

IN THE COURT OF APPEALS OF IOWA

No. 1-454 / 10-0951
Filed August 10, 2011

**IN RE THE MARRIAGE OF
DAVID A. SCHULTZ
AND DEVI S. SCHULTZ**

**Upon the Petition of
DAVID A. SCHULTZ,**
Petitioner-Appellant,

**And Concerning
DEVI S. SCHULTZ,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

David Schultz appeals from the district court's ruling dissolving his marriage
to Devi Schultz. **AFFIRMED AS MODIFIED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West
Des Moines, for appellant.

Becky S. Knutson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des
Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ.

VOGEL, P.J.

David Schultz appeals from the district court's ruling dissolving his marriage to Devi Schultz. He asserts the district court erred by inequitably dividing the property. Specifically he asserts the district court (1) misapplied premarital agreement leading to an inequitable property division, (2) wrongly omitted marital property from the overall distribution, (3) wrongly awarded the Vanguard REIT account to Devi, and (4) wrongly ordered David to pay the fees for Devi's supervised visitation. We affirm, as modified.

I. Background Facts and Proceedings.

David and Devi were married in April 2004. Two children were born of the marriage: Kathryn, born in 2006, and Lauren, 2005. Prior to marriage, the couple entered into a premarital agreement that allowed them to retain control of their separate property, should the marriage be dissolved. During the marriage, Devi worked at Wells Fargo (WF), and David worked as an electrician. David suffered a work related injury that led to a workers' compensation award of \$46,581.43, dispersed in weekly benefits from September 2006 to October 2007, as well as a lump sum payment of \$25,000 in November 2008. He was also diagnosed with rheumatoid arthritis, a permanent disability that entitled him to receive monthly social security disability benefits of \$1778.20, plus \$444 for each child; in addition he received a lump sum of \$35,973 as back payment for the period of December 2006 through April 2009. David did not work from October 2004 through April 2005, and from October 2007 through the time of trial. Although physically healthy, Devi also suffered from some mental health problems, which required hospitalization for a time.

The parties separated in June 2008. In a temporary order, the court ordered physical care of the children with David, with Devi to pay child support. The court also required Devi's visitation be supervised "by someone of [David's] choosing but not him." In a subsequent order on temporary matters, based on the recommendation of Dr. Steven Dawdy, the appointed custody evaluator, the order was modified and Devi was granted unsupervised visitation. In December 2009, the district court entered a decree dissolving the marriage, but due to a weather delay, reserved all other matters for a later trial.

In January 2010, the disputed issues were tried over the course of five days. The court granted David and Devi joint legal custody of the parties' two children, with Devi having physical care, and David visitation.

The court divided the parties' assets based on its reading of the premarital agreement, including setting aside "the growth in value by way of interest, dividends accumulated, or appreciation of market value on the premarital asset." The court noted that the premarital agreement was "silent on the treatment of active contributions during the marriage to what would otherwise be a premarital asset." The court in turn divided what it determined to be marital property according to equitable principles.¹ David appeals.

II. Standard of Review.

Dissolution proceedings are equitable actions, which we review de novo. Iowa R. App. P. 6.907; *In re Marriage of Shanks*, 758 N.W.2d 506, 510 (Iowa 2008). However, the district court had the advantage of listening to and

¹ The district court set forth a chart of marital and non-marital assets, assigning values and distributing the assets accordingly. David states in his brief that a "new Table is appended to the end of this Brief." We find none in the record on appeal.

observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Premarital Agreement – Division of Assets.

Both parties agree the premarital agreement is enforceable, but David disagrees with the district court's construction of the agreement. The premarital agreement stated,

[David and Devi] desires that he or she shall have and retain absolute and unrestricted control and dominion on his or her own estate and property. . . . The parties also agree that they each consider "premarital" to be defined as growth in value by way of interest, dividends accumulated, or appreciation or market value on the premarital asset. The interest and/or dividends and/or appreciation of market value shall be considered to be a part of the premarital asset.

As a general rule, premarital agreements are favored and should be construed liberally to carry out the intention of the parties. *In re Marriage of Christensen*, 543 N.W.2d 915, 918 (Iowa Ct. App. 1995). We treat such agreements in the same manner as ordinary contracts. *Id.* The purpose of such contracts is to fix the interests of the respective parties in the property of the other. *In re Marriage of Pillard*, 448 N.W.2d 714, 715 (Iowa Ct. App. 1989). Because of the relationship of trust and confidence between the parties, the law requires a full and frank disclosure of all matters bearing upon an antenuptial agreement. *In re Marriage of Sell*, 451 N.W.2d 28, 30 (Iowa Ct. App. 1989).

Generally, the partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in 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).

David contests the district court's property distribution, in part asserting the premarital agreement was not correctly construed or enforced. He contends the court improperly awarded Devi the Wells Fargo, (WF), consolidated account; WF stock purchase plan; WF direct purchase plan; and WF 401(k). He also asserts the district court omitted marital property from the overall division, including WF partner shares, Vanguard Total, Fidelity Contra, and Dodge and Cox Funds. Finally, he argues the court wrongly awarded the Vanguard REIT account to Devi, and incorrectly required him to pay for supervised visitation for Devi.

WF consolidated account. David contends the court improperly awarded Devi the WF consolidated account valued at \$18,476, asserting the account was not listed as Devi's asset in the premarital agreement. Devi states the "consolidated" account is not a separate account, but is comprised of the WF Roth IRA (\$8620) and the WF stock account (\$9997), both of which the district court set aside to Devi, thus twice attributing these assets to Devi. We agree the accounts were counted twice by the court. Devi also asserts only the Roth IRA

existed at the time of trial and David asserts the consolidated account was only worth \$9887.² While we agree only the Roth IRA remained at the time of trial, we find that because the property was non-marital, the value of the IRA, even if twice listed, would not change or off-set the overall division of property. See *In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa Ct. App. 1996) (entitling a party to a just and equitable share of all assets that are marital).

WF stock purchase plan. The WF stock purchase plan was largely part of Devi's premarital property, valued in 2004 at \$6943. During the marriage, Devi contributed approximately \$2900 to the account, and David seeks division of the \$2900. We agree this amount should have been considered marital and divided accordingly. Finding no reason given in the district court decision to do otherwise, we modify to award David an additional \$1450.

WF direct purchase plan. David asserts the court failed to include the WF direct purchase plan in its overall distribution. However, David fails to list the district court's valuation or the amount he seeks to be divided. Devi asserts this account does not exist as it was simply noted as the ticker symbol for the WF common stock, discussed above. We agree. There is nothing to divide.

WF 401(k). David contends the court improperly divided Devi's WF 401(k) account. He acknowledges the court properly divided the contributions during the marriage, each party being awarded \$19,997, and concedes the premarital

² David refers us to Appendix page 385, Devi's Exhibit "T", to an account having a balance of \$9887 on December 4, 2009. However that page number, with that exhibit bears a date of "10/25/2002." See *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) (instructing that when not directed to information in the record to aid our resolution of the issue, we will not assume a partisan role and undertake the appellant's research and advocacy).

value of the account was \$146,390. He then calculates the employer matching funds to be \$119,982 and asserts that amount should have been divided equally as marital property. Devi contends David produced no evidentiary support for his assumptions as to employer matching funds as opposed to what the premarital agreement spells out as “growth in value by way of interest, dividends accumulated, or appreciation of market value . . . considered to be a part of the premarital asset.” With no support in the record, we affirm the setting aside of this asset to Devi.

WF partner shares. David asserts the district court omitted Devi’s WF partner shares account from its overall division, worth \$14,980. Devi claims when she left her employment at Wells Fargo in 2007, she cashed in these stock options, and the money was used for housing, child support, and insurance. No account with these funds existed separately at the time of trial and the last record of the funds is in 2007. While David asserts Devi should be held to account for the whereabouts of this asset, there is no indication it was in existence at the time of trial. See *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997) (explaining that we value assets at the time of trial). Because the asset no longer existed, and David could not prove it was inappropriately dissipated, there was nothing to divide.

Vanguard Total, Fidelity Contra, and Dodge and Cox Funds. David asserts the district court omitted the Vanguard Total, Fidelity Contra, and Dodge and Cox Funds from the property division, arguing they had substantial value in 2007. He also notes these assets were not listed on Devi’s schedule in the premarital agreement, and therefore they were marital property and should have

been divided accordingly. Devi responds that the documents David presented (e.g. 2007 IRS Form 1099; Iowa Form 1040) reflect the trading, sales and purchases of stocks over a period of time, not a comprehensive list of assets held at a particular time. We agree; there is no proof these assets existed in this form at the time of trial and consequently were appropriately not included in the distribution of assets.

Vanguard REIT Fund. David argues the Vanguard REIT fund was created during the marriage in his name only, funded by his workers' compensation income, and the district court incorrectly awarded the proceeds to Devi. Devi agrees the fund was created during their marriage with David's workers' compensation income, but because he was not working at the time, she was supporting the family financially, so consequently it was a marital asset for division. In a post-trial motion, the district court ordered Devi be awarded the fund in order to "equalize the property division." The resolution of this issue is tied to the following issue.

Supervised Visitation Fees. In a temporary order, the court determined Devi's visitation with the children should be supervised. Dr. Dawdy later recommended unsupervised visitation, and the court so modified the order. In the original decree, the court initially found the parties should, "split . . . the expenses associated with the visitation supervisor." However, in calculating the final distribution of net assets the court stated, "the petitioner shall be responsible for the . . . bills associated with the visitation supervisor." In a post-trial ruling the court found:

The amount owed for the visitation supervisor should have been set at a total of \$5980. The court will continue to require [David] to pay this amount; in order to equalize the property division, the only other change will be to award the Vanguard REIT account to [Devi]. . . . This will result in [David] receiving marital assets with a value of \$51,882, while [Devi] will receive marital assets valued at \$51,738.

David argues the court was incorrect in ordering David to pay for Devi's supervised visitation. However, the district court clearly was attempting to make as equal of a distribution as possible. While "equitable" does not require an "equal" distribution of assets and liabilities, there is no indication in this record that the district court abused its discretion in the distribution plan it found to be appropriate. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009) ("An equitable division does not necessarily mean an equal division of each asset."); *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa Ct. App. 1998) (noting the trial court has considerable discretion in fixing fees, including costs of experts); see *McNamara v. McNamara*, 181 N.W.2d 206, 210 (Iowa 1970) (stating that the matter of property distribution in divorce cases is left largely to trial court's sound discretion).

From our review of the facts and circumstances of this case, it is evident the district court divided the separate property of David and Devi in accordance with the premarital agreement, and the marital property, according to equitable principles. With the exception of the addition of \$1450 to David's side of the ledger, we affirm the distribution of assets by the district court.

IV. Attorney Fees.

Devi seeks attorney fees on appeal. "An award of attorney fees is not a matter of right but rests within the court's discretion and the parties' financial

positions.” *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We review the needs of each party seeking the attorney fees, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). After considering the appropriate factors, we decline to award appellate attorney fees. Costs on appeal assessed one-half to each party.

AFFIRMED AS MODIFIED.