

**IN THE COURT OF APPEALS OF IOWA**

No. 6-638 / 06-0089  
Filed September 7, 2006

**IN RE THE MARRIAGE OF KAREN R. BAIRD  
AND GREGORY L. BAIRD**

**Upon the Petition of  
KAREN R. BAIRD,**  
Petitioner-Appellee,

**And Concerning  
GREGORY L. BAIRD,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Linn County, Amanda Potterfield,  
Judge.

Respondent appeals from provisions of the decree dissolving his marriage  
to petitioner. **AFFIRMED.**

Charles Hallberg of Hallberg, Jacobsen, Johnson & Viner, P.L.C., Cedar  
Rapids, for appellant.

Karen Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

**MAHAN, J.**

Respondent Gregory L. Baird (Greg) appeals from the provisions of the decree dissolving his marriage to Karen R. Baird. We affirm.

**I. Background Facts and Proceedings**

Greg and Karen were married on September 16, 1989. It was the second marriage for both parties. No children were born to the marriage. At the time of trial, Greg was fifty-one and Karen was fifty-eight. The parties separated in late September 2004, and Karen filed a petition for dissolution of marriage in December 2004.

Karen is employed as an office manager for a family physician's practice, where she has worked for eighteen years. She earns approximately \$25,000 per year. She has a 401(k) retirement account through her employer.

At the time of the marriage, Greg was employed as a union painter and plasterer. He has an IRA retirement account through the union. In 1998 Greg suffered a work-related injury. He received workers' compensation benefits from 1999 until the summer of 2004. He attended classes to obtain his real estate license in 2004, but was unable to pass the test. He enrolled in typing classes at the local community college and went to vocational rehabilitation. Greg remained unemployed at the time of trial and testified he could not work because of his injury and the pain medication he takes.

During the marriage, the parties acquired real estate through their corporation, B&V Enterprises. The properties acquired included an apartment complex, residential lots, and farmland. At the time of trial, the corporation had been dissolved, and most of the parties' properties, including the marital home,

had been sold. The remaining real estate included two contracts for lots and approximately forty-six acres of land near the Cedar River (hereinafter referred to as the "Otis Road" property).<sup>1</sup>

In January 2005 the district court entered a temporary injunction prohibiting both parties from selling, transferring, or depleting any marital assets without order of the court. The injunction also gave Karen exclusive possession of the marital home.

In March 2005 the district court entered a temporary order denying Greg's application for temporary spousal support, but amending the temporary injunction to allow him to withdraw \$1500 per month from his IRA to pay his expenses. The temporary order also permitted Karen to apply payments received on the parties' two real estate contracts to pay the mortgage on the marital home until it was sold.

The marital home was listed for sale in June 2005. An offer was made to purchase the property, but Greg was unhappy with the sale price and refused to sign the purchase agreement.<sup>2</sup> On July 6, 2005, the court entered an order requiring Greg to execute "any document necessary to effect the sale pursuant to the offer," and reserving the issue of distribution of the net proceeds from the sale for trial. After Greg refused to sign the deed or related sale documents, Karen obtained an additional court order, entered on September 28, 2005,

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<sup>1</sup> The district court's dissolution decree refers to thirty-eight acres of property, but it is clear from the appraisal that the property is approximately forty-six acres.

<sup>2</sup> The house sold for \$215,000. Greg estimated it was worth \$240,000 and testified the parties had turned down an offer for \$235,000 in 2002. Greg had contributed a considerable amount of sweat equity building the house.

requiring Greg to “sign any and all documents necessary for the closing on or before September 29, 2005 . . . .”

Trial was held in November 2005. The district court entered its decree on December 9, 2005. In relevant part, the decree awarded the Otis Road property to Greg at its appraised value, awarded the parties the value of their respective retirement accounts, and divided the parties’ personal property, including several guns. The court further required Greg to pay Karen an equalization payment of \$38,871 and ordered Greg to pay \$1500 of Karen’s attorney fees.

Greg appeals, arguing the district court erred in (1) its valuation and award of the Otis Road property, (2) its valuation and award of the parties’ retirement accounts, (3) its award of the firearms, (4) its determination of the equalization award, and (5) its award of trial attorney fees. Karen requests appellate attorney fees.

## **II. Scope of Review**

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g). We accord the trial court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

## **III. Property Division**

The 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, 325 (Iowa Ct. App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (2005). *Id.*

#### **A. Otis Road Property**

At trial Karen introduced into evidence an appraisal of the Otis Road property, estimating the value of the property at \$136,500. The appraiser indicated his value conclusions were based on two “primary extraordinary assumptions: (1) The land is not contaminated and the cost for remediation of the dump site per city requirements is not a significant cost factor. (2) The land valued is buildable.” The “site analysis” portion of the appraisal divided the property into two parcels (7.75 acres and 38.17 acres, respectively), and indicated approximately eighty percent of the larger parcel was in the 100-year flood zone. With respect to the larger parcel, the appraisal further stated:

Per the City of Cedar Rapids Engineering Department there has been illegal dumping into the Zone A flood plain area between the railroad tracks and the river. The city is requiring that a land use plan be developed to outline how the illegal material . . . is to be removed, the material must be removed and the site restored to its natural state. At the time of this appraisal this issue had not been resolved. The estimated value shown in this appraisal is to be reduced by the costs of remediation that are finally incurred to meet the city requirements. These costs may have a significant impact on the value stated in this report.

Karen testified she was called by the City of Cedar Rapids twice about alleged illegal dumping on the Otis Road property by Greg. Karen further

testified she was not interested in the Otis Road property, primarily because Greg had the equipment necessary to maintain the property. She indicated the property is adjacent to other land acquired by the City of Cedar Rapids in the hope of developing a recreational area, and that the city has expressed an interest in purchasing the property.

Greg did not object to the admission of the appraisal into evidence, nor did he introduce an appraisal of his own. He disputed the appraised value and introduced tax documents listing the assessed value of the property at approximately \$13,000. He admitted to placing dirt, concrete, and gravel on the property, but denied his actions constituted illegal dumping. Greg testified he wanted the property sold and the proceeds divided, but he was reluctant to commit to any sale terms and indicated he would cooperate with the sale of the property only “as long as I didn’t get shotgunned,” as he felt he had been with the sale of the marital home.

The district court awarded Greg the Otis Road property at the appraised value of \$136,500. In explaining its decision, the court stated, “Because Mr. Baird is unwilling to cooperate in the sale of the land, the court awards it to him at the appraised value. He will suffer any consequences of his dumping or storing property on the land.” On appeal, Greg argues the award of the property at the appraised value amounts to “unjust punishment.”

Generally, we 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 will not disturb valuations by the trial court that are within the permissible range of the evidence. *In re*

*Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984). We conclude the court's valuation of the Otis Road property was within the permissible range of the evidence. The appraiser's report was accompanied by an addendum listing the extensive qualifications of the appraiser. The report included a detailed site analysis and sales comparisons. Greg did not object to the introduction of the appraisal. He testified the property was overvalued, but would not commit to offering the property for sale at its assessed value of \$13,000, or otherwise provide the court with a specific opinion as to the property's value. His denial of any illegal dumping lends further support to the district court's decision to accept the appraisal without a reduction in value.

Further, it is clear from the record that Greg has been uncooperative with numerous aspects of the dissolution proceedings, including the sale of the parties' marital home. Given Greg's failure to follow court orders and his reluctance at trial to commit to cooperating with the sale of the Otis Road property, we conclude the district court's decision to award the Otis Road property to Greg at its appraised value was equitable under the circumstances.

### ***B. Retirement Accounts***

At the time of the parties' separation, Karen's retirement account had a value of \$95,564, while Greg's account was valued at \$49,989. At the time of trial, Karen's account was valued at \$105,862, and Greg's account was valued at approximately \$10,000. Pursuant to the temporary order entered in March 2005, Greg was allowed to withdraw \$1500 per month from his account to use for living expenses.

The district court awarded both parties their respective retirement accounts, and valued the accounts as of the time of separation. The court explained its decision as follows:

Mr. Baird flagrantly violated the injunction issued by the court pending the dissolution trial. He withdrew most of the remaining funds in his IRA between October 31, 2004 and October 31, 2005. He sold his Harley-Davidson motorcycle and a trailer for \$5000, his truck for \$4000, and his dump truck for \$800. The buyer for all of these items was Julie Burnside, with whom Mr. Baird lives. He also sold the Chrysler LeBaron to a friend at the bar. Mr. Baird testified that the money was gone and he cannot say where. He said he has drinking and gambling problems. He has been arrested twice for operating while intoxicated since the parties' separation and spent some money on expenses associated with those arrests.

In the year following their separation, between October 31, 2004, and October 31, 2005, Mr. Baird withdrew \$42,645 from his IRA. His balance at the time of trial was \$10,631.39. In these unique circumstances, where one party dissipates a substantial portion of marital retirement funds during the separation in violation of a court order and without explanation, the court finds it equitable to use the separation date as the relevant time to value the asset. In the division of assets, the court uses the balance as of October 1, 2004, of \$49,989.05 of Mr. Baird's retirement account.

Greg argues the district court erred by failing to account for the temporary order that allowed him to withdraw a monthly sum from his retirement account and by valuing the accounts as of the date of separation, rather than the date of trial. He further argues the district court should have divided the retirement accounts equitably between the parties.

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). "As in all dissolution cases, our review of decrees is driven by our overarching goal of assuring equity between the

parties.” *Id.* at 587. In addition, “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.” *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997); see also *In re Marriage of Johnson*, 350 N.W.2d 199, 202 (Iowa 1984) (noting the court could not ignore one party’s unilateral post-separation disposition of assets).

Based on our de novo review of the evidence, we conclude the district court’s valuation of the parties’ retirement accounts and its decision to award each party his or her respective account was equitable under the circumstances. The record supports the court’s findings related to Greg’s violation of court orders and wasting of assets pending the dissolution trial. The district court was not required to give Greg credit for the amounts withdrawn to use as living expenses. Greg’s withdrawal of far more than the amount allowed by the court’s March 2005 order,<sup>3</sup> along with his failure to account for these sums, lends further support to the district court’s decision to value the accounts as of the date of separation.

### ***C. Personal Property – Guns***

Greg argues the district court erred by failing to set aside certain guns as premarital assets before dividing the parties’ gun collection. We disagree.

Premarital assets are not set aside like gifted or inherited property. *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998). Rather,

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<sup>3</sup> The record shows Greg received two distributions from his IRA in April 2005 totaling \$16,000.

property a party brings into the marriage is merely one factor to consider in making an equitable distribution. *Id.*; see also Iowa Code § 598.21(1)(b).

The testimony regarding the guns was conflicting. Karen testified Greg owned two or three guns prior to the marriage, but that most of them were purchased after the marriage. Greg testified he owned ten guns prior to the marriage. He denied removing any guns from the marital residence until September 2005. Karen testified Greg removed guns from the home after she filed the dissolution petition in December 2004. An appraiser conducting an appraisal of the personal property in the home in April 2005 appraised only the guns remaining on the premises. Greg introduced into evidence a list identifying his items of premarital property and an insurance coverage binder identifying certain guns, but did not provide other documentation to prove he owned specific guns at the time of the marriage.

The district court awarded a share of the guns to Karen at a value of \$10,025 and the remaining guns to Greg at a value of \$18,980. We conclude the court's decision to include any alleged premarital guns in its valuation was equitable under the circumstances.

***D. Equalization Payment***

Given our conclusion that the district court's distribution of assets was equitable under the circumstances, we will not disturb the court's equalization payment on appeal.

#### **IV. Attorney Fees**

##### **A. Trial Attorney Fees**

An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). The district court ordered Greg to pay \$1500 of Karen's attorney fees. An affidavit from Karen's attorney, admitted into evidence at trial, showed a total of \$6265 of attorney fees incurred by Karen. Given Greg's failure to cooperate with the sale of the marital home and other actions throughout the pendency of the dissolution that required court intervention, the trial court was well within its considerable discretion in its award of attorney fees. We will not disturb the court's award of trial attorney fees on appeal.

##### **B. Appellate Attorney Fees**

An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny Karen's request for appellate attorney fees. Costs shall be divided equally between the parties.

**AFFIRMED.**