

IN THE COURT OF APPEALS OF IOWA

No. 9-262 / 07-2061
Filed June 17, 2009

IN RE THE MARRIAGE OF MARY JO WAHLERT AND DENNIS WAHLERT

Upon the Petition of

MARY JO WAHLERT,
Petitioner-Appellee/Cross-Appellant,

And Concerning

DENNIS WAHLERT,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, J. C. Irvin, Judge.

Dennis Craig Wahlert appeals and Mary Jo Wahlert cross-appeals from a district court order dividing the assets and liabilities of their marriage.

AFFIRMED.

Alexander Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

J.C. Salvo, Harlan, and David L. Brown and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Dennis Craig Wahlert appeals and Mary Jo Wahlert cross-appeals from a district court order dividing the assets and liabilities of their marriage. He raises two issues for review. In the first he contends the district court did not correctly value the parties' assets, and in the second he contends Mary Jo should not have been awarded alimony. We affirm.

BACKGROUND AND PROCEEDINGS. This case has a long and troubled history. Mary Jo filed a petition seeking dissolution of her marriage to Dennis on July 21, 1999.¹ The matter came on for hearing on August 7, 2002. On November 25, 2002, the district court entered a decree dissolving the parties' marriage and allocating the parties' extensive real and personal property and debts, ordering alimony and attorney fees. Appeal was taken from that decree. The official court reporter failed to produce a transcript² of the trial and apparently there was no other record of the proceedings. Finally in November of 2005, over six years after the petition for dissolution was filed, a three-justice panel of the Iowa Supreme Court preserved only that portion of the 2002 decree that dissolved the marriage and vacated the balance of it. The matter was remanded to the district court for further proceedings.

The matter came on for trial again on September 20, 2006. Following trial the district court on July 27, 2007, entered an order. The district court noted that

¹ At the time the petition was filed the parties had two adult sons, born in 1977 and 1979, and a minor daughter born in 1982.

² The transcript was ordered and the court reporter failed to deliver it despite several warnings from the supreme court and threats of finding her in contempt. She finally left the state without delivering a transcript or her notes.

Mary Jo argued assets should be valued as of the date of the second hearing and Dennis contended they should be valued as of the date of the first hearing. The district court determined that this issue should be decided prior to the parties submitting “proposed findings of fact, conclusions of law, and judgment.”³ The district found there had been some change in the value of assets since the first trial and found that there was no showing that using current values was inequitable. The court ordered the assets be valued as of the date of the second trial. On October 12, 2007, the district court filed its findings of fact, conclusions of law and decree. The court identified property and debts, allocated both between the parties, and ordered Dennis to pay Mary Jo alimony of \$1000 a month commencing on the first day of November 2007, and continuing on the first day of each month thereafter until Mary Jo’s sixty-fifth birthday, death, or remarriage. The court ordered each party to pay his or her own attorney fees. Appeal was taken from this order.⁴

The case was transferred by the supreme court to this court on April 8, 2009. In his brief Dennis advances only two arguments. He contends that the district court erred (1) in valuing the parties’ assets and liabilities at the time of the second trial rather than the trial that resulted in the dissolution of the marriage, and (2) and in awarding Mary Jo alimony that was not appropriate. Mary Jo contends that the district court (1) did not err in establishing the

³ Mary Jo complied with the district court’s request. Dennis did not. The district court did not adopt Mary Jo’s proposed decree.

⁴ The case was further delayed by Dennis’s counsel’s failure to file his brief within the time frame provided, resulting in Mary Jo’s counsel asking that the appeal be dismissed, which request was denied by the supreme court. Unfortunately the brief Dennis has filed provides little guidance to us in addressing the issues he raised.

valuation date, (2) did not err in awarding her alimony, (3) erred in charging her with a distribution of \$90,000 in assets, and (4) erred in not awarding her attorney fees.

VALUATION DATE. Dennis contends that the assets and liabilities should have been valued as of the date the parties were divorced. Mary Jo contends the valuation date is appropriate in that it is supported by case law and taking Dennis's valuation date would lead to an inequitable result.

We agree with Dennis that the Iowa courts have frequently held that the date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994). We value property for division purposes at its value at the time of the dissolution. In ordinary circumstances it is the net worth of the parties at the time of trial that is relevant in adjusting property rights. See *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979). However, this case does not come to us under ordinary circumstances. This case is an exception, and the date of valuation is only one of a number of factors to be considered in assessing the equity of the district court's distribution. The focal question is whether the division made in the second decree is equitable—that is, whether the assets and liabilities that existed at the time the marriage was dissolved were equitably divided in the second decree. To address this question adequately we would need to be able to determine, among

other things, (1) what assets and liabilities existed at the time of the first decree, (2) what assets and/or liabilities the individual parties acquired after the marriage was dissolved and before the second hearing, (3) what assets that existed at the time of the first hearing have appreciated or depreciated in value, (4) what assets have been depleted by a party, (5) what efforts if any have been made by a party or parties that enhanced the value of assets.

Dennis's brief does not focus on any of these issues, nor does he make any real effort to assist us in identifying evidence that would allow us to make these findings despite, as found by the district court, that a majority of the parties' assets were under his control during the pendency of this action.⁵ Dennis contends merely that Mary Jo received an additional \$76,000 because parcels of farmland awarded to him in the initial decree had increased in value and he was prejudiced because he was awarded the property at its inflated values. He also argues that at the time of the dissolution Mary Jo's Jeep was valued at \$22,625 and the district court valued it at \$11,000 in the second decree. These are the only specific arguments that Dennis makes before advancing a general argument

⁵ "We are not bound to consider a party's position when the brief fails to comply with our rules of appellate procedure." *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002).

In some situations our appellate courts have taken the time and made the effort necessary to decide an appeal despite the failure of the appellant to comply with applicable rules of appellate procedure. Where a party's failure to comply with the appellate rules requires the court to assume a partisan role and undertake a party's research and advocacy, we will dismiss the appeal. . . . [O]ur supreme court has, however, dismissed appeals for substantial failure to comply with the rules of appellate procedure, even without any finding or suggestion that the failures required the court to assume a partisan role or engage in a party's research or advocacy.

Id. (citations omitted).

that the decree should be modified to establish November 25, 2002, as the correct valuation date and to divide the property equally between the parties in light of the long-term nature of the marriage. We cannot consider these two assets in isolation but must consider the property division in total. Yet Dennis in his brief does not even suggest how the other property should be divided, and when his attorney was asked in oral argument how he contends this should be done he was unable to answer the question. After our review of the extensive and confusing record, we cannot say that the district did not do equity; consequently, we affirm on this issue.

ALIMONY. Dennis contends Mary Jo should not have alimony because (1) she withdrew some \$510,838 from bank accounts but did not repay some \$300,000 of it,⁶ (2) they did not have a high standard of living while married, and (3) he was not given credit for alimony he paid under the dissolution decree that was vacated by the supreme court.⁷ He also contends he should be given credit for alimony he paid from the time of the original decree of November 25, 2002, until the time of the second decree on November 1, 2007.

Mary Jo contends the alimony award is appropriate. She contends the only withdrawals she made that are supported by the record total \$17,861.44,

⁶ In the conclusion to Dennis's brief he asks that Mary Jo's share be reduced by \$309,838 for unaccounted for and unreasonable depletion of assets by Mary Jo. The issue is not raised as a separate issue in his statement of issues presented for review. We have considered this issue in addressing the equity of the district court decision and have found the division made by the district court to be equitable.

⁷ As a part of his challenge to the alimony award, Dennis asks that we remand to the district court to correct this issue. He argues that this amount is \$17,261.58 "as evidenced by the Clerk's records," but fails to direct us to where in the appendix this information appears nor does he show how error was preserved on this issue.

and that despite a court order, Dennis failed to supply documentation as to the amounts he claims were withdrawn. She contends Dennis has failed to respond to numerous discovery requests and that he hid documents. She contends the evidence supports that she withdrew \$342,180.39, repaid \$211,071.69 for a net of \$131,108.70 and Dennis withdrew \$175,214.00. She also contends that the alimony is necessary to allow her to maintain the standard of living to which she became accustomed.

When determining the appropriateness of alimony, the court must consider “(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other.” *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa Ct. App. 1983). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3) (1999). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa Ct. App. 1983). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa Ct. App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984).

Dennis received further education during the marriage. He is employed as a respiratory therapist and has wages of nearly \$70,000 a year in addition to

investment income. He makes maximum contributions to his 401k plan. Mary Jo's wages are less than \$24,000 a year and she too has investment income. However, she has diabetes, high blood pressure, and a history of depression. The district court did not abuse its discretion in making the award of alimony; we affirm on this issue.

MARY JO'S CROSS APPEAL. Mary Jo contends that she should not have been charged with the receipt of \$90,000 in assets and that the district court abused its discretion in not awarding her attorney fees. We have found the district court's division of assets equitable and find no reason to modify it as Mary Jo requests.

We review a challenge to the failure to award trial attorney fees for an abuse of discretion. *In re Marriage of Titterington*, 488 N.W.2d 176, 181 (Iowa Ct. App. 1992). Mary Jo has received considerable property and is able to pay her own attorney fees. We find no abuse of discretion.

We make no award of appellate attorney fees. Cost on appeal shall be divided two thirds to Dennis and one third to Mary Jo.

AFFIRMED.