IN THE COURT OF APPEALS OF IOWA

No. 1-204 / 10-0897
Filed April 27, 2011

IN RE THE MARRIAGE OF VICKIE SWANSON AND RODNEY SWANSON

Upon the Petition of
VICKIE SWANSON,
Petitioner-Appellee,

And Concerning
RODNEY SWANSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Hancock County, John S. Mackey, Judge.

Rodney Swanson appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED.**

Michael G. Byrne of Winston & Byrne, P.C., Mason City, for appellant.

Thomas W. Lipps of Peterson & Lipps Law Firm, Algona, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Mahan, S.J.* Doyle, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

POTTERFIELD, J.

Rodney Swanson appeals from the economic provisions of the parties' dissolution decree.

I. Background facts and proceedings.

Vickie and Rodney Swanson were married in 1973 and over the next three-plus decades the couple engaged in farming and hog production and amassed significant assets. They now contest the value of those assets.[1]

The parties' first dispute whether the "home place" is a marital asset. Vickie argued the "home place"—27.3 acres quitclaimed by Rodney's parents to the parties upon which are located several hog buildings including a nursery and finishing buildings, grain bins, machine sheds, and the marital residence—is marital property and has a value of $775,000, which includes the value of the land—$117,929. Rodney's mother testified the purpose of the quit claim deeds was to allow Rodney to obtain financing for the hog buildings, but there was no intention to give the property to Rodney until his parents' deaths. Rodney contended that since the land continued to be owned by his parents, the value of the hog buildings thereon was substantially reduced and proposed a value of $120,000.

Other assets are agreed to be marital, and include the equity in two corporations through which the farming and hog operations were conducted, Swanson Hillside Farms and Hillside Sales, LLC; the Peat farm (consisting of approximately 128 acres worth $450,130), and the Crystal Lake farm (consisting of 67.3 acres worth $306,000). Vickie contended the couple's assets should be

[1] Vicki filed a petition for dissolution of marriage in October 2008.

valued at the time of separation when the couple's net equity was approximately $3.5 million as reflected in a balance sheet presented to Farm Credit Services on January 31, 2008. Rodney, however, opined the parties' net worth at the time of trial was approximately $1.2 million due to the dramatic downturn in the hog market. He asked the court to award Vickie the 67-acre Crystal Lake farm and $150,000.

After a four-day December 2009 trial, the district court made several findings of fact, including the following:

> The court finds the evidence establishes the transaction consisting of the quitclaim deeds to the acreage constitutes an incomplete gift and the land portion of the acreage worth $117,929 should be excluded from the marital estate. The court further finds that the appraiser John Cowin's estimate of the fair market value of the land and improvements at the home place is fair and reasonable and reflects a truer fair market value for the property than Rodney's estimate thereof and, accordingly, the court finds the same to be worth $775,000.
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> The hog buildings are subject to a weaner pig contract with Allstar Pork entered into by Rodney on behalf of Swanson Hillside Farms, one of the parties' farm corporations and may result in a contingent liability of over $400,000 if not fulfilled. . . . The court finds Swanson Hillside Farms owns grain worth $99,820, sows worth $70,875, and farm machinery and equipment worth $419,500. With respect to the latter, the court concludes that appraiser Jeffrey Obrecht's appraisal reflects the truest fair market value for Rodney's line of machinery and equipment. The court further finds Hillside Sales, LLC, owns grain worth $234,560 and hogs worth $156,000.

The court found the parties had liabilities of $910,599.

The court awarded Rodney the home place and all interest in the two corporations, subject to all outstanding debt. Vickie was awarded the Peat farm and the Crystal Lake farm "free and clear from any claim by Rodney subject to Rodney's exclusive right of first refusal to lease the tillable acres at current ISU

Extension Service rates." By the court's reckoning, Vickie received a net value of marital assets of $793,348 and Rodney received a net value of $777,933.20.

Both parties moved for expanded findings, Rodney asking that the court make several findings consistent with Rodney's testimony, including that if he did not retain the Peat farm, Farm Credit Services would call its loan and require liquidation of the operation, and also that Farm Credit would be willing to loan $150,000 toward a settlement of the parties' divorce action provided only if Rodney retained the Peat farm and Vickie was awarded only the Crystal Lake farm.

Rodney appeals, arguing the district court failed to equitably value and divide the assets and liabilities of the parties and inappropriately assessed all the risk and liability of the farm operation on him. He also contends the court erred in denying his motion for new trial and considered inappropriate matters in ruling on post-trial motions.[2]

II. Valuations are within the range of evidence.

"Although our review is de novo, we ordinarily defer to the trial court when valuations are accompanied by supporting credibility findings or corroborating evidence." *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); *see also In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007); *In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987) ("Ordinarily, a trial

[2] We note several problems with the appendix filed in this appeal, which made this court's review much more difficult: (1) The names of witnesses were not inserted at the top of each transcript page included in appendix. *See* Iowa R. App. P. 6.905(7)(*c*); (2) Omitted pages of transcript were not indicated by asterisks. *See* Iowa R. App. P. 6.905(7)(*e*); and (3) The appendix includes poorly reproduced photographs and other exhibits. *See* Iowa R. App. P. 605(3)(*c*) (noting all copies of exhibits "must be legible").

court's valuation will not be disturbed when it is within the range of permissible evidence."). Here, the trial court's valuations are well within the range of permissible evidence.

Rodney's brief states, "The most hotly disputed issue before the trial court was the valuation of hog buildings upon the homestead." He asks this court to accept his opinion that the value is $120,000, since his parents still own the land. While Rodney is competent to testify as to market value of his property, *see Holcomb v. Hoffschneider*, 297 N.W.2d 210, 213 (Iowa 1980), we accept the trial court's finding that Cowin's appraisal was "fair and reasonable and reflects a truer fair market value for the property than Rodney's estimate thereof." And given the quit claim deeds and Rodney's parents' stated intention to gift the land to him, we do not disturb the court's value placed on the hog operation buildings. The trial court's values with respect to the other marital assets are also within the range of evidence and we will not disturb them.

III. Division of assets is equitable.

We also reject Rodney's claim that the court's distribution of marital assets is inequitable. Rodney claims the district court "essentially fashioned a 50/50 division of assets after liabilities in the unwarranted hope that the existing farm enterprise existing would continue." We agree with the first part of the statement–that the court "essentially fashioned a 50/50 division of assets after liabilities," but reject Rodney's characterization that the division was "in the unwarranted hope the farm enterprise" would continue. Rodney's testimony in opposition to Vickie's request that the court liquidate the marital assets and his statement that to exit the hog business would be "stupid" supports a conclusion

that Rodney intended to continue the farm enterprise. His own brief further supports such a conclusion, stating liquidation of the farm enterprise would "trigger[ ] additional debt in the form of deferred tax liability and breach of contract of damages for the hog operation, [and] also deprives the Respondent of his livelihood in the only occupation he has pursued for over 30 years."

Rodney was awarded the farming and hog operations, all the buildings and machinery to carry on those operations, and the right of first refusal to rent the tillable ground awarded to Vickie until the crop year 2019. We find no fault with the trial court's findings that Rodney was "better suited to handle the hog and grain operation given his years of vast experience." We uphold the district court's approximately equal division of assets after liabilities.[3]

IV. Denial of motion for new trial was not an abuse of discretion.

The district court entered its Findings of Fact, Conclusions of Law and Decree on February 4, 2010. On March 15, 2010, Rodney filed a motion for new trial claiming newly discovered evidence that his farm operation financing was in jeopardy due to the district court's division of marital assets. Vickie resisted on grounds the motion was untimely and the "'financing' issue does not constitute newly discovered evidence."

The district court denied the motion as the claimed "newly discovered evidence" did not exist at the time of trial and thus did not support the motion.

[3] Vickie argues the district court should have valued the parties' property at the time of separation, which was March 2008. We are not convinced the circumstances presented warrant a different date of valuation. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997) ("There may be occasions when the trial date is not appropriate to determine values. Equitable distributions require flexibility and concrete rules of distribution may frustrate the court's goal of obtaining equitable results. For example, when parties separate several years before even filing a petition for dissolution of marriage, an alternate valuation date is appropriate.").

See Benson v. Richardson, 537 N.W.2d 748, 762-63 (Iowa 1995) ("Under Iowa law, 'newly discovered evidence' sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time.").

> Our scope of review of a ruling on a motion for a new trial depends on the grounds asserted in the motion. To the extent the motion is based on a discretionary ground, we review it for an abuse of discretion. But if the motion is based on a legal question, our review is on error. In discretionary matters, the trial court is accorded broad but not unlimited discretion.
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> An abuse of discretion is found when the trial court has clearly exercised its discretion on untenable grounds or acted unreasonably.

In re Marriage of Wagner, 604 N.W.2d 605, 608 (Iowa 2000) (citations omitted).

A party seeking a new trial on grounds of newly discovered evidence must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. Rodney's motion fails on the first element and we therefore find no abuse of the district court's broad discretion here.[4]

[4] Rodney contends the district court "ignored" his trial testimony that the loss of the two farms would make his hog operation unsustainable. We disagree. The district court rejected many of Rodney's claims of liabilities and values, at least implicitly finding his testimony not credible on these matters, which is not the same thing as ignoring his testimony.

V. The trial court did not consider improper evidence on ruling on post-trial motions.

On March 30, 2010, the court received testimony and exhibits in support of the parties' post-trial motions. At the hearing, Rodney asked the court to allow the parties an additional thirty days to reach an agreed solution. At the end of the hearing, the court stated it would take the matters under advisement and

> it's safe to say that you will have a—at least a 30-day delay before any ruling based upon my view of my future schedule and I just say that for your own purposes. If you wish to try and resolve the matters which are presently before the court, if you do, please notify the court. Otherwise, I will make a ruling whenever I can.

In ruling on the post-trial motions, the court noted "[t]here was further filed with the court a 'Report to the Court' on April 19, 2010, advising the court of further correspondence reflecting the positions of the parties post-hearing." Rodney filed a response objecting to the "Report to the Court." The court thereafter issued a Ruling and Order stating in part:

> The court concludes that the petitioner's "Report to the Court" merely advised the court that settlement negotiations were fruitless between the parties following the hearing upon post-trial motions and, accordingly, the court entered its ruling thereon on April 27, 2010, which the court concludes shall stand.

Rodney contends on appeal that the 'Report to the Court" was improperly considered and constitutes a denial of due process and equal protection. He argues—without citation to any authority—that because the trial court did not expressly disavow influence of the report "actual influence must be presumed," despite "the generalized disclaimer . . . after issuing the ruling." We will not presume the trial court considered the report in a manner other than noted in its

Ruling and Order. Nothing in the court's post-trial motion ruling indicates otherwise.

VI. Motion for appellate attorney fees.

Vickie requests an award of her attorney fees on appeal. Such an award rests within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). "Factors to be considered in determining whether to award attorney fees include: 'the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.'" *Id*. (citation omitted). We decline to award appellate attorney fees here.

VII. Conclusion.

Because the court's valuations of the marital assets were within the range of the evidence and its division of marital assets was equitable we affirm the court's property distribution. We find no abuse of discretion in the court's denial of Rodney's motion for new trial or in its ruling on post-trial motions. We award no appellate attorney fees. Costs of the appeal are assessed to Rodney.

AFFIRMED.

Mahan, S.J., concurs; Sackett, C.J., specially concurs.

SACKETT, C.J. (concurring specially)

I concur specially without opinion.