

IN THE COURT OF APPEALS OF IOWA

No. 8-274 / 07-1214

Filed June 25, 2008

IN RE THE MARRIAGE OF EUGENE FRANCIS FISHER AND ERIN KRISTINE FISHER

**Upon the Petition of
ERIN K. FISHER,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning
EUGENE F. FISHER,**

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs,
Judge.

Husband appeals from the economic provisions of a divorce decree and
wife cross-appeals and requests appellate attorney fees. **AFFIRMED.**

John E. Beasley of Phelan, Tucker, Mullen, Walker, Tucker & Gelman,
L.L.P., Iowa City, for appellant.

Frank J. Nidey and Mark D. Fisher of Nidey, Peterson, Erdahl & Tindal,
P.L.C., Cedar Rapids, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

In this dissolution action, Gene Fisher seeks a reduction in property valuations, additional credit for premarital assets, a tax adjustment, and additional credit for a pretrial advance. Erin Fisher cross-appeals seeking to eliminate several capital gains deductions and seeking to reduce a debt assignment. Erin also requests appellate attorney fees. We affirm and decline to award appellate attorney fees.

I. Background Facts and Proceedings.

Gene and Erin cohabited for several years prior to their 1982 marriage and are the parents of two teenage sons. This was Erin's first marriage and Gene's third marriage. In the May 2007 dissolution decree, the district court adopted the parties' agreement for joint legal custody of their sons with physical care to Erin.

At the time of trial, Erin was forty-one years old with a high school education. She attended community college but did not obtain a degree. While attending community college Erin started working part time for Gene, who owned Keystone Property Management. Keystone manages privately-owned rental property. Erin eventually worked full-time for Keystone both before and after the marriage. Erin earned her realtor and real estate broker licenses which allowed her to expand her job duties at Keystone. Those licenses lapsed while the dissolution was pending.

Although Erin primarily worked at Keystone, she also became licensed as a massage therapist during the marriage. Additionally, for a few years Erin developed and operated a day care/preschool business before selling her

interest in the business. Erin currently works part-time at a newspaper to accommodate the boys' schedule.

Gene was sixty-one years old at trial, has a college degree, and has realtor and real estate broker licenses. At the time of the marriage Gene had already established Keystone, owned a one-third interest in Ellis Manor Partners, and had accumulated life insurance cash value. The parties bought and operated rental properties during the marriage and these properties are collectively referred to as Fisher Rentals.

Erin hired Kerry Bolt, a certified fraud examiner and former IRS special agent, to examine financial records. Bolt concluded substantial bank deposits were made in excess of reported income and there was approximately \$400,000 of excess funds. After Bolt's investigation and report, Gene filed amended tax returns for 2002 – 2005 due to understatement of income. Amended tax returns were also filed for Keystone. Gene paid around \$170,000 in additional taxes, penalties, and interest and requested the amount he paid be deducted from the life insurance cash values as part of the property division. Noting Gene handled Keystone's bookkeeping and was responsible for the amounts reported on the tax returns, the court concluded Gene was not entitled to a deduction and was solely responsible for the tax liability, penalties, and interest. Because Gene's understatement of income affected the appropriate amount of temporary child support, the court ordered Gene to pay an additional \$6555 in temporary child support.

The parties stipulated to the values of their real estate holdings, but disagreed on the amount of debt assigned to 201 5th Street and disagreed on

whether a lack of control deduction was appropriate for Ellis Manor Partners. The court recognized Gene's debt assignment on 201 5th Street, but declined Gene's request for a lack of control deduction in the Ellis Manor Partner's valuation. The court granted Gene's request he be awarded the Southgate property within Fisher Rentals. Southgate is the location of Gene's ongoing Keystone business. The court also granted Gene's request the remaining Fisher Rentals properties be sold and the parties divide the net proceeds. Additionally, the court ordered Gene to pay Erin for her interest in Keystone, which Gene will continue to operate.

The court instructed Gene to pay Erin an equalization payment for retirement accounts and for life insurance cash values. Erin's requests for spousal support and attorney fees were denied.

On appeal, Gene requests (1) an increase in premarital asset credit; (2) a reduction in the valuations of Keystone and Ellis Manor Partners; (3) a tax adjustment to his life insurance equalization payment; and (4) additional deductions for the \$45,000 he advanced before trial.

Erin cross-appeals and requests (1) elimination of a capital gains deduction in the valuations of Keystone and Ellis Manor Partners; (2) invalidation of debt assigned to 201 5th Street; and (3) an award of appellate attorney fees.

II. Scope and Standards of Review.

We review this equity action de novo. Iowa R. App. P 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa

1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(g).

III. Merits.

In allocating the parties' assets and debts, Iowa law does not require an equal division or percentage distribution; rather, the decisive factor is what is fair and equitable in each particular case. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991).

A. Gene's Premarital Assets.

Gene brought more assets into the marriage than Erin and requested a set aside of \$343,186.95 in premarital assets. The trial court granted five of Gene's premarital requests totaling \$191,186.95. On appeal, Gene disputes the district court's valuation for 112 Fifth Street. The district court rejected Gene's valuation of \$60,000 and placed a value of \$18,000 on the property — the same valuation Gene himself utilized in a Hills Bank financial statement he prepared near the time of the marriage. After our de novo review, we agree \$18,000 is appropriate.

Gene next argues he should receive \$53,000 in premarital credit for the residence he owned at the time of the marriage. In denying Gene's request, the district court stated:

That residence was occupied by the parties then sold to purchase a subsequent residence for the family. That residence was later then sold to purchase the family residence at G. Richard Circle which was sold in this proceeding and the proceeds divided between the parties. No offset is given.

We agree with the district court.

Additionally, Gene requests credit for two cars, household goods and jewelry, and an asset which will be used to fund his sons' college education. The district court did not allocate premarital credit for these assets. Gene complains the court failed to give him full credit for the assets he brought into the marriage. "Our law, however, does not give credit to a party for the value of property owned prior to the marriage." *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). Rather, the property Gene brought into the marriage "is only a factor to consider together with the other relevant factors in determining an equitable property division." *Id.* "Only inherited and gifted properties are set aside from the distribution scheme and only if it would not be inequitable." *Id.* Gene's additional requests do not include inherited or gifted property. After our de novo review, we conclude the district court equitably determined Gene's premarital credit.

B. Keystone Property Management Valuation.

Gene argues the court incorrectly valued Keystone Property Management. Gene requests we use the valuation proposed by his expert because it was prepared closer to the time of trial. Gene also requests we then reduce this valuation in recognition of Gene's professional goodwill. "Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). We generally defer to the trial court when valuations are supported by accompanying credibility findings or corroborating evidence. *Id.*

Both parties offered CPA expert opinions regarding the value of Keystone, which manages rental real estate for property owners. Gene is the sole owner of Keystone. Gene's expert first valued Keystone at \$24,000 in reliance on

Keystone's original tax returns. A second valuation, prepared in February 2007, utilized Keystone's 2002-2005 amended tax returns and also relied on Keystone's 2006 tax return. The second valuation by Gene's expert concluded Keystone's value was \$260,000.

Erin's expert valued Keystone "just short of \$521,000" as of March 2005 in reliance on the unreported income discovered by the certified fraud examiner and on the amended tax returns. The valuation did not include Keystone's 2006 tax return because the CPA received the 2006 return one week prior to trial and because the 2006 return had not been subjected to a detailed analysis by the certified fraud examiner. The examiner testified his initial comparison of the bank deposits made in 2006 again showed an excess over the amount Keystone reported on its recently-completed 2006 return. The examiner testified it was his opinion the 2006 tax return was not accurate.

Additionally, the \$521,000 Keystone valuation included an adjustment for excessive compensation paid to Gene. Erin's expert explained:

As an example, 2005, [Gene] was paid \$79,850. If a reasonable compensation was \$50,000, then he was paid \$29,000 more than we felt was necessary to compensate him for his services. So that adds to the bottom line, or adds to the cash flow earnings of the company, which obviously the earnings of the company are then capitalized to come to the value of the company. So all of these adjustments need to be made to come up with what we would call the true earnings of the company.

The district court recognized Gene to be the sole shareholder of Keystone, awarded him a premarital valuation of \$60,000, and concluded: "The court heard expert testimony concerning the value of the business, the methods of valuation, and the reasons given for the expert opinions. The court finds that this corporation has a value of \$521,000 minus the premarital value."

While the expert opinion relied upon by the district court was not as recent as the opinion provided by Gene's expert, the court's valuation did not rely upon the 2006 data which the certified fraud examiner testified was inaccurate. Additionally, Gene's request for a \$60,000 deduction for premarital Keystone assets was recognized and this already included some goodwill. We find the value placed on Keystone Property Management was within the permissible range of evidence and was supported by corroborating evidence. *See Hansen*, 733 N.W.2d at 703. Because valuing a closely-held business is a difficult task, "the law provides much leeway to the trial court." *In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa Ct. App. 1993). Therefore, we will not disturb the valuation on appeal.

C. *Ellis Manor Lack of Control Deduction.*

Gene argues the court incorrectly valued his interest in Ellis Manor Partners by not utilizing the marketability and lack of control reductions advocated by his expert. Gene also requests a change in the order of the court's calculations.

Gene originally purchased a one-third interest in Ellis Manor Partners, which owns a twelve-unit apartment complex. At the time of trial, Gene owned fifty percent of the partnership. In October 2006, Erin and Gene stipulated the total valuation was \$1,022,500 and Gene reserved the right to argue a reduction to the agreed-upon valuation "due to lack of control of the real estate partnership." Gene's expert valued the partnership by applying a fifteen percent discount for marketability and a five percent discount for lack of control. Since

Gene did not reserve the right to argue a discount for marketability in the written stipulation of value, we reject this argument as without merit.

Gene testified the other partner in Ellis Manor Partnership is a close associate and a dear friend. During the pendency of the dissolution, Gene's partner allowed Gene to use the Ellis Manor property as collateral for \$200,000 in financing Gene needed for a separate property Gene would own independently from Ellis Manor Partners. In rejecting Gene's assertion of a deduction for lack of control, the district court stated:

Evidence was presented on [the lack of control] issue. Gene has a close, long-standing relationship with his partner. Further, this partner, during the pendency of this action, agreed to encumber this property so that Gene could borrow money needed on another property. No reduction is taken.

In our de novo review and under the circumstances of this case, we conclude the court's rejection of Gene's claimed reduction due to lack of control is well-founded and equitable. We agree with the court's order of calculations in determining Gene's payment and decline Gene's request to alter the district court's ruling on Ellis Manor Partners.

D. Cross-Appeal: Capital Gains Deductions.

Erin's cross-appeal raises a taxation issue concerning the Ellis Manor property and concerning the Southgate property where Gene's Keystone business is located. Erin argues the court erred in deducting fifty percent of the capital gains taxes of \$54,099.61 (Ellis Manor) and \$24,289.28 (Southgate) when calculating the amounts Gene should pay. However, in both her trial testimony and her exhibits, Erin proposed these exact deductions. In fact, the district court references Erin's exhibits in its decision. While it is true these deductions were

suggested by Erin in the context of her request for a total cash settlement, during the course of the trial she did not advance any alternative proposal suggesting the elimination of the capital gains deductions.

Therefore, we question whether Erin's issue is properly before us on appeal, as the record indicates she raised the matter for the first time in her motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The purpose of such a motion is to provide the district court an opportunity to resolve an issue properly submitted, but one which the court has *failed to address*. See *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (emphasis added). Rule 1.904(2) is not available in situations where a party challenges "a decision made by the district court." *Id.* Erin's newly-advanced capital gains argument is not properly before us. See *id.* at 537 (issues must be raised before we will decide them on appeal).

E. Income Tax and Life Insurance Cash Value.

Gene argues he is entitled to an income tax deduction of \$23,144 from his \$131,317.96 cash payment to Erin for her share of the parties' life insurance assets. Courts consider the "tax consequences to each party" as one of the many factors utilized when making an equitable division of property. See *In re Marriage of Keener*, 728 N.W.2d 188, 198 (Iowa 2007). However, "where there is no evidence to support a discounting based on a sale and the trial court has not ordered a sale, the effect of considering income tax consequences on a sale" diminishes the value of the asset to the non-owning spouse. *In re Marriage of Friedman*, 466 N.W.2d 689, 691 (Iowa 1991). Therefore, where a sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate. See *In re Marriage of Hogeland*, 448 N.W.2d 678,

680-81 (Iowa Ct. App. 1989). Where a sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. See *Friedman*, 466 N.W.2d at 691.

The district court did not order the sale of the life insurance policies. Additionally, we do not conclude a sale of the life insurance policies is relatively certain to occur within the reasonably foreseeable future. Gene is not entitled to a deduction of \$23,144.

F. Gene's Pretrial \$45,000 Payment.

On December 15, 2005, the court adopted the parties' pretrial stipulation and ordered Gene to pay \$45,000 to Erin for moving expenses, a down payment and initial mortgage payments on Erin's Mt. Vernon home, and a car purchase. In the pretrial order, the court ruled: "The \$45,000 shall be considered an asset of Erin for purposes of this dissolution of marriage proceeding."

The court's dissolution decree specifically offset the \$6555 additional temporary child support against the \$45,000, but Gene argues the remaining \$38,445 is not accounted for in the division of assets. We disagree.

The court referenced the \$45,000 stipulation and ruled: "The court notes that asset as Erin's in this Decree." Additionally, the stipulation itself ties the \$45,000 advance to the down payment and mortgage payments of the Mt. Vernon property, about which the court stated:

After purchasing the home, Erin had the basement finished for an additional cost of \$25,500. At the end of 2006, Erin owed \$154,643.83 on the first mortgage on the residence. She further encumbered the home with a second mortgage to pay for the basement work and other expenses incurred during the pendency of this dissolution. That mortgage has a balance of \$62,874.90. Using either party's estimate [of the home's valuation], the property is encumbered beyond its value.

While the court's decision does not specifically detail \$38,445 in its discussion of the Mt. Vernon property, its discussion of the property does specifically reference the \$45,000 advance. In the circumstances present here, where the property is carrying mortgages exceeding its value and the pretrial advance was ordered to provide for the down payment and mortgage payments on this property, we conclude it would not be equitable for Gene to offset the \$38,445 against other decree payments.

G. Cross-Appeal: 201 5th Street Debt.

Erin argues the court should not have assigned \$75,000 in debt Gene alleges he owes his mother to this property. Erin claims Gene handles his infirm mother's finances and Gene's testimony about the debt is not credible when viewed in conjunction with his filing of inaccurate tax returns. Additionally, Erin contends the \$50,000 Hills bank loan assigned as debt to 201 5th Street violated the court's temporary injunction and should not be allowed to reduce sale proceeds. Gene responds the Hills loan was within the scope of allowable transactions under the injunction. The district court detailed the numerous transactions applicable to the property and accepted Gene's proposed debt load.

The original note on this property was \$200,000 in July of 2001. Gene testified that he borrowed \$150,000 from his parents in 2002 as is evidenced by [two exhibits]. He used \$104,092.09 of that amount to retire debt on the loan on 210 5th Street as is shown on the 11/13/02 entry in the bank record in [an exhibit]. The remaining \$45,907.91 of the loan from Gene's parents was used to pay another loan at Hills bank, as shown in [an exhibit]. Gene has repaid \$75,000 of the original \$150,000 by paying his sister \$25,000, at the request of his mother, and by paying \$50,000 to his mother. The source of that \$50,000 was a loan at the Hills bank. All of these transactions are supported by documents in [exhibits]. The court finds Gene has established an indebtedness which should be assigned, for purposes of this ruling, to 201 5th St.

Whether Gene owed a debt to his mother depends on his credibility, the handwritten documentation of the debt, and the bank's records. The district court was well aware of Gene's filing of false tax returns and accepted Gene's testimony and exhibits concerning the debt owed his mother. The trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We accept the court's determination Gene's testimony concerning the debt was credible and agree with the district court.

Although the court had the power to find the Hills bank loan to be a transaction in violation of the temporary injunction, it did not do so. See *Northwestern Mut. Life Ins. Co. v. Hahn*, 713 N.W.2d 709, 713 (Iowa Ct. App. 2006) (holding transfers in violation of an injunction may be set aside). After our de novo review, we conclude the court's treatment of the debt assigned to 201 5th Street is equitable.

H. Appellate Attorney Fees.

Erin requests an award of appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the parties' needs, ability to pay, and the relative merits of the appeal(s). *Id.* Upon consideration of the foregoing factors, we deny Erin's request for appellate attorney fees. Court costs on appeal are taxed one-half to each party.

AFFIRMED.