

IN THE COURT OF APPEALS OF IOWA

No. 1-125 / 10-1420
Filed April 27, 2011

**IN RE THE MARRIAGE OF WILLIAM H. SCHWEGMAN
AND SUSAN E. SCHWEGMAN**

Upon the Petition of

WILLIAM H. SCHWEGMAN,
Petitioner-Appellant,

And Concerning

SUSAN E. SCHWEGMAN,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

William Schwegman appeals from the economic provisions of the decree dissolving his marriage to Susan Schwegman. **AFFIRMED AS MODIFIED.**

Robert L. Sudmeier of Feurste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Kim C. Roddick of Reynolds & Kenline, L.L.P., Dubuque, for appellee.

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

TABOR, J.

William Schwegman appeals from the decree dissolving his marriage to Susan Schwegman. He alleges the property distribution is inequitable, challenging certain calculations by the district court and arguing the court erred in failing to credit him for gifted property. Because we agree that the court erred in adjusting the allocation of assets, we modify the decree and order Susan to make an equalization payment.

I. Background Facts and Proceedings.

William and Susan were married in 1997 after living together for approximately seven years. William filed a petition to dissolve the marriage in November 2009. At the time of the June 2010 dissolution hearing, both parties were fifty-six years old. They had no children together.

Both parties enjoy gainful employment. William works for John Deere Tractor Works and earned \$60,471 in 2009. He testified he received a pay cut in 2010 and was on track to earn \$51,130. Susan works at Rite Hite Corporation and earned \$49,781 in 2009. Based on their similar earning capacities, the district court denied Susan's request for alimony and declined to award either party their trial attorney fees.

Both parties have retirement accounts. William has a John Deere pension plan valued at \$64,187 at the time of trial (47.37% marital) and a tax-deferred savings plan valued at \$47,595, which was a marital asset. He also has a Wells Fargo IRA and an IPERS account, both of which were entirely pre-marital assets. Susan has a Rite Hite Schwab 401(k) plan valued at \$157,739, of which

\$135,468 is marital. The district court awarded each party their respective retirement accounts.

During the marriage, William received significant gifts from his mother and aunts. These include two certificates of deposit valued at \$10,000 each, a \$40,000 advance on his inheritance from his mother, and a duplex worth \$66,260. These funds were used to make down payments and reduce the mortgage on jointly owned properties.

In the decree dissolving the marriage, the court found that if it accepted the values used by William in his proposed resolution, William would receive a net distribution of \$167,726 in property while Susan would receive \$139,329. The court then made three adjustments to the property distribution. First, the court addressed the John Deere tax-deferred savings plan, finding that it was “entirely marital, which means that one half of this amount, or \$23,797.00 should go to the Petitioner’s side of the ledger.” Second, the court made an adjustment for the Dutrac accounts, deciding that they were also “entirely marital, such that one-half of the balances, or \$4831 should go to the Petitioner’s side of the ledger.” Third, the court made an adjustment for William’s alleged dissipation of a savings account:

Lastly, the Petitioner dissipated a considerable amount from the Dutrac savings account, for which an adjustment should be made. Respondent’s Exhibit “S” shows that the account had a value of \$37,069.00 just prior to the Petitioner filing the Petition for Dissolution of Marriage while it has a present balance of \$5,587.00. The Petitioner through his testimony could account for approximately \$12,000.00 of the dissipation, the majority of which was to pay tax penalties which the Petitioner argues were attributable to the actions of the Respondent. The testimony, however, established that both of the parties shared some

culpability in this regard. One-half of the remainder of the dissipation is \$9,741.00, which should be placed on the Petitioner's side of the ledger.

Based on these three adjustments, the court reached the following conclusion:

This results in an increase in the Petitioner's net distribution from \$167,726.00 to \$206,095.00. If this amount is subtracted from the Respondent's net distribution of \$139,329.00, the Petitioner is receiving \$66,766.00 in excess of the amount that the Respondent is receiving. This is more than one-half of the amount that the Petitioner is requesting to be excluded as gifted property and appears to be a reasonable variance considering the totality of the circumstances.

William filed a motion to enlarge or amend the court's findings and conclusions and to modify the judgment, arguing in part that the court erred in making the mathematical adjustments listed above. The court overruled his motion in its entirety.

II. Scope and Standard of Review.

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.907; *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). Although we decide the issues raised on appeal anew, we give weight to the district court's factual findings, especially regarding the credibility of the witnesses. *Witten*, 672 N.W.2d at 773. We defer to the district court's opinion regarding the believability of the parties because of the trial judge's superior ability to gauge their demeanor. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996).

III. Property Distribution.

Partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Dean*, 642

N.W.2d 321, 323 (Iowa Ct. App. 2002). The property should be distributed based on what is equitable under the circumstances and with consideration to the criteria listed in Iowa Code section 598.21(1) (2009). *Id.* We look at the decree as a whole in determining what is equitable. *Id.* at 325. We value the assets and liabilities as of the date of trial. *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa 1997). The district court is afforded wide latitude, and we will disturb the property distribution only when there has been a failure to do equity. *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005).

William contends the property distribution is inequitable. He first argues the district court made several mathematical errors in its distribution. He claims the court erred in crediting him one-half the values of the John Deere tax-deferred savings plan and the Dutrac accounts by virtue of the fact they were marital property. We agree this was an error.¹ The property distribution, using the values assigned by William, should show a net distribution of \$167,726 to William and \$139,329 to Susan.

William also argues the court erred in adjusting the property distribution to assign \$19,482 in dissipation of the Dutrac account to William. Although he was only able to account for \$12,000 of the money he spent out of the account in the nine months leading up to trial, he claims that Susan dissipated more funds overall during the marriage on gambling. The district court made the following finding:

¹ We note that Susan does not argue in her appellate brief that the district court's adjustments were accurate. Rather, she generally asserts that the division of the property was equitable.

It is the Petitioner's position that the Respondent has a gambling problem. The undersigned, however, gives little weight to this testimony. The testimony and the exhibits admitted show that the Respondent has spent considerably more time gambling than has the Petitioner, but the Petitioner has established little more than that. Also, it is an activity that they enjoyed doing together.

We find the evidence in the record supports the court's finding and defer to it. The court did not err in crediting one half of the \$19,482 in dissipated marital funds to William's side of the ledger. This brings William's net distribution to \$177,467. This amount is \$38,138 more than the assets on Susan's side of the ledger.

Finally, William argues he should receive a greater share of the property distribution as reimbursement for the gifted and inherited property he received during the marriage. Iowa Code section 598.21(6) states:

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

In determining whether inherited property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the inheritance or gift. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). Placing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property. *Id.*

In determining whether such property should be divided, we consider five factors: (1) the parties' contributions 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 donee or devisee; (3) the parties'

separate contributions to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) the other party's special needs; 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. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). The length of the marriage or the length of time the property was held after it was devised, though not independent factors, may indirectly bear on the question for their effect on these factors, and still other matters that "might tend to negative or mitigate against the appropriateness of dividing the property under a claim that it falls within the exception [to the general rule against division]." *Id.*

The evidence shows William placed inherited and gifted monies in joint accounts rather than keeping them separate. He also used the money to purchase and reduce the mortgage on properties that were jointly owned and contributed to by both parties. Susan testified that she could not keep track of what money was gifted or inherited and what money was earned by the parties. But the evidence did not demonstrate that Susan had an independent close relationship with William's aunts or that it would be unfair to her to set aside a portion of William's gifts for his exclusive enjoyment.

William contends the district court intended to return to him more than one-half of the assets he received in gifts from his family members, but through its mistaken adjustments in paragraph fifteen of the decree failed to effectuate that intent. His contention is correct. To achieve the equitable distribution sought by the district court, we believe that Susan must make an equalization

payment of \$28,628. That payment reflects the district court's faulty adjustments to William's assets in the amounts of \$23,797 from the John Deere account and \$4831 from the Dutrac account. Such an equalization payment returns the variance between the parties' distributions to \$66,766, which was more than half the amount William claimed as gifted property. The court deemed this amount to be "a reasonable variance considering the totality of the circumstances." We agree with that assessment.

Costs on appeal are assessed equally to both parties.

AFFIRMED AS MODIFIED.