IN THE COURT OF APPEALS OF IOWA

No. 0-390 / 09-1383
Filed August 11, 2010

IN RE THE MARRIAGE OF JAMIE SUE TYERMAN
AND BRANDON REEVES TYERMAN

Upon the Petition of
JAMIE SUE TYERMAN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
BRANDON REEVES TYERMAN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dallas County, William Joy (sanctions order) and Gregory A. Hulse (decree), Judges.

A husband appeals a dissolution decree and his wife cross-appeals. **AFFIRMED.**

Jane White of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Cory F. Gourley of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

VAITHESWARAN, P.J.

Brandon Tyerman appeals a dissolution decree. He contends the district court (A) abused its discretion in imposing discovery sanctions, (B) denied him telephone access to portions of the trial, (C) did not appoint a guardian ad litem based on his incarceration, and (D) divided the assets inequitably. Jamie cross-appeals, contending that she should have been awarded more of the couple's assets.

I. Background Facts and Proceedings

Brandon and Jamie Tyerman married in 2003 and divorced in 2008. After Jamie filed the dissolution petition, she served Brandon's attorneys with a request for production of documents and interrogatories. The attorneys did not respond to the requests. They were subsequently allowed to withdraw as counsel. Meanwhile, Brandon was jailed at a county facility on State criminal charges. He remained incarcerated through trial in the dissolution proceeding.

After Brandon's civil attorneys withdrew, Jamie's attorney served them with a motion to compel discovery. Brandon first learned of the motion when he received a notice of hearing from the district court. He notified the court he was incarcerated and asked for an order requiring his transport to the hearing. The district court allowed Brandon to participate by telephone. Following the hearing, the district court ordered Brandon to produce discovery responses by a date certain, on pain of sanctions. Brandon did not fully comply with the order. At a sanctions hearing, the district court limited Brandon's presentation of a defense at trial.

Brandon moved to reconsider the ruling. He again noted that he was incarcerated. He also requested the appointment of a guardian ad litem. The district court granted the request, and the guardian ad litem appeared at trial. Before evidence was taken, the district court advised the guardian that the previously imposed limitations on the presentation of a defense would be enforced.

Following trial, the district court entered a dissolution decree. Following a post-trial ruling, Brandon appealed and Jamie cross-appealed.

II. Brandon's Appeal

A. Discovery Sanctions

Brandon challenges the district court's imposition of sanctions. "We do not reverse the district court's imposition of discovery sanctions unless there has been an abuse of discretion." *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988).

The district court has the power to "make such orders in regard to the failure [to comply with discovery] as are just," including the following:

> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence.

Iowa R. Civ. P. 1.517(2)(*b*)(2). The district court acted under this authority. The court found that Brandon did not comply with discovery, citing Brandon's admission that Jamie had not received responses and his statement that he would comply.[1] The court afforded Brandon more than a month to provide the

[1] The discovery documents were not attached to the motion to compel as required by Iowa Rule of Civil Procedure 1.502. The district court had authority to deny the motion

responses and advised him that a failure to comply would result in sanctions, "which can include an award of attorney fees, or restriction of the evidence which respondent is allowed to present at trial." When Brandon did not fully comply within the prescribed time limit, the court issued the following sanctions ruling:

> As a sanction, the respondent should be prohibited from offering any document into evidence that was requested by the petitioner and any document related to or associated with any document requested by the petitioner. In the event the petitioner obtains any of the documents that petitioner requested from the respondent, the cost of obtaining those documents shall be paid by the respondent. As to the petitioner's interrogatories, as to the subject matter of those interrogatories that the respondent failed to answer and as to those interrogatories that the respondent provided only partial answers, the respondent shall be prohibited from challenging any of the evidence and testimony offered by the petitioners on the subject matters of those interrogatories. As to those interrogatories to which the respondent provided complete answers, the respondent shall be prohibited from challenging any of those answers at trial.

As months had elapsed since the discovery requests were served and only a portion of the answers to interrogatories were completed, we conclude the court acted reasonably in restricting Brandon's ability to present a trial defense.[2]

We recognize Brandon was unrepresented and incarcerated at the time of the discovery proceedings. We believe his recourse was not to ignore properly propounded discovery requests, but to seek the appointment of counsel or a guardian ad litem. Brandon did neither. He voluntarily participated in the hearing on the motion to compel and agreed to comply with the discovery requests.

---

to compel on that ground. Iowa R. Civ. P. 1.502. However, the court was not required to do so.

[2] We note that Brandon answered certain interrogatories completely, thereby partially complying with the discovery order. For that reason, we question the district court's sanction with respect to these completed answers. However, we cannot glean from the trial record or the completed answers whether this particular sanction was enforced at trial, and Brandon, as the party challenging the sanctions ruling, does not point to portions of the transcript that would enlighten us on this issue. Accordingly, we decline to vacate this portion of the sanctions ruling.

Under these circumstances, the court's discovery ruling did not amount to an abuse of discretion.

B. Participation at Trial

Brandon next contends the district court inappropriately limited his telephone participation at trial. He acknowledges that "matters relating to the course and conduct of a trial, not regulated by statute or rule, are within the discretion of the trial judge." *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998). He appears to maintain, however, that the court imposed time limits on his testimony.

The record reveals that the district court cut off Brandon's testimony when it was becoming too narrative and did so by disconnecting the telephone line. The court was unable to immediately reconnect him and elected to discontinue Brandon's testimony at that time and proceed with cross-examination of Jamie's father. Brandon was not on the line during that cross-examination. When he was reached, he was allowed to continue his testimony. Based on this record, we conclude the district court did not place time restrictions on Brandon's testimony and did not abuse its discretion in briefly cutting off Brandon's testimony.

C. Appointment of Guardian Ad Litem

Brandon next argues that he should have been appointed a guardian ad litem during the discovery phase of the litigation. Our review of this issue is de novo. *See In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

Iowa Rule of Civil Procedure 1.211 provides:

> No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the mentally ill, or one adjudged incompetent, or whose physician certifies to the court that the party appears to be mentally incapable of conducting a defense. Such defense shall be by guardian ad litem . . . .

After Brandon's criminal trial ended, he was found guilty of certain crimes and committed to the Iowa Department of Corrections. At this point, the district court appointed Brandon a guardian ad litem in the dissolution proceeding. This attorney had several months to prepare for trial and she participated at trial. Therefore, the district court complied with the rule's requirement that a guardian ad litem present a defense prior to entry of judgment against an incarcerated person.

We recognize that Brandon did not have a guardian ad litem during the discovery phase of the litigation even though he was also incarcerated at that time. However, he had no Sixth Amendment right to counsel. *See In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995). Additionally, he chose to represent himself during that phase and he was allowed to participate in the hearing on the motion to compel.[3] In *McGonigle*, our highest court held this was sufficient. *Id.* The court specifically stated:

> [Rule 1.211] is not intended to go any further for the classes it protects than to place them on an equal footing with those not under one of the impediments listed. If McGonigle had not been incarcerated he would not be entitled to free representation by a lawyer. All he would be granted is the right to hire an attorney or, if he chose, to attend trial and represent himself. This is exactly what he was allowed to do here. There was no error.

[3] It is unclear whether Brandon was allowed to participate at the sanctions hearing. As Brandon does not argue that he was not allowed to participate at this hearing, we find it unnecessary to address the issue of whether non-participation at this hearing would require a different result.

Id.; s*ee also In re Marriage of Smith*, 537 N.W.2d 678, 680 (Iowa 1995) (finding no violation of Rule 1.221 where "Smith did not contest the petition for dissolution of marriage," "chose to represent himself and voluntarily entered into a stipulation," and "[t]he district court adopted the stipulation in its dissolution of marriage decree").[4] Brandon's presence distinguishes this case from *Garcia v. Wibholm*, 461 N.W.2d 166, 169 (Iowa 1990), where neither the guardian ad litem nor the incarcerated person appeared at trial.

As for the fact that Brandon was effectively foreclosed from presenting a defense at trial, we note that the sanctions rule specifically authorizes this remedy and we would be speculating to conclude the result of the sanctions hearing would have been different had a guardian ad litem been appointed at the discovery stage. *See In re T.C.*, 492 N.W.2d 425, 429 (Iowa 1992) (finding failure to appoint guardian ad litem non-prejudicial).

---

[4] We also note that Brandon was not incarcerated at a "penitentiary" or "reformatory" during the discovery phase of the litigation, but in a county jail. *See* Iowa R. Civ. P. 1.211. Our courts have treated this language in various ways. *See In re T.C.*, 492 N.W.2d 425, 428–29 (Iowa 1992) (noting county jail was not a penitentiary or reformatory within the meaning of what is now rule 1.221 but assuming rule applied and deciding failure to appoint guardian ad litem was not prejudicial); *In re S.R*., 554 N.W.2d 277, 278 (Iowa Ct. App. 1996) (holding rule applied to a person held at a medium security correctional facility even though such a facility was not specifically mentioned in the rule). Based on *McGonigle*, we believe the key inquiry is whether the incarcerated person was allowed to participate in the proceedings. *See McGonigle*, 533 N.W.2d at 525 (noting rule "is intended to bring before the court, through one acting as an officer of the court, the vicarious presence of one who for some reason is unable to attend a civil trial or present a defense"). Having said that, it is unclear why the rule is limited to those incarcerated at the pentitentiary or reformatory. Persons incarcerated in other institutions under the jurisdiction of the Department of Corrections would presumably require the same protections, as would persons incarcerated in county jails around the state.

As Brandon was allowed to participate in the hearing on the motion to compel and was appointed a guardian for trial and prior to entry of the decree, we conclude rule 1.221 was followed.[5]

D. Division of Assets

Brandon finally argues that the district court's division of the assets and liabilities was inequitable. His argument is simply a rehash of his argument that the district court abused its discretion in restricting his trial defense. Accordingly, we find it unnecessary to address this argument.

III. Cross Appeal: Division of Assets and Liabilities

Jamie contends the district court's property division was inequitable. She seeks additional assets based on what she describes as Brandon's "massive dissipation of assets."

The dissipation of assets by the parties is a proper consideration to take into account when dividing property. *In re Marriage of Fennelly & Breckenfelder*, 737 N.W.2d 97, 104 (Iowa 2007). During his jury trial on criminal charges, Brandon admitted that he went on a gambling spree and "gambled a lot of money away. Real close to a $100,000." The district court took this testimony into account in its property distribution, stating "the excessive spending through gambling was in fact dissipation of the marital assets." The court carefully considered several factors before concluding that Brandon dissipated a total of $68,424, which "should be included in the marital estate and awarded to him."

[5] Brandon does not argue that the court should have ensured on the record that he wished to represent himself and did not wish to have a guardian ad litem appointed. *See Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. Ct. App. 2009) (requiring waiver of right to be express).

Partially as a result of this finding, the court ordered Brandon to pay Jamie $95,078. On our de novo review, we conclude the district court's property distribution award was equitable. We find it unnecessary to address the remaining property distribution issues raised by Jamie, including the court's resolution of tax matters.

IV. Attorney Fees

Both parties request appellate attorney fees. An award of fees rests within our discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). As Brandon did not prevail in his appeal, he is not entitled to appellate attorney fees. While he was successful in the cross-appeal, the issues raised on cross-appeal were a small portion of the entire appeal. As for Jamie's request, we conclude Brandon's incarceration limits his ability to pay her appellate attorney fees.

Costs are taxed equally to each party.

AFFIRMED.