

IN THE COURT OF APPEALS OF IOWA

No. 8-721 / 08-0005
Filed February 19, 2009

IN RE THE MARRIAGE OF SCOTT KREIGLER AND DAIVA KRIEGLER

**Upon the Petition of
SCOTT KREIGLER,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
DAIVA KREIGLER,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Mills County, James Heckerman,
Judge.

The parties appeal the property division provisions of their dissolution of
marriage decree. **AFFIRMED.**

DeShawne L. Bird-Sell of DeShawne L. Bird-Sell, P.L.C., Glenwood, for
respondent-appellant/cross-appellee.

Suellen Overton, Council Bluffs, for petitioner-appellee/cross-appellant.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Daiva Kreigler appeals, and Scott Kreigler cross-appeals, from the economic provisions of the decree dissolving their marriage. We affirm.

I. Background Facts and Proceedings. Daiva and Scott were married in September 2000. It is the third marriage for each. There were no children born of the marriage.

Prior to marrying, Daiva was employed by Bakers. When she terminated her employment there in May 2005, she was earning twelve dollars per hour. Scott has worked as a general contractor since 1986, when he began his business, Whitney Construction.

In February 1999, while the parties were living together, Daiva prepared Articles of Incorporation for Whitney Construction. The parties then entered into an agreement by which Scott transferred to Daiva a fifty-one percent interest in the corporation. The agreement provided that Daiva would focus on managerial and financial accounting, while Scott would focus on procurement of jobs and general management of work site operations. It further stated that Daiva and Scott would “proportionally share in both the income and related expenses dealing with Whitney Construction, Inc.” The agreement stated the warehouse owned by the corporation “was bought for the sole benefit of Scott E. Kreigler, and any benefit, or liability, interests associated with said building belong exclusively to Scott E. Kreigler.” A separate document signed on the same day states:

In the event, that Scott E. Kreigler, and myself, Daiva M. Pozela, reach a point in our lives where we desire to explore

separate ventures, I hereby give notice that I will not pursue any claim against Whitney Construction, Inc., or Scott E. Kreigler, above what I have personally invested in the company which can be evidenced in the Additional Pd-In Capitol [sic] account.

In August 2006, Scott filed a petition to dissolve the marriage. Following trial, the district court entered its decree dissolving the marriage on November 19, 2007. The court valued Whitney Construction at \$41,935 and awarded it to Scott. It awarded Daiva fifty-one percent of the company's value in the amount of \$21,387. Scott was awarded the warehouse.

Scott was also awarded the marital residence, which he owned prior to the marriage. The court valued the property at \$300,000, and found it had increased in value by \$131,000 during the marriage. The court found sixty percent of the increase in value was attributable to Scott's labor and forty percent was attributable to materials from Whitney Construction, which the parties jointly owned. Accordingly, the court awarded Daiva one-half of the increase in value attributable to those materials, in the amount of \$26,200.

Scott alleged that Daiva had taken more than \$40,000 from Whitney Corporation during the marriage without his knowledge. Although Daiva admitted to withdrawing between \$10,000 and \$20,000 from Whitney Construction during the marriage to pay her son's gambling debts, the court found no evidence that the withdrawals impacted the parties' finances "to such an extent that it would be unjust not to consider it." The court found Scott also withdrew a substantial sum of money from the company's account during the parties' separation.

The court distributed other property not at issue here and ordered Scott pay Daiva a property settlement in the amount of \$50,587. No spousal support was awarded and the parties were ordered to pay their own attorney fees.

Daiva filed a motion to enlarge, arguing the court miscalculated the increase in the value of the marital home attributable to improvements made during the marriage. The court agreed and increased the amount of Daiva's property settlement by \$10,000 to reflect the adjustment. Both parties appealed.

II. Scope and Standard of Review. Appeal of economic provisions of a divorce decree is de novo. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). This standard requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *Id.* We recognize the value in listening to and observing the parties and witnesses. See Iowa R. App. P. 6.14(6)(g). Consequently, we give weight to the findings of the trial court, although they are not binding. *Campbell*, 623 N.W.2d at 586.

III. Whitney Construction. On appeal, Daiva argues the district court valued Whitney Construction too low because it failed to consider "the income stream, earning potential and the potential settlement of [its] pending legal matters." Scott counters that the court erred in valuing the company too high. He also contends Daiva should not be entitled to a share of Whitney Construction because she agreed to only seek return of her initial investment.

Patricia Andersen, a certified public accountant and certified valuation analyst, testified at trial. Her specialty is to appraise closely-held businesses such as Whitney Construction. She testified that there are three approaches to

valuing businesses: (1) an income based approach, where the net earnings of the business are examined to determine what an investor would pay to be able to earn what the business earns; (2) a market based approach, in which sales of similar businesses are looked at to determine what the value is; and (3) an asset based approach, in which the value of the underlying assets of the business are determined. Andersen valued Whitney Construction using the last of these methods, which is typically used for businesses in which profits are volatile or when the business is not profitable. Andersen determined that the value of the assets would not be more than \$41,935, and would probably be less because the equipment would have depreciated in value over time.

William Cheese, a certified public accountant with over twenty-five years experience in valuing businesses, valued Whitney Construction at \$85,724. This valuation was based on a \$74,350 insurance value of the equipment. If the equipment was valued at the depreciated value of \$19,250 instead, the business valuation decreases to \$30,624. Cheese testified the depreciation value is not always reflective of the actual value of an asset.

The district court found the actual value of the corporation to be \$30,624 when using actual value, rather than insurance value. However, the court used the 1999 original value of the corporation, \$41,935, for the purpose of property distribution.

The evidence presented at trial estimates the range of value of Whitney Construction at between something less than \$40,000, by Andersen's calculation, and \$74,350, by Cheese's calculation. Although the value could be

as low as \$30,624, Cheese testified the depreciated value of the equipment was not always reflective of the actual value. Using the value of \$41,935 was within the permissible range of the evidence. *See In re Marriage of Williams*, 449 N.W.2d 878, 881 (Iowa Ct. App. 1990).

Scott contends Daiva should not be entitled to a share of Whitney Construction. He points to the agreement Daiva signed which states that she will not pursue any claim against Scott or Whitney Construction above her initial investment of \$2500. The district court did not address this issue in the decree. Scott failed to raise it in a motion to enlarge or amend. Accordingly, he has failed to preserve error on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (holding when the district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal).

IV. Warehouse. Daiva contends the district court erred in assigning Scott full ownership and benefit of the warehouse. She claims she contributed to the increase in value of the warehouse and should receive a benefit from it.

Daiva signed a document relinquishing any interest in the warehouse. This agreement is controlling. Accordingly, we decline to award Daiva any of the increased value of the warehouse.

V. Marital Residence. Daiva contends the improvements to Scott's home were the result of the contributions of both parties and therefore, she should "benefit in equitable measure." Scott counters that Daiva did not contribute anything toward the improvements.

The property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). The district court may not separate a premarital asset from the divisible estate and automatically award it to the spouse that owned the property prior to the marriage. *Id.* Instead, “property brought to the marriage by each party” is merely one factor among many to be considered under section 598.21. *Id.* Other factors include the length of the marriage, contributions of each party to the marriage, the age and health of the parties, each party's earning capacity, and any other factor the court may determine to be relevant to any given case. Iowa Code § 598.21(1); *Fennelly*, 737 N.W.2d at 102.

When premarital property appreciates during the marriage, we give special consideration to three factors in determining whether and to what extent that appreciation should be considered in the division of assets and debts. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852-53 (Iowa Ct. App. 1998). First, we look to the tangible contributions each party made to the marital relationship. *Id.* at 853. Second, we consider whether the appreciation in the value of the premarital property was due to the efforts of the parties, or mere fortuitous circumstances. *Id.* Third, we look to the length of the marriage. *Id.* Although the three foregoing factors are given special emphasis, we also look to all factors enumerated in section 598.21(1), in an effort to ensure an overall equitable property division. *Id.*

Considering the property settlement as a whole, we conclude it is equitable to award Daiva \$36,200.00 to reflect her portion of the increase in value of the marital property.

VI. 2005 Tax Refund. Daiva contends the court erred in awarding Scott the tax refund of \$1250. The court awarded Scott the refund in lieu of having Daiva reimburse him for health insurance premiums he paid for her after their separation. We conclude the court acted equitably in this matter and decline to modify the award on appeal.

VII. Dissipation of Assets. Daiva acknowledged that she withdrew between \$10,000 and \$20,000 from Whitney Construction to pay her son's gambling debt. Scott contends the court should have considered this dissipation of assets in making the property distribution. He asks that Daiva be ordered to repay him.

Dissipation of assets is a proper consideration when dividing property. *Fennelly*, 737 N.W.2d at 104. In determining whether dissipation has occurred, courts must decide "(1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." *Id.* (quoting Lee R. Russ, *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, 421 (1985)). The first issue is an evidentiary matter and may be resolved on the basis of whether the spending spouse can show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence.

The second issue requires the consideration of many factors, including (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.

Id. at 104-05 (citation omitted). Courts may also consider whether the dissipating party intended to hide, deplete, or divert the marital asset. *Id.* at 105.

As the district court found, both parties withdrew money from Whitney Construction. Daiva did not make the withdrawals with the intent to deprive Scott of the money prior to the divorce. We find Daiva did not dissipate the funds and therefore do not require the funds be repaid to Scott.

VIII. Appellate Attorney Fees and Costs. Scott contends he should be awarded his appellate attorney fees and that Daiva should pay the costs associated with the appeal.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to 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. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

We decline to award Scott his appellate attorney fees.

Costs of the appeal are taxed to Scott.

AFFIRMED.