

IN THE COURT OF APPEALS OF IOWA

No. 0-842 / 10-0056
Filed February 9, 2011

**IN RE THE MARRIAGE OF REBECCA ROSS THOMPSON AND RICHARD
LOGAN THOMPSON**

Upon the Petition of

REBECCA ROSS THOMPSON,
Petitioner-Appellee,

And Concerning

RICHARD LOGAN THOMPSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde,
Judge.

Richard Logan Thompson appeals, challenging the economic provisions
of the decree dissolving his marriage to Rebecca Ross Thompson and finding
him in contempt of court. **AFFIRMED AS MODIFIED, WRIT ANNULLED.**

Kenneth Dolezal and Kyle A. Sounhein, Cedar Rapids, for appellant.

Allison M. Heffern of Simmons, Perrine, Moyer, Bergman, P.L.C.,
Coralville, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Richard Thompson appeals from an October 22, 2009, decree dissolving his marriage challenging what he contends is an inequitable division of assets and debts and an unjustified award of \$500 per month alimony. He also contends the district court erred in finding he was in contempt for failing to pay temporary alimony. Rebecca contends that the issue concerning the property division is moot because of the parties' subsequent bankruptcies,¹ and if not moot we should find it equitable. She also contends that the contempt of court order should be affirmed. We modify the property division and alimony award and find the district court did not abuse its discretion in finding Richard in contempt of court. We affirm as modified and annul the writ.

I. SCOPE AND STANDARDS OF REVIEW. On appeal, equity dissolution cases are reviewed de novo. Iowa R. App. P. 6.907; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). While we give weight to the district court's findings of fact, especially the credibility of the witnesses, we are not bound by such findings. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). The trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases

¹ A supplemental appendix was filed by Rebecca including alleged copies of bankruptcy petitions and discharges showing an alleged discharge of Rebecca on March 17, 2010 and of Richard on January 20, 2010. This case was tried on May 27 and 28, 2009, and a decision was rendered on October 19, 2009. The matter of the bankruptcy was not before the district court and we do not address it.

have little precedential value as we examine the particular facts and circumstances before us. *Id.*

II. BACKGROUND. The parties were married in 2000 and their marriage was dissolved in October of 2009 at which time Rebecca was sixty-five years old² and Richard was fifty.³ Rebecca's assets at the time of the marriage included a 401(k) of less than \$10,000 and an automobile subject to an encumbrance. She was trained as a licensed practical nurse and was working in that capacity. Richard was an over-the-road truck driver, and apparently the parties initially agreed that Rebecca would leave her employment and join Richard on the road. Richard had debt at the time of marriage including child support obligations.⁴ At some point Rebecca returned to work as a nurse and Richard bought a truck which he customized and upgraded. The parties also bought a house. The down payment for the house of \$30,000 came from a \$130,000 inheritance Rebecca received during the marriage from her mother.

While married and living together the parties acquired substantial debt including credit card debt on cards in Rebecca's name. Richard had debt for the truck and the customizing and upgrading. Richard did not pay income tax withholding resulting in the parties owing the Internal Revenue Service about \$3500.

The district court valued the assets and debts and gave Rebecca equities of \$19,062 and Richard equities of -\$44,387.90. Rebecca's share included all

² She was born May 4, 1945.

³ He was born August 16, 1958.

⁴ The district court noted, as do we, that the amount of debt Richard had at the time of the marriage cannot be ascertained from the record.

the equity in the parties' home. In addition the court ordered Richard to pay alimony of \$500 a month payable until Rebecca remarried or dies whichever occurred first.

III. EXHIBIT. Richard contends the district court abused its discretion in excluding his exhibit B. Rebecca contends that the district court did not abuse its discretion in excluding it. While making this allegation Richard fails to show us where in the appendix the challenged exhibit appears. We agree with Richard that exhibits should be received in an equity case subject to objection. In equity the district court should not rule on objections but should receive all exhibits subject to objection. *See Hughes A. Bagley, Inc. v. Bagley*, 463 N.W.2d 423, 426 (Iowa Ct. App. 1990). The problem here is we have been unable to find the questioned exhibit. We have searched the trial court file presented to us and the supreme court clerk's office has checked with the county clerk of court to no avail. Reviewing Richard's argument on this issue and the entire record we do not believe that if we had the exhibit to review that we would arrive at a different decision.

IV. ECONOMIC PROVISIONS OF THE DECREE. Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Havran*, 406 N.W.2d 450, 452 (Iowa Ct. App. 1987). The distribution of the property of the parties should be what is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1) (2009). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa

Ct. App. 1983). Assets and liabilities are valued as of the date of dissolution. See *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994); see also *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). We value property for division purposes at its value at the time of the dissolution. See *Locke*, 246 N.W.2d at 252. It is the net worth of the parties at the time of trial that is relevant in adjusting property rights. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979). We look to the economic provisions of the decree as a whole in assessing the equity of the property division. See *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995).

We consider alimony and property distribution together in assessing their individual sufficiency. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984).

The district court appears to have justified the unequal division of equities and the awarding of alimony, noting that Rebecca came into the marriage with little debt and her inheritance was diminished during the marriage and Richard was financially irresponsible.

Rebecca contends the division was equitable and giving her the equity in the family home was fair. The current equity in the home is less than the \$30,000 down payment that came from her inheritance. Iowa statutory law governs the treatment of inherited property in dissolution cases and an equitable

distribution of the property must be made according to the criteria established in Iowa Code section 598.21(5). This statute excludes from the court's property division "inherited property or gifts received by one party." *Id.* The latter portion of the statute identifies a qualification to the gift and inheritance set-aside rule: "Property inherited . . . is not subject to a property division . . . except upon a finding that refusal to divide the property is inequitable to the other party." *Id.* § 598.21(6).

In determining whether inherited property is divisible, the controlling factors are "the intent of the donor and the circumstances surrounding the inheritance." *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). Other factors are: (1) contributions of the parties toward the property, its care, preservation or improvement; (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) any special needs of either party; and (5) any other 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. *See In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000) (quoting *In re Marriage of Muelhaupt*, 439 N.W.2d at 659). Reviewing these factors we agree with the district court that consideration should have been given to Rebecca's inheritance.

Rebecca also contends that we should consider the fact she brought some \$10,000 to the marriage when apparently all Richard brought was undefined debt.

Under section 598.21(5)(b), the property a party brought to the marriage is one factor to consider in determining an equitable division of property. See *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). However assets owned by a party prior to the marriage are not required to be set aside like inherited or gifted property. *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998); *In re Marriage of Garst*, 573 N.W.2d 604, 606 (Iowa Ct. App. 1997). “[P]roperty included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party.” *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). The district court gave some consideration to the fact that the parties did not enter the marriage on the same financial footing. Under the facts of this case this is a fair consideration.

V. EQUITY OF DIVISION. Does the fact that Rebecca has inherited property and brought assets while Richard brought debt render the unequal allocation of equities fair? We believe as stated above that it does justify less than an equal division. However; we do not accept the argument that the allocation of debt was all Richard’s doing.

The district court allocated to Richard credit card debt of \$25,694⁵ accrued during the marriage in Rebecca's name or jointly. Richard contends this is not equitable. Rebecca blames the accumulation of debt on Richard's spending habits. However, the balances owed on Rebecca's credit cards required Rebecca's acquiesce. Furthermore the dissolution decree did not and could not have absolved Rebecca from the responsibility to the creditors and it is doubtful Richard will be able to discharge all the debt allocated to him. With these factors in mind we look at the award of alimony.

The district court found that Richard is younger and more likely to have more years of gainful employment and that Rebecca may not be able to work until age seventy-two in order to maximize her social security benefits.⁶

This is a marriage of less than ten years duration. Both parties have a similar income. Rebecca, when she reached her sixty-sixth birthday in May of 2010, qualified for full social security benefits without a reduction for any earnings. Neither party has benefited financially from the marriage. We affirm the property division, but modify the award of alimony to provide that it terminate in May of 2010 at which time Rebecca can receive full social security benefits.

⁵ The district court found all this debt was Rebecca's alone, but then noted an account in the amount of \$4992 included in the above total was joint debt.

⁶ Because Rebecca was born between January 2, 1943 and January 1, 1955, her full retirement age is sixty-six. Rebecca reached that age in May of 2010 and she can continue to work without her wages decreasing her social security benefits. In addition, as long as she continues to work and receive benefits her record will be checked every year to see whether the additional earnings will increase her monthly benefit. She could also receive additional benefits by waiting to age seventy, and if she did continue at her current wage, her benefit at age seventy is estimated at \$1326 a month.

VI. CONTEMPT. Richard contends he should not have been found to be in contempt of court, ordered to pay \$3500, and if not paid to serve five days in the Linn County jail.

Because no appeal exists for punishment for contempt for failure to pay spousal support, we treat this portion of Richard's appeal as an application for writ of certiorari. See *Rausch v. Rausch*, 314 N.W.2d 172, 173 (Iowa Ct. App. 1981). Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). Review is not de novo but at law. *Id.*

A person can be held in contempt if a person “willfully disobeys the order or decree.” Iowa Code § 598.23(1). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. *In re Marriage of Wegner*, 461 N.W.2d 351, 353 (Iowa Ct. App. 1990).

[A] finding of willful disobedience requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Id. (quoting *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988)).

Rebecca has the burden of proving Richard (1) had a duty to obey the court order, and (2) willfully failed to perform that duty. See *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). The burden then shifts to Richard to produce evidence that the violation was not willful. See *id.* However, the burden to prove willfulness beyond a reasonable doubt always rests with Rebecca. See

id. Richard may show that his failure to comply with the order was not willful if the order was indefinite or if he was unable to perform the act ordered. *Christensen*, 578 N.W.2d at 678.

On December 15, 2008, Richard was ordered to pay Rebecca \$500 a month in spousal support and \$2000 towards her expenses in filing for bankruptcy. The support was to commence on January 15, 2009 and the \$2000 was to be paid within thirty days of the order. On May 6, 2009, some twenty-two days before the commencement of the dissolution hearing Rebecca filed an application for a rule to show cause seeking to have Richard found in contempt for failure to make the ordered payments.

The district court found that Richard lost his job in December of 2008 and did not again begin working until April of 2009 and had earned about \$6600 at the time of trial. The court found he received several thousand dollars from his mother while he was employed but made no effort to pay any of the amount ordered in the temporary order.

Richard recognizes there was a temporary support order entered in December of 2008 ordering him to pay Rebecca \$500 a month thereafter. He contends he lost his job that month through no fault of his own and he did not start working until April of 2009, one month prior to trial. He said the district court used gross earnings of \$6600 when his net earnings were only \$1800.

Richard's failure to make any payments on the order despite the fact he had some resources supports the district court's findings and the writ is annulled.

IX. ATTORNEY FEES AND COURT COSTS. We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED, WRIT ANNULLED.