

IN THE COURT OF APPEALS OF IOWA

No. 1-810 / 10-2107
Filed December 21, 2011

**IN RE THE MARRIAGE OF GERALD G. BAKER
AND LYNDA A. BAKER**

Upon the Petition of

GERALD G. BAKER,
Petitioner-Appellee,

And Concerning

LYNDA A. BAKER,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Lynda Ann Baker appeals from the decree dissolving her marriage to
Gerald G. Baker. **AFFIRMED.**

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

Brent A. Cashatt and Kodi A. Brotherson of Babich & Goldman, P.C., Des
Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Lynda Ann Baker appeals from the September 10, 2010 decree dissolving her marriage to Gerald G. Baker. She contends the district court failed to divide the parties' assets equitably and award her alimony. Both parties request appellate attorney fees. We affirm.

BACKGROUND. Linda and Gerald married in June of 1976, shortly after they both graduated from college. During the first four years of the marriage they were students in the medical school at the University of Iowa. Both of them graduated with honors. They took residencies at the Methodist Medical Center in Des Moines. Lynda's was in internal medicine and Gerald's was in surgery. Both continued to work in the medical field and, at the time of the dissolution hearing, Lynda was Acting Chief Primary Care Physician at the Veterans' Administration Hospital in Des Moines and Gerald continued to practice as a general surgeon with Iowa Surgery. They had accumulated in excess of five million dollars in assets as a result of their efforts and financial assistance from both families. They were parents of three daughters born between 1982 and 1986. The children had completed their secondary education and appeared to be self-supporting.

Gerald filed a petition for dissolution of the marriage in May of 2008. The matter came on for trial before the district court on May 25, 2010. On September 17, 2010, the district court filed findings of fact, conclusions of law, and decree of dissolution of marriage.

The district court found the parties had assets of \$5,230,253 and distributed \$2,230,253 to Gerald and \$2,889,549 to Lynda.¹ Lynda's request for alimony was denied. The court ordered the parties to pay their own attorney fees and one-half of the costs of the action. Both parties filed post-trial motions. Gerald's motion was not ruled upon and Lynda's was summarily denied.

Lynda appeals contending (1) she should have spousal support, (2) the property division was not equitable, and (3) certain assets and debts were not included in the property division. She also asks for an award of attorney fees on appeal.

SCOPE OF REVIEW. To assess the equity of the property division accurately, we review the evidence de novo. Iowa R. App. P. 6.907; *In re Marriage of Bethke*, 484 N.W.2d 604, 607 (Iowa Ct. App. 1992). "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them." Iowa R. App. P. 6.904(3)(g). In assessing the district court's valuations of property, although our review is de novo, we will defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). We apply this standard to the economic provisions of the decree as well as to the spousal support provisions. *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991); *Zinger v. Zinger*, 243 N.W.2d 639, 640 (Iowa 1976). We review the

¹ The district court also showed Lynda had a home equity line of credit of \$19,944, and Gerald owed a debt to his father of \$19,571, but did not consider either in arriving at the \$5,230,253 amount.

district court's denial of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

PROPERTY DIVISION. Lynda contends the property division was not equitable. She argues that the district court failed to consider all assets and debts, failed to consider the separate property of each party properly, and erred in valuing the property. She asks that Gerald be required to pay her a cash equalization payment of \$183,266.

Lynda seeks to support her claim for the equalization payment by raising a number of issues, including a claim the district court should have considered a paycheck in the amount of \$22,863 Gerald received while the action was pending and gave to his father to repay a debt. She also argues Gerald did not immediately deposit three additional paychecks that had been deposited by the time of the dissolution trial.

Gerald argues that his parents paid for his undergraduate and medical school education in the amount of \$42,434 and they expected to be repaid. He contends he made the first payment of \$22,863.85 because he no longer had a house payment and he had nearly finished paying for his daughters' education. There was testimony Gerald's father assisted him with his undergraduate educations and medical school expenses and, according to an agreement, both Gerald and his sister were expected at some time to repay those funds. Gerald contends, while he still owes his father the balance, it was not included by the district court in making distribution as a debt of the parties.

We have held that a party to a dissolution should be fair and accountable as to property under his or her control during the dissolution process and that a loss or disposal of property that would otherwise be subject to division in a dissolution of marriage may be considered in making an equitable distribution of the parties' property. See *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988). However, in *Williams* the wife asked for and obtained an *ex parte* order enjoining her husband from encumbering property and destroying, altering, or concealing records. *Id.* There were no such orders here, nor were the parties enjoined from spending their own earnings, which it appeared both did during the time they waited for the dissolution petition to come on for trial. However, it was Gerald who paid for a number of joint expenses during the separation, and Lynda did not join in the payment of these expenses. While Lynda contends Gerald did not properly document this obligation, the district court, in making its credibility assessments, apparently decided to accept Gerald's claim. We find no reason to disagree with this conclusion.

Lynda next contends the district court should have awarded her additional personal items. The district court left the personal items with the party who had them in his or her possession. It is apparent Lynda removed a large number of items from the family home when she moved out, and Gerald likewise retained a number of items. Lynda introduced a list of additional items she wanted from the home, but the district court did not order she receive them. Gerald questioned her right to have all the items she requested arguing, among other things, she had one set of dishes and did not need two. In her post-trial motion Lynda

contended she should have received the items and specifically pointed out that Gerald agreed to give her the items listed on an exhibit that included such things as an outdoor moose, a silver candelabra, and a fishing vest. There was no value placed on these items nor was a value placed on most of the items in her exhibit, and there is no basis here to determine the division of the personal items was not equitable.

Lynda further argues the district court failed to show a loan she took out for purposes of improving and landscaping a home she purchased following the parties' separation. Gerald contends the district court's treatment of this debt was equitable because the parties had agreed as to the value of the home based on its purchase price, and using the loan for the purpose it was intended enhanced the value of the property. Lynda also contends that a loan for improvement of the family's home should not have been considered. Gerald argued that at the time the bids were selected for improvements on the home Lynda still lived in the house and it was not clear who would keep the property. He also contends that neither his appraiser nor Lynda's appraiser viewed the family home until after the improvements were completed, consequently they considered the improvements in valuing the property. We find no basis to disagree with the district court's treatment of the loan.

Lynda also challenges the district court's valuation of certain items. Although our review is de novo, we ordinarily defer to the trial court when valuations are accompanied by corroborating evidence. *Vieth*, 591 N.W.2d at 640.

Lynda claims Gerald's 2005 Ford was undervalued by \$4175 and her 2007 Saab was overvalued by \$600. She contends Gerald failed to describe the additional features on his pickup correctly. Gerald contends Lynda, in assessing the value of his pickup, considered it had extra items it did not have and she also considered it to be in better condition than it was.

Lynda further claims the district court did not correctly value the Iowa Clinic Holding Company. The district court valued it at \$1000. Lynda contends it should have been valued at \$83,780. As a member of the Iowa Clinic, Gerald owns one unit that cannot be sold or transferred. Lynda acknowledges it has a fixed value of \$1000, which is the amount Gerald would receive if there were a buyout.

Gerald contends Lynda is attempting to value the holding company based on Gerald's future potential income. He does not deny the holding company produces income and advances that he received about \$12,000 from the company in the year of 2008 and a like amount in 2009. He contends amounts he might receive in the future are income to him and are not current assets. He further notes that should he die, retire, or voluntarily terminate his employment with the clinic he will only receive the sum of \$1000 for his unit.

Lynda further contends the district court erred in valuing two grand pianos. One piano was awarded to Gerald and one was awarded to Lynda. The district court did not value the pianos. Lynda claims her piano was worth \$6000 and Gerald's was worth \$11,600 because he had purchased it in January of 2010 for that amount. While she claims the evidence shows that hers was worth the

lesser amount, she fails to indicate in her brief where this evidence appears. Having been presented with a 1765 page appendix we do not consider it our responsibility to attempt to locate the claimed evidence. See Iowa R. App. P. 6.905(2)(b)(3), (7) (describing required contents of the appendix on appeal).

Having found the district court's valuations of the items above to be within the permissible range of the evidence we will not disturb them on appeal. See *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("A trial court's valuation of an asset will not be disturbed when it is within the permissible range of evidence.").

INHERITED AND GIFTED MONEY. Lynda received a set-off in the property division for \$625,152 in inherited and gifted property. Lynda contends she inherited an additional amount of \$315,954 and the district court only gave her credit for a portion of that amount. Gary contends, and Lynda acknowledges, that some of her inherited money was used for family expenses and for taxes. Gerald contends that taxes on her inheritances and gifts were also paid for with family funds. He points out that some of the funds were not the initial gift but were earnings on the gift, which the family funds also paid taxes on, so the earnings should not be considered Lynda's separate property. He further advances that some of the invested accounts lost money and a car that was purchased with Lynda's separate funds has depreciated.

The district court made few factual findings on this issue but found that Gerald's exhibit "most appropriately summarizes the assets and liabilities of the parties and the distribution that should be followed by the Court." This was a

lengthy trial. There was confusing and contradictory testimony. The district court heard the testimony of the witnesses and made credibility assessments. The exhibit presented by Gerald that the court accepted provides a reasonable basis to support setting aside Lynda's separate property. Lynda has failed to present clear reasons why it should have been rejected and her separate property should have been increased. We affirm on this issue.

CAPITAL LOSS CARRYOVER. Lynda contends the district court should have divided a capital loss carryover shown on a 2009 income tax return filed by the parties. While Gerald agrees the loss should be divided equally, he challenges our authority to divide the loss. Lynda cites no authority to support finding the Internal Revenue Service recognizes a division of a loss carryover by a state court or showing that we have jurisdiction to allocate a carryover capital loss, and we are inclined to agree we do not.

ALIMONY. Lynda contends she is entitled to alimony and at trial asked the court to order Gerald to pay her \$8000 a month until she reached seventy-five years of age. She now contends she should have \$2000 a month until she turns sixty-five, dies, or Gerald dies. She contends Gerald has the ability to pay it, as his income is greater than hers. She contends it is unfair and inequitable for Gerald to benefit from the years she sacrificed her career. She is of course benefiting in that she is sharing here in the assets that were acquired with Gerald's income. She has benefited from the substantial income he earned working eighty hours a week as he has benefited from her attention to raising their children, who apparently have turned out well. She shared a good lifestyle

because of his earnings and she is realizing a substantial property division because of property acquired with those earnings.

Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). An award depends upon the circumstances of each particular case. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). The court is allowed to consider the property division in connection with the alimony award. See *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's determination if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540.

An award of alimony is discretionary with the district court made after considering the factors of Iowa Code 598.21A(1), which sets the criteria for determining support, including

- (a) The length of the marriage.
- (b) The age and physical and emotional health of the parties.
- (c) The distribution of property made pursuant to section 598.21.
- (d) The educational level of each party at the time of marriage and at the time the action is commenced.
- (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education to enable the party to find appropriate employment.
- (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal.
- (g) The tax consequences to each party.
- (h) Any mutual agreement made by the parties concerning financial or service contribution by one party with the expectations of future reciprocation or compensation by the other party.
- (i) The provisions of an antenuptial agreement.
- (j) Other factors the court may determine to be relevant in an individual case.

An award of alimony is frequently justified when the distribution of assets of the marriage does not equalize the inequities and economic disadvantages suffered in the marriage by the party seeking alimony who has a need for support. See *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa Ct. App. 1992). That is not the case here. They each are receiving considerable assets. This is a long-term marriage that both parties leave at an age when they yet are capable of self-support and are in relatively good health. Both have received a substantial property distribution. Both left with inherited property, though Lynda's inherited and gifted property is substantially more than Gerald's. While it is because she received more in the nature of inheritances and gifts than did Gerald and the fact that it is hers because of these factors and is excluded from division, does not in any way prevent its being considered on the question of alimony. See *In re Marriage of Thomas*, 319 N.W.2d 209, 212 (Iowa 1982). They both have excellent educations that they obtained without any substantial efforts of the other spouse. Both parties have a substantial earning capacity and either would have the ability to pay alimony. Paying alimony would give Gerald a tax break and would increase Lynda's taxable income. The district court did not abuse its discretion in not awarding alimony.

ATTORNEY FEES. Lynda contends the district court erred in failing to order Gerald to pay her attorney fees and that he should be required to pay her appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa Ct. App. 1994). We are to consider the needs of the party making the

request and the ability of the other party to pay. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa Ct. App. 1996). Both parties have the ability to pay their own attorney fees. We determine the trial court was within its discretion in not awarding any trial attorney fees to Lynda.

Both parties seek appellate attorney fees. We award no appellate attorney fees.

AFFIRMED.