

IN THE COURT OF APPEALS OF IOWA

No. 2-271 / 11-1398
Filed May 23, 2012

**IN RE THE MARRIAGE OF DIANA L. KIMBRO
AND STEVEN C. KIMBRO**

Upon the Petition of

DIANA L. KIMBRO,
Petitioner-Appellee,

And Concerning

STEVEN C. KIMBRO,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

A husband appeals the property division in the parties' dissolution decree,
and the wife cross-appeals on the issue of attorney fees. **AFFIRMED AS
MODIFIED.**

Karen A. Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.
Matthew J. Brandes of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar
Rapids, for appellee.

Considered by Vaitheswaran, P.J., Tabor, J., and Sackett, S.J.*

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

SACKETT, S.J.

Steven C. Kimbro appeals and Diana L. Kimbro cross-appeals from the June 2011 decree dissolving their marriage. Steven's sole issue is that an equalization payment he was ordered to pay Diana was inequitable because she dissipated a portion of funds divided at the time of the parties' separation. Diana requests attorney fees on appeal and claims the district court abused its discretion in failing to award trial attorney fees. We affirm as modified and deny requests for appellate attorney fees.

SCOPE OF REVIEW. We review dissolution cases de novo. Iowa R. App. P. 6.907; *In re Marriage of Schriener*, 695 N.W.2d 493, 495 (Iowa 2005). "Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses." *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

BACKGROUND AND PROCEEDINGS. The parties were married in August of 1993. They have three children. The oldest, an adult, was in college at the time of the hearing. Their two daughters, born in 1994 and 1996, were in high school.

Steven, born in 1964, graduated from Iowa State University in 1986. He had for a number of years been employed as a pharmaceutical representative. At the time of the hearing he was working in sales for Response Genetics. The district court projected his earnings, including both salary and commissions, to be about \$170,000 annually.

Diana graduated from college and obtained a teaching certificate several months before the parties were married. About the time of the parties' separation in January of 2010 she obtained recertification as a teacher and made herself available as a substitute teacher. Steven testified he paid her student loans of about \$11,000. The parties had agreed at the time the third child was born that Diana would not work outside the home, and she did not until after the dissolution decree was filed. At the time of the dissolution hearing she was not fully employed, but estimated if she worked full time she would have an annual income of about \$22,800 a year.

The controversy centers on \$444,053 Steven put in an account at Banker's Trust Company in about 2009.¹ The money came when he sold a stock option in Genentech, a pharmaceutical company he had worked for for approximately six years. In mid-January of 2010, Diana advised Steven she intended to end the marriage. The next day Steven took \$226,518 from this account and left \$217,353 in the account for Diana.² He was to testify that he did not want to fight about the account and after the division he told Diana he had divided the account and her money was still in the account, as he did not want her to be decimated and have nothing. He further testified he told her they would split everything from there on out, other than he would pay all taxes, the mortgage, utilities, and everything to do with the home. He left in place a joint

¹ Some of these funds were moved to other financial institutions during the course of the proceedings. The issue stems from the use of these funds so we will continue to refer to it as the Banker's Trust Company account.

² While Steven talks about an equal division, it appears he took about \$10,000 more than he left for Diana.

checking account and Diana paid family expenses from this joint checking account funded with Steven's salary until about May of 2010, when Steven, as a result of a withdrawal of \$750 by Diana from the account for herself, closed the joint account alleging, according to Diana, that she should pay household expenses from her funds at Banker's Trust. Steven alleged he told her he would pay the bills if she presented them to him. He testified she only presented one bill and refused to give him the grocery bill, telling him it was not his business how she spent her money.

Requests for temporary orders came before the district court in June of 2010. On June 22 of that year Diana was given primary care of the parties' daughters and Steven was granted visitation. Steven was ordered to pay Diana temporary child support as of July 1, 2010, of \$1734 and temporary alimony of \$1000 a month, in addition to a sum for medical expenses. The order was subsequently amended to decrease child support to \$1569.40, to modify the initial medical expense award, and to require Steven to continue existing medical insurance on Diana and the children. There is no contention that the expenses ordered were not paid. In addition to the child support, Steven paid during the pendency of the proceedings about \$800 per month tuition for the girls at Catholic schools.

At some juncture Diana and the parties' daughters moved out of the family home and sought other housing. Steven stayed in the family home.

At the time of the dissolution hearing the parties had agreed to a substantially equal division of nearly a million dollars in assets, but disagreed on

the ultimate division of the money that had been in the Banker's Trust account at the time of their separation. The \$217,353 left in the Banker's Trust for Diana had been reduced to about \$49,000. Steven's portion of the divided account had not been used. Steven contended Diana should be charged with the full amount left for her in the account when Steven divided it, arguing this was equitable because she had overspent and dissipated the asset.³

The district court followed the parties' agreement as to the division of assets, but accepted Diana's argument and ordered an equalization payment of \$45,468.⁴

Steven was ordered to pay child support of \$1751 a month for his two daughters and \$1240 for one after the older girl graduates from high school. In addition he was ordered to pay his daughters' tuition at Xavier High School of about \$800 monthly to decrease to about \$400 a month when the older daughter graduates from high school. He was also ordered to pay spousal support of \$2000 a month for a period of seven years, which the district court found "should be a sufficient period of time for the rehabilitative spousal support to serve its purpose."

Steven filed a motion challenging the equalization payment ordered in the decree. He argued that he tried to do the right thing by dividing the account on the eve of Diana's filing for divorce and that the court punished him for making

³ Diana had used the Banker's Trust monies to buy an option to purchase housing, to remodel the housing she purchased, and to buy a car for one of the parties' daughters. She still had these assets, which were allocated to her in the property division.

⁴ The equalization payment was initially set by the district court at \$50,060.62 but was reduced after Steven filed a motion for new trial pointing out that the court had not properly considered the income tax consequences.

the division and trying to be fair. He further argued by Diana's own admissions she used her proceeds from the account for unnecessary purchases including trips, theater tickets, and home furnishings, and during the majority of this time she was receiving spousal and child support and he was paying school tuition. He also argued that during this time he was making mortgage payments that reduced the home mortgage, increasing the value of the home, which was ordered sold and the proceeds divided. The district court denied the motion except to make an adjustment for income tax.

Dianna contends the equalization payment was equitable. She contends that after dividing the money Steven paid little in family support and refused to leave the family home, forcing her to make a substantial financial outlay to obtain housing for herself and the children.⁵ She contends that her situation was unlike that of Steven, who continued to earn a substantial salary and could pay his expenses from this income.

DISCUSSION. Iowa is an equitable distribution state. *In re Marriage of Schriener*, 695 N.W.2d at 496. This “means that courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties.” *Id.* (citing *In re Marriage of Mc Nerney*, 417 N.W.2d 205, 207 (Iowa 1987)). All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property.

⁵ There is nothing in the record to support Diana's contention Steven should have moved from the house.

Iowa Code § 598.21(1) (2009); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

While the trial date is generally the most appropriate date to value assets, we “recognize the need for flexibility in making equitable distributions based on the unique circumstances of each case.” *In re Marriage of Campbell*, 623 N.W.2d 585, 588 (Iowa Ct. App. 2001). Our review of decrees is driven by the goal of assuring equity between the parties. See *id.* at 587. In addition:

We have previously determined that some conduct of a spouse which results in the loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable division of property. See *In re Marriage of Johnson*, 350 N.W.2d 199, 202 (Iowa 1984); *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988). Moreover, we recognize that dissipation or waste of marital assets by a spouse prior to the dissolution of marriage may generally be considered in making a property division. See Lee R. Russ, Annotation, *Spouse’s Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court’s Determination of Property Division*, 41 A.L.R.4th 416 (1985).

In re Marriage of Burgess, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997).

In addition to the criteria listed in section 598.21(1), the statute makes it mandatory to consider all of the enumerated factors, but the list does not purport to be exclusive. In addition to the factors that are specifically identified, the court is required in section 598.21(1)(m) to consider “[O]ther factors the court may determine to be relevant in an individual case.” Thus, the court is to consider in an individual case such additional factors as the court in its discretion deems relevant. It is mandatory for the court to consider the listed factors and discretionary for it to consider others. *In re Marriage of Johnson*, 350 N.W.2d 199, 201-202 (Iowa 1984).

In *Johnson*, the court approved the trial court's determination that an oral agreement made by the parties was relevant and noted that steps taken by the parties allowed the husband to take control of assets that should have been preserved for equitable division. *Id.* at 202.

We have a similar situation here. Steven turned half the account over to Diana and indicated his desire to split assets equally. Her post-separation spending did not make for a property division that was consistent with this understanding. Even if the parties had not made an agreement, we cannot ignore Diana's unilateral post-separation disposition of marital assets. To do otherwise would not do equity. Steven had the right to rely on Diana not spending the money to his detriment.

We also note that Iowa courts seek equity and hold persons accountable for fairness. See *In re Marriage of Harvey*, 523 N.W.2d 755, 756 (Iowa 1994). In *Harvey*, the court, after noting that the doctrine of equitable estoppel should rarely be applied to reach an equitable resolution, applied it to enforce an oral agreement on child support. *Id.* at 756. There, a mother having been named custodian sought child support from the noncustodial parent who had housed and supported the child in his home after an oral promise of the mother that she would not demand support for the time the child lived with his father. *Id.* at 757.

We believe the equities here are with Steven and we modify to reduce the equalization payment. The initial division saw Steven taking about \$10,000 more from the account than did Diana. We modify and reduce Diana's equalization payment to \$5000.

ATTORNEY FEES. Diana on cross-appeal contends the district court should have awarded her attorney fees. We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). The district court denied Diana's application for attorney fees finding she had sufficient property and was able to pay them. We find no abuse of discretion and affirm on this issue.

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

AFFIRMED AS MODIFIED.