FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JOHN A. ROE AND MARY L. ROE

UPON THE PETITION OF)

JOHN A. ROE,)

Petitioner-Appellant,)

AND CONCERNING)

MARY L. ROE,)

Respondent-Appellee.)

Filed October 28, 1982

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Appeal from Plymouth District Court, Richard F. Branco, Judge.

Petitioner appeals from trial court's denial of motion for new trial and application to reopen testimony based on newly discovered evidence and from trial court's property division and alimony rulings. AFFIRMED AS MODIFIED.

John T. O'Brien, Sioux City, for petitioner-appellant.

J. Patrick Ryan and Edward J. Keane, Sioux City, for respondent-appellee.

Considered en banc.

The marriage of John A. Roe and Mary L. Roe was dissolved by the trial court's decree entered on July 6, 1981. The decree divided the parties' property and awarded alimony to Mary. In this appeal, John claims that the property division and the alimony award were unjust. In addition, John challenges the trial court's denial of his motion for a new trial and an application to reopen testimony based on newly discovered evidence. We find no merit in John's allegations of errors and affirm the trial court.

The parties were married in 1953. Five children, now adults and not involved in the proceedings, were born of the marriage. John has been a career law enforcement officer and at the time of trial he was serving at the United States Marshall Service in northern Iowa. His net take-home pay at that time was about $18,000 per year. Because of the change in administration, John has indicated that his appointment at the Marshall Service may be terminated. Mary, on the other hand, was working at a clerical job at the time of trial at nominal wages. Both parties are in their early fifties and are in good health.

I. Scope of Review

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 158 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 296 (Iowa 1976).

II. Motion for New Trial Based on Newly Discovered Evidence

After the trial court issued its findings of fact, conclusions of law, and judgment, John timely filed a "motion for new trial for newly discovered evidence." The motion alleges that John's employment would terminate by September 1, 1981, and "that this is new evidence which should serve to allow new consideration by the court." This motion was denied.

The pertinent provisions of the rule governing new trial motions based on newly discovered evidence provide:

> The aggrieved party may, on motion, have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted, for any of the following causes, but only if they materially affected his substantial rights:
> . . . .
> Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial. . . .

Iowa R. Civ. P. 244(g)(emphasis added). Our examination of the record does not reveal any affidavits or other showings that the "newly discovered evidence" alleged in John's motion "could not with reasonable diligence have been discovered and produced at the trial." John's failure to satisfy the requirements of rule 244(g) is sufficient to support a denial of his motion. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). See generally Wilkes v. Iowa State Highway Commission, 186 N.W.2d 604, 607 (Iowa 1971)(courts do not favor grant of new trial because of newly discovered evidence). In addition, we note that "newly discovered evidence" comprises "those facts existing at trial time of which the aggrieved party was then excusably ignorant." Id. If at time of trial John did not know that his employment would terminate by September 1, 1981, his knowledge of the termination subsequent to trial does not constitute "newly discovered evidence." See id. We also note that trial court is given considerable discretion in

ruling on motions for new trial, Kaiser v. Statlas, 263 N.W.2d 522, 525 (Iowa 1978), and that a reviewing court would not interfere with trial court's decision unless there was an abuse of discretion. See In re Canterburry's Estate, 224 Iowa 1080, 1084, 278 N.W. 210, 212 (1938). Last, it has been held that when a party has satisfied all the requirements of rule 244(g), a new trial should not be granted for newly discovered evidence unless a different result is reasonably probable. Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972). In the instant case, the trial court was well informed of John's employment situation. In fact, the court's decree acknowledges that "[t]he petitioner's present position. . . is in jeopardy." It thus appears not reasonably probable that a new trial would have been granted by the trial court. The trial court's denial of John's "motion for new trial for newly discovered evidence" was correct.

III. Application to Reopen Testimony

On August 26, 1981, almost two months after trial court's decree, John filed an application to reopen testimony to reflect new evidence. The significant substance of the proffered testimony is that John inherited approximately $9000 from his mother, not $3000 as revealed by his original testimony. This application was denied.

In considering whether to reopen a case for the reception of additional evidence, trial court enjoys wide discretion. Anderson v. City of Council Bluffs, 195 N.W.2d 373, 378 (Iowa 1972). Generally,

> [f]or us to find an abuse of discretion in a trial court ruling, it must be shown by the complaining party that the trial court's action was unreasonable under the attendant circumstances. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). We note, too, that discretionary rulings, such as the one here, are presumptively correct and complainant has a heavy burden to overcome the presumption of regularity. See State v. Gartin, 271 N.W.2d 902, 910-11 (Iowa 1978)(quoting Dunahoo, The Scope of Judicial Discretion in

> the Iowa Criminal Trial Process, 58 Iowa L. Rev. 1023, 1024 (1973)). Ordinarily, an abuse is found to exist only where there is no support in the record for the trial judge's determination. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972).

Michael v. Harrison County Rural Electric Cooperative, 292 N.W.2d 417, 419 (Iowa 1980). Applying these standards, we conclude that the trial court did not abuse its discretion in rejecting John's application to reopen. The application was not made until almost two months after the decree.

John claims that trial court erred in construing Iowa R. Civ. P. 192, which provides that "[a]t any time before final submission, the Court may allow a party to offer further testimony to correct an evident oversight or mistake, imposing such terms as it deems just." (emphasis added). John also relies on In re Allen's Estate, 251 Iowa 177, 100 N.W.2d 10 (1959), for the proposition that the court may properly reopen testimony even after findings of fact and conclusions of law are made.

We agree with the trial court that rule 192 has no application in the instant case. That rule permits reopening if the application is made before final submission. The application in the case at bar was filed after judgment, i.e., after final submission of the case. Rule 192 therefore does not apply.

IV. Property Division

John contends that the property settlement was not just. We disagree and affirm the trial court.

Our analysis is governed by Iowa Code § 598.21 (1981). A proper property division is one that is equitable under the circumstances. E.g., In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa Ct. App. 1981). We reject any rule based on a mechanical percentage division of the assets. See In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa Ct. App. 1982).

Our review of the record reveals that the parties' property was generally divided equally them. The only point of contention appears to be trial court's ruling that John be required to pay the approximately $5000 payment due on Mary's car. The court ruled that because Mary has spent her $9500 inheritance money toward home improvement whereas John has kept his inheritance money, it would be fair to require John to pay for Mary's car. John contends that this ruling violated Iowa Code § 598.21(2), which states that "[p]roperty inherited by either party. . . is not subject to a property division. . . except upon a finding that refusal to divide the property is inequitable." We disagree.

In In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982), the supreme court in construing § 598.21(2) held that

> the requirement to set aside to a party the property which has thus been inherited or received as a gift is not absolute. Division may nevertheless occur to avoid injustice. A number of factors might bear on a claim that property should be divided under this exception. These include. . . any matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.

The trial court in requiring John to pay for Mary's car considered it unfair to allow John to enjoy his $3000 inheritance exclusively in light of Mary's contribution of her inheritance to the family. Such consideration is permissible and proper under the Thomas standard. The trial court did not err in this regard.

The decree also provided that "in the event [John] dies prior to the death or to the remarriage of [Mary] and if at that time there is a lump sum remaining in [John's] retirement fund or pension fund, then such lump sum shall become the property of [Mary]." John claims that this assignment of his retirement pay violates federal law. We disagree.

5 U.S.C. § 8 346(a)(1978) provides that "the money [derived from civil service retirement] is not assignable, except under the provisions of subsection[. . .] (j) of section 8345." 5 U.S.C. § 8345(j)(i)(1978) then provides that "[p]ayments under this subchapter which would otherwise be made to an employee. . . shall be paid. . . to another person if and to the extent expressly provided for in the terms of any court decree of divorce." Our reading of sections 8345 and 8346 leads us to conclude that it is permissible for the trial court to award John's retirement benefits to Mary at John's death. There was no error.

V. Alimony Award

The trial court awarded thirty-three percent of John's net income from wages, self-employment or retirement or pension benefits to Mary as alimony. On our de novo consideration of the decree as an integrated whole, In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976), we find that an established sum in the amount of $350 per month for life, subject to termination upon death or remarriage, would constitute a more appropriate and equitable alimony award under the circumstances. Mary has contributed significantly to the family and in raising the parties' children when John was away on business trips. We think an award of $350 per month represents a proper and just "allowance to [Mary] in lieu of [John's] legal obligation to support her." In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). We therefore modify the trial court's decree accordingly.

AFFIRMED AS MODIFIED.