IN THE COURT OF APPEALS OF IOWA

No. 8-271 / 07-1029
Filed August 27, 2008

IN RE THE MARRIAGE OF DANNY H. VALENTINE
AND LORI JEAN VALENTINE

Upon the Petition of
DANNY H. VALENTINE,
Petitioner-Appellant,

And Concerning
LORI JEAN VALENTINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Grundy County, Todd A. Geer, Judge.

Former husband appeals from a district court order modifying the property division in the parties' dissolution decree. **REVERSED.**

Norma J. Meade of Moore, McKibben, Goodman, Lorenz & Ellefson, L.L.P., Marshalltown, for appellant.

Erika L. Allen of Heronimus, Schmidt & Allen, Grundy Center, for appellee.

Considered by Vogel, P.J., Zimmer, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, J.

Danny (Dan) Valentine appeals from a district court order modifying the property division in the parties' dissolution decree. We reverse the judgment of the district court.

***I. Background Facts and Proceedings*.**

Dan and Lori Valentine, now known as Lori Amos, were married in 1979. Dan was employed by Fisher Controls throughout the marriage, and he participated in his employer's 401(k) and pension benefit plans. The 401(k) plan was entitled the "Emerson Employee Savings Investment Plan," and the pension plan was entitled the "Emerson Electric Co. Retirement Plan for Salaried Employees of Fisher Controls (Appendix 81)." Fisher controls provided periodic updates regarding company benefits, including the pension plan, throughout the parties' marriage.

On August 5, 2004, Dan filed a petition for dissolution of the parties' twenty-five year marriage. Thereafter, Dan and Lori each filed an affidavit of financial status. Lori stated on her affidavit that her assets included a 401(k) account and an IRA, and that Dan's assets included an IRA, a 401(k) account, and a security titled "ESIP Putnam Investments."[1] Dan's affidavit stated that Lori's assets included a 401(k) account and an IRA, and that his assets included a 401(k) account and an IRA. Dan's pension plan and the "ESIP Putnam Investments" security referred to in Lori's affidavit were not listed on Dan's affidavit.

[1] It is unclear from the record whether the "ESIP Putnam Investments" security stated in Lori's affidavit was the same asset as Dan's "Emerson Employee Savings Investment Plan" 401(k), though she listed Dan's 401(k) account separately.

Both parties were represented by counsel during the dissolution proceedings. The parties reached an agreement resolving their differences, and they entered into a stipulation setting forth their agreement. The stipulation provided that Lori was to retain her 401(k) account and her IRA. She was also awarded $94,231.59, which was to be paid by transfer of Dan's IRA to Lori and the remainder from rollover of a portion of Dan's 401(k) account. Dan was awarded the remainder of his 401(k) account. The stipulation did not list or discuss Dan's pension plan or the "ESIP Putnam Investments" asset. However, the stipulation stated that "[t]he parties are the owners of other personal property which has been divided. Each party has in his or her possession all of the personal property to which he or she is entitled." The stipulation further provided that Dan was to pay Lori $1200 per month in permanent spousal support.

On February 18, 2005, a decree dissolving the marriage was entered that incorporated the terms of the parties' stipulation. Following entry of the decree, the parties attempted to accomplish the desired division of Dan's 401(k) plan through four qualified domestic relations orders (QDRO). The first QDRO, entered on July 5, 2005, by the district court, stated the QDRO applied to Dan's "Emerson Employee Savings Investment Plan." On July 15, 2005, a second QDRO was entered which applied to (1) "Emerson Electric Co. Retirement Plan for Salaried Employees of Fisher Controls (Appendix 81)" and (2) "Emerson Employee Savings Investment Plan." Both Dan and Lori and their attorneys approved the second QDRO as to form and substance before it was filed.

Thereafter, Lori began to question why the 401(k) account was being referred to as a pension plan, and she asked her attorney to look into the matter.

On August 22, 2005, Lori's attorney, Melissa Nine, sent an email to Dan's attorney which stated that "[Lori] has contacted me regarding her belief that Dan was possibly hiding assets." However, Lori later testified that she did not believe that Dan was hiding assets, and that she did not authorize the email to be sent. The record reveals that Lori fired her attorney after the email was sent and obtained new counsel.

On February 14, 2006, a third QDRO was entered which only applied to the "Emerson Electric Co. Retirement Plan for Salaried Employees of Fisher Controls (Appendix 81)."[2] In May 2006 Dan filed a motion, which the district court granted, to vacate all previously filed QDROs, stating the effect of the previously filed QDROs "was not to roll over the 401(k) but, instead, to divide a pension plan that was not contemplated by either party." A final QDRO was then entered by the court on July 13, 2006, assigning a portion of Dan's 401(k) account under the "Emerson Electric Co. Employee Savings Investment Plan" to Lori as ordered in the parties' decree.

On August 25, 2006, Lori filed a petition entitled "Petition for Modification of Decree—Spousal Support" alleging that after the entry and acceptance of the February 14, 2006 QDRO by the plan administrator, "it was discovered that the QDRO entered in this matter divided a defined benefit pension plan and not the 401(k) that was the intended subject of division." The petition asserted that the pension was unknown to Lori, and that its discovery constituted a substantial change of circumstances. Lori requested an equitable division of Dan's newly discovered pension. In addition, she requested the permanent spousal support

[2] Both Dan and Lori's attorneys approved the QRDO as to form.

award be modified to an award of rehabilitative support. Dan filed an answer, which asserted that property divisions in dissolution decrees are not modifiable. He also requested that his spousal support obligation be terminated.

Lori's petition to modify was scheduled for trial in February 2007. On the morning of trial, Lori withdrew her request regarding modification of her spousal support obligation. Prior to receiving evidence, the district court limited the parties' testimony to the pension issue.

Lori testified that she did not know Dan had a pension plan with Fisher Controls until she received a letter from Dan's attorney in April 2006 stating that Dan's pension plan had not been disclosed. Lori's testimony made clear that she did not believe Dan fraudulently concealed the pension plan.

Dan testified that Lori knew about both of his retirement plans through Fisher Controls because they discussed them throughout their marriage. He stated he did not include his pension plan in his financial affidavit or in the property division provisions of the stipulation because he did not believe the pension was an asset, since it did not have a "defined value like a bank account."[3] He also claimed he would not have agreed to pay permanent alimony of $1200 a month if he had known his pension benefit was subject to division.

After the parties presented their evidence, Dan moved to dismiss the modification petition because it was not filed within one year of the dissolution decree as required by Iowa Rule of Civil Procedure 1.1013(1), which sets forth the procedure for vacating or modifying a judgment. Dan also argued the petition

[3] The plan is a defined benefit plan. Therefore, the company determines the value of the plan at the time of retirement according to several elements of employment, and then distributes a monthly amount according to a formula.

should be dismissed because it did not "specifically set out the ground for vacating or modifying the judgment." Lori resisted Dan's motion. Her attorney informed the court that Lori's petition sought modification of the decree based on the newly discovered material evidence ground set forth in rule 1.1012(6). She also noted that she had informed the court that Lori was relying on this ground during discussions just prior to trial.

Following the trial, the district court entered a ruling modifying the decree and denying Dan's motion to dismiss. The court concluded the decree should be modified to equally divide the pension plan due to the parties' mistake "as to the existence of the pension plan as an asset" and stated it would consider the spousal support issue upon further application by the parties.

Dan appeals. He claims the district court erred in modifying the property division in the parties' dissolution decree because (1) the petition to modify was not timely filed under rule 1.1013(1), and it did not request modification of the property division in the decree; (2) Lori did not establish a mistake justifying modification; (3) the decree awarded the pension to Dan as his personal property; and (4) the property division and spousal support issues should have been considered together.

***II. Scope and Standards of Review*.**

A proceeding to modify a dissolution decree is reviewed de novo. Iowa R. App. P. 6.4. However, we review a district court's ruling on a motion to dismiss for the correction of errors at law. *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 728 (Iowa 2008).

***III. Discussion*.**

It is a well-established rule that a property division in a dissolution decree, like any ordinary judgment, cannot be modified or vacated after it has become final in the absence of "fraud, duress, coercion, mistake, or other grounds as would justify the setting aside or changing a decree in any other case." *In re Marriage of Knott*, 331 N.W.2d 135, 136 (Iowa 1983); *see also* Iowa Code § 598.21(7) (2005). The other grounds that would justify setting aside or changing a decree in any other case are found in rule 1.1012. *Knott*, 331 N.W.2d at 136. Rule 1.1012 provides, in relevant part:

> Upon timely petition and notice under rule 1.1013 the court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds:
> . . . .
> 1.1012(6) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and was not discovered within the time for moving for new trial under rule 1.1004.

A petition for relief under rule 1.1012 is timely if it is filed "within one year after the entry of the judgment or order involved." Iowa R. Civ. P. 1.1013(1).

Dan claims the district court erred in denying his motion to dismiss because Lori's petition to modify the dissolution decree was filed more than one year after the decree was entered. Lori argues, however, that her petition was not filed under rule 1.1012.[4] We do not agree.

[4] She also claims Dan waived any objections to alleged deficiencies in her petition because he did not raise those objections until the day of the trial. Lori did not raise this defense to Dan's motion to dismiss during the district court proceedings. "Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided on appeal." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 207 (Iowa 1984). Thus, we need not and do not address this issue on appeal.

The petition to modify did not state what rule of civil procedure, statute, or equitable ground, if any, it was seeking relief under. It simply alleged that the discovery of Dan's pension plan, allegedly unknown to Lori, constituted a substantial change of circumstances and requested "an equitable division" of the pension.[5] In denying Dan's motion to dismiss, the district court stated, "Iowa law does not require that a property division be modified through the use of a Petition to Vacate Judgment" under rule 1.1012. We believe this to be a true statement in some circumstances. *See Ash v. Ash*, 172 N.W.2d 801, 803 (Iowa 1969). However, in this case, Lori twice clarified at trial that the petition was filed under rule 1.1012(6). As such, Lori's petition for relief under rule 1.1012(6) was required to be filed within one year after the entry of the February 18, 2005 dissolution decree. *See* Iowa R. Civ. P. 1.1013(1). Because Lori's petition to modify the decree was filed on August 25, 2006, approximately eighteen months after the decree had been entered, her petition was not timely filed. *Id*.; *see also In re Marriage of Waggoner*, 438 N.W.2d 850, 851-52 (Iowa Ct. App. 1989) (affirming the district court's dismissal of petition to modify dissolution decree filed approximately two years after the original decree).

Nevertheless, Lori contends the time constraints of rule 1.1013 do not apply, citing *Shaw v. Addison*, 236 Iowa 720, 18 N.W.2d 796 (Iowa 1945). There, the Iowa Supreme Court held:

> [W]here the petitioner has not in the exercise of proper diligence discovered the fraud or other grounds upon which he relies within the year after the entry of final judgment or decree, he may institute

[5] We note the substantial-change-of-circumstances ground for modification of dissolution decrees under Iowa Code section 598.21C does not apply to property divisions. *Kleinsmith v. Nw. Bank & Trust Co.*, 477 N.W.2d 388, 390 (Iowa 1991).

> suit in equity invoking the equitable powers of the court to vacate the judgment or grant him a new trial, after the time fixed in the statute for so doing has passed.

Shaw, 236 Iowa at 729, 18 N.W.2d at 801. However, Lori did not institute her suit on this basis. Lori specifically alleged at trial that her motion was brought pursuant to rule 1.1012(6), which must be filed within one year after the entry of the judgment as stated in rule 1.1013(1). Consequently, we find Lori's argument to be without merit.

Furthermore, even if Lori had brought her suit on this basis, she has not established that she was not able to discover the pension within one year after the judgment with reasonable diligence. *See Shaw*, 236 Iowa at 729, 18 N.W.2d at 801; *see also Johnson v. Mitchell,* 489 N.W.2d 411, 415 (Iowa Ct. App. 1992). In fact, the evidence shows the opposite. The July 15, 2005 QDRO, signed by Lori and her attorney, listed both the 401(k) account and pension plan as the subject of the order. According to Lori, she then began to question why the 401(k) account was being referred to as a pension. In response to Lori's inquiry, Lori's attorney sent an email to Dan's attorney on August 22, 2005, questioning if Dan had hidden assets. A third QDRO, signed by Lori's new counsel, naming only the pension plan as the subject of the order was filed February 14, 2006. Yet, Lori did not file her petition to modify until August 25, 2006. It is reasonable to infer from this evidence that Lori was aware of Dan's pension, or at the very least, could have discovered the pension within one year after the decree was filed with reasonable diligence.

In light of the foregoing, we find that the district court erred in denying Dan's motion to dismiss and conclude that the district court erred in modifying the

parties' dissolution decree.[6] In so concluding, we reiterate our supreme court's prior admonitions that "[i]nequitable property division in a dissolution decree should be corrected by an appeal. Thereafter, property rights ought to be accorded some permanency." *Knott*, 331 N.W.2d at 137. The need for stability of judgments is the principal reason for refusing "to disturb a judgment once entered and allowed to remain of record beyond the statutory period for reconsideration." *Ash*, 172 N.W.2d at 803.

***IV. Attorney Fees*.**

Lori requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.*; *see also* Iowa Code § 598.36 (authorizing an award of attorney fees to the "prevailing party" in a modification proceeding). Upon consideration of these factors, we decline to award Lori appellate attorney fees.

***V. Conclusion*.**

We conclude the district court erred in denying Dan's motion to dismiss Lori's petition to modify. We therefore reverse the judgment of the district court. We decline Lori's request for an award of appellate attorney fees.

REVERSED.

[6] We therefore need not and do not address the remaining grounds urged by Dan for reversal of the court's ruling.