimony would not be reduced. We trust that Karen will use her best efforts to find a job and if a suitable opportunity presents itself she will accept it. We deplore any scheme to refuse gainful employment only to avoid having one's alimony award reduced. With this admonition, we affirm the alimony schedule of the trial court.

IV. Attorney Fees

An award of attorney fees depends on the financial conditions of the parties and their respective ability to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa 1981); In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). We agree with petitioner that the property division and alimony award well equip Karen to pay her own attorney fees. Therefore, we modify that portion of the trial court's decree which awarded $2,308.97 in attorney fees to Karen and accordingly relieve Gene of his obligation to pay such fees. Karen's cross-appeal for attorney fees for this appeal is also denied.

V. Cross Appeal

In Iowa, once a party files an appeal jurisdiction is vested solely in the supreme court and the trial court is precluded from issuing new orders. Hulsing v. Iowa National Mutual Insurance Co., 329 N.W.2d 5, 6-7 (Iowa 1983) (supreme court vacated trial court's order on plaintiff's motion which was issued after the plaintiff filed a notice of appeal). We find Hulsing controlling on the issue at hand. On June 11, 1984, Karen filed a motion with the trial court to enlarge the decree. See Iowa R. Civ. P. 179(b). The notice of cross appeal was filed on June 29, 1984, which vested jurisdiction exclusively in the supreme court. Thus, the trial court's order on December 20, 1984, was void. To avoid the hardship of waiving posttrial relief, a party need only raise the issue contained in the posttrial motion in their appellate brief under rule 179(b) which provides

"a party on appeal may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise." For this reason, the trial court's ruling expanding its finding is vacated.

AFFIRMED AS MODIFIED; CROSS-APPEAL DENIED.

Schlegel, J., concurs; Sackett, J., dissents.

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I have grave difficulty with the majority's treatment of moneys Eugene claims he gave to his child Paula. Paula was nine years of age at the time of trial. The record does not reflect that Paula was represented. The majority failed to recognize the gifts because of the control Eugene exercised over the money, and the fact that Paula exercised no control.

With regard to a loan made with Paula's money they state: "Paula who is nine, was unaware of the transaction." The majority seems to be unaware of the fact that Paula is a minor and consequently under a legal disability. However, I refuse to determine that she is not entitled to the gifts[1] because her father exercised control over them.

Because Paula is an unrepresented minor, we have an obligation to protect her interests. I would remand the cause for the limited purpose of ordering a conservator and counsel be appointed for Paula and for such further record to determine the amount and whereabouts of these gifts.

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[1] Paula, not a party to or represented in this action, would not be foreclosed from challenging her father's rights to the money at a later date.