

IN THE COURT OF APPEALS OF IOWA

No. 8-128 / 07-1213
Filed May 14, 2008

**IN RE THE MARRIAGE OF KONNIE JO
ELSBERND AND MICHAEL ARNOLD ELSBERND,**

**Upon the Petition of
KONNIE JO ELSBERND,**
Petitioner-Appellee,

**And Concerning
MICHAEL ARNOLD ELSBERND,**
Respondent-Appellant.

Appeal from the Iowa District Court for Winneshiek County, John
Bauercamper, Judge.

Husband appeals from the economic provisions of supplemental decree of
dissolution. **AFFIRMED.**

Dale L. Putnam of Putnam Law Office, Decorah, for appellant.

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C.,
Decorah, for appellee.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

BAKER, J.

Michael Elsbernd appeals from the property and debt division and award of expert witness and attorney fees in a supplemental decree of dissolution. Because the property and debt distribution was equitable and the trial court did not abuse its discretion in awarding attorney fees, we affirm.

I. Background and Facts

Michael and Konnie Elsbernd were married on September 12, 1992. Three children were born to the marriage. A decree of dissolution of marriage was entered on March 19, 2007. The decree incorporated the terms of a partial stipulation with respect to custody, visitation, and child support. The trial court reserved jurisdiction to resolve at trial the disputed issues concerning property division, allocation of debts, attorney fees, and other related property issues.

Konnie earns approximately \$25,000 annually as an office manager for a small manufacturing company. Michael earns approximately \$50,000 annually, principally from hog finishing confinement facilities he built in 2000.

Michael has a history of engaging in unethical behavior. In 1997, the Internal Revenue Service audited the 1993 tax returns of Michael and his father and brother. Additional income taxes, interest, and civil fraud penalties were assessed against Michael due to his failure to report income from selling hogs. Additionally, during the dissolution proceedings, Michael stopped making interest payments on the hog facilities. The bank sought to foreclose its mortgage against the facilities. At trial, a bank employee testified that during a telephone conversation, Michael stated that he planned to intentionally default on his future payments and force the bank to foreclose because he believed that, if the bank

foreclosed on the two acres on which the facilities were built, Konnie would not maintain an ownership in the land or the buildings. Konnie learned of the pending foreclosure and intervened in the action, which preserved the asset for consideration in the court's property distribution.

The trial court entered a supplemental decree of dissolution on April 26, 2007. Pursuant to the supplemental decree, Konnie was awarded various assets, including the homestead valued at \$130,000, and investments valued at over \$148,000. She was also given over \$37,000 in debts. Michael was awarded various assets, including the hog finishing confinement facilities valued at \$450,000, and farm equipment and other assets valued at over \$220,000. Michael was ordered to pay Konnie a \$75,000 lump sum equalization payment and \$25,000 for her attorney and expert witness fees.

Michael filed an Iowa Rule of Civil Procedure 1.904(2) motion to amend and enlarge requesting, among other things, that the court show how it determined the value of the hog confinement facility and other farm assets and that no debt was owed to his parents, and how the court failed to find he still owed over \$17,000 in attorney fees. The motion was denied. Pursuant to Konnie's rule 1.904(2) motion, the court ordered Michael to pay credit card indebtedness of \$17,247, with a credit in that amount against the \$75,000 payment required under the supplemental decree. Michael appeals. Other facts relevant to the appeal will be considered in our discussion of the legal issues presented.

II. Merits

Our review in dissolution cases is *de novo*. *In re Marriage of Schriener*, 695 N.W.2d 493, 495 (Iowa 2005). Although we give weight to the trial court's

fact findings, especially regarding the credibility of witnesses, we are not bound by them. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

A. Division of Marital Assets and Debts

Michael contends the trial court erred in failing to equitably divide the marital assets and debts. After assigning valuations, the court must determine an equitable, though not necessarily equal, allocation of assets and debts. *Id.* We give strong deference to the trial court, which has already sorted through the economic details of the parties, when it makes a fair division that is supported by the record. *Id.* at 641.

This deference to the trial court's determination is decidedly in the public interest. When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize.

In re Marriage of Benson, 545 N.W.2d 252, 257 (Iowa 1996).

Michael contends the trial court erred in determining the value of the hog finishing confinement facilities at \$450,000. Because the land under the facilities is not owned by him but by his parents, he argues, the court erred in finding the facilities have "any value above salvage value." He further contends that the trial court's "finding of \$450,000 value based on a market analysis is fatally flawed."

The trial court found that the facilities had been built in 2000 at a cost of approximately \$250,000 on land owned by Michael's parents. Upon our de novo review, we question the court's finding regarding the ownership of the land. Prior to the parties' separation, Michael represented to third parties that he owned or had permanent access to the land. Regardless of who owns the land, however,

Michael has access to and use of the land. The facilities have more than salvage value.

Although our review is de novo, we defer to the trial court's valuations when they are accompanied by corroborating evidence or supporting credibility findings. *Vieth*, 591 N.W.2d at 640. Konnie hired a CPA to evaluate Michael's finances and provide expert testimony regarding his assets, debts, and earnings. The court found the expert's testimony was credible and persuasive. At trial, an experienced appraiser testified that the fair market value of the hog confinement facility was \$450,000. Michael, on the other hand, did not offer a single witness other than himself to verify his claims or refute Konnie's valuations. Parties to a dissolution are required to make a full and fair disclosure of their financial status. Iowa Code § 598.13 (2007); *In re Marriage of Mueller*, 400 N.W.2d 86, 88 (Iowa Ct. App. 1986). "A party who has not been fair and accountable with property under his or her control during the dissolution process must be charged accordingly." *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988). To hold otherwise would be unfair to the party who does not have control of the marital asset. *Id.*

[S]ecretion of assets, or transfer of assets during the dissolution process must be dealt with harshly. Otherwise the process becomes an uncivilized procedure and the issues become not ones of fairness and justice but which party can outmaneuver the other.

Id.

Here, the court found that

Mike has consistently reported his net worth to his bank at around \$500,000 or more. Since the parties separated, he has steadily decreased his estimates of net worth, deflated the quantity and value of his assets, claimed assets titled in his name belonged to

family members, and listed pre-existing debts not previously disclosed, all in an obvious effort to manipulate his financial status and shield his assets from division with Konnie. The court finds that Mike lacks any serious credibility on these issues.

The record supports the court's credibility assessment. "Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence." *In re Marriage of Hanson*, 733 N.W.2d 683, 703 (Iowa 2007) (citation omitted). Although a property owner is considered a competent witness to testify as to the market value, in this case the court found Michael lacked credibility on these issues. We find the trial court's valuation of the hog confinement facilities was within the permissible range of evidence and, therefore, should not be disturbed on appeal.

Michael next contends the trial court erred in determining he and Konnie owed no money to his parents. Upon our de novo review, we affirm the trial court's finding regarding indebtedness to Michael's parents. We cannot improve on the language of the trial court, which we quote and adopt as our own:

Prior to the separation . . . , [Michael's] right to use the land under the hog confinement building was not questioned or subjected to the payment of rent. Therefore, the court finds no merit to [his] arguments that the hog facilities have little or no value, or that the claimed debts to his family members are legitimate.

Michael also contends the trial court erred in determining he and Konnie had assets of \$55,300 in livestock, \$39,190 in grain, and \$107,000 in agricultural equipment at the time of dissolution. At trial, the CPA hired by Konnie testified credibly as to the value of the livestock, grain, and equipment. Michael claimed many of these assets were owned by other family members or had been sold, yet offered only his own testimony to explain his business relationship with his family,

where the assets went, and why he no longer owned certain property. Michael's testimony regarding his financial matters was inconsistent and conflicted with other credible evidence, supporting the trial court's finding that Michael lacks credibility on these issues. Rather than proving Michael has no assets, his testimony supports the conclusion that he has been engaged in a financial shell game, using his family as shells to hide the pea. We find the trial court's valuation of the livestock, grain, and equipment was "within the range of permissible evidence." *Hanson*, 733 N.W.2d at 703.

Michael also contends the trial court erred in ordering him to pay Konnie \$75,000. This contention is based on his arguments that the court incorrectly valued his debts and assets, including the hog facilities, livestock, crops, equipment, and debt owed to his parents. We accept the trial court's findings regarding the parties' debts and valuation of the assets. We find the property and debt distribution was equitable. There is nothing fundamentally unfair about the trial court's distribution, and we will not disturb it on appeal.

B. Attorney Fees

Michael contends the trial court erred in ordering him to pay \$25,000 for Konnie's attorney fees, but not ordering her to pay his attorney fees. Whether to award attorney fees lies within the court's discretion and depends on the parties' abilities to pay. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). Any award must be based on reasonable fees. *Id.* To overturn an award of attorney fees, Michael must establish the trial court abused its discretion. *Id.*

Konnie spent \$23,850 prior to trial on fees for the appraiser and CPA. She has spent over \$37,000 in attorney fees. The record demonstrates that

Michael's failure to document transactions, attempts to conceal or dissipate assets, and his failure to cooperate in discovery contributed to the large amounts of money Konnie was required to expend in order to preserve the marital assets and obtain an equitable property distribution. Under these circumstances, we affirm the trial court's award of \$25,000 for her attorney and expert witness fees.

Konnie requests Michael be required to pay \$4200 for her appellate attorney fees. "An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court." *Vieth*, 591 N.W.2d at 641 (citation omitted). We consider the parties' needs and ability to pay, and whether a party was obligated to defend the trial court's decision on appeal. *Id.* We determine Konnie was forced to defend the trial court's decision and was successful in her defense. We therefore award her \$4200 in appellate attorney fees.

Because the property and debt distribution was equitable, and the trial court did not abuse its discretion in awarding attorney fees, we affirm.

AFFIRMED.