IN THE COURT OF APPEALS OF IOWA

No. 0-679 / 10-0101
Filed October 20, 2010

IN RE THE MARRIAGE OF JENNIFER GONZALEZ AND CLIFFORD GONZALEZ

Upon the Petition of

JENNIFER GONZALEZ,
Petitioner-Appellee,

And Concerning

CLIFFORD GONZALEZ,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Clifford Gonzalez appeals from the economic provisions of the decree dissolving his marriage to Jennifer Gonzalez. **AFFIRMED AS MODIFIED.**

Robert S. Gallagher of Gallagher, Millage & Gallagher, P.L.C., Davenport, for appellant.

Michael J. Koury, Jr. of Bush, Motto, Creen & Koury, P.C., Davenport, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Clifford Gonzalez contests two determinations in the decree dissolving his twenty-year marriage to Jennifer Gonzalez. He challenges how the district court calculated the value of Jennifer's 401(k) account and contends he was entitled to traditional rather than rehabilitative alimony. Finding the 401(k) account should have been valued as of the time of trial and not reduced by the amount of a loan, we modify the decree. We also modify the spousal support award to achieve equity between the parties.

I. Background Facts and Proceedings.

Clifford and Jennifer Gonzalez were married in 1989 and have one son who was born in 1993.[1] At the time of the marriage, Clifford worked as a waiter. He possessed a high school diploma and received some junior college training in broadcast journalism. The record does not reflect whether Jennifer had any post-secondary education. The couple lived in California for several years early in the marriage. Clifford worked as a manager at the Chinese Theater in Hollywood. Clifford and Jennifer moved back to Davenport, Iowa when their son was six months old.

When the dissolution decree issued, Clifford was fifty-two years old and Jennifer was forty-two years old. Both parties enjoyed good health, though Clifford took medication for diabetes and high blood pressure. For the past fifteen and one-half years, Clifford had been a stay-at-home father and tended to the couple's house, while Jennifer worked at Kraft Foods. Jennifer started out

[1] The parties are not appealing the portions of the decree relating to custody and support of their sixteen-year-old son.

covering odd shifts at the business when it was known as Oscar Mayer. She advanced in the company and at the time of the trial, she was a business unit manager, earning a gross income of approximately $125,000 annually.

On February 24, 2009, Jennifer filed a petition for dissolution of the marriage; she moved out of the marital home during the first week in March 2009. The district court heard evidence on October 14, 2009, and issued the decree on November 16, 2009. The court indicated its intent to divide the parties' assets "more or less" equally and awarded Clifford one-half of Jennifer's 401(k) plan and one-half of her Roth IRA. The court ordered Jennifer to pay $1047.65 a month in child support. The decree also directed Jennifer to pay Clifford $700 a month in spousal support for three years.

On November 30, 2009, Clifford filed a motion to reconsider and enlarge the ruling, challenging—among other things—the court's method of calculating Clifford's share of Jennifer's 401(k) and the award of spousal support. Jennifer resisted the motion on December 3, 2009. Without waiting for a ruling on the motion to reconsider, Clifford filed a notice of appeal on January 13, 2010. The district court denied the reconsideration motion on January 19, 2010. Clifford filed another notice of appeal on January 19, 2010.

II. Jurisdiction and Timeliness of Appeal

As a threshold matter, we consider the timeliness of Clifford's appeal. While the parties do not bring this matter to our attention we may consider matters of jurisdiction on our own accord. *See Doland v. Boone County*, 376 N.W.2d 870, 876 (Iowa 1985) ("It is our duty to refuse, on our own motion, to

entertain an appeal not authorized by rule."). The district court issued the decree on November 16, 2009. Clifford filed a motion to reconsider or enlarge on November 30, 2009. Given the Thanksgiving holiday and following weekend (*see* Iowa Code § 4.1(34) (2009)), the motion was timely filed under Iowa Rules of Civil Procedure 1.904(2) and 1.1007 which then carried a ten-day deadline.

The complicating factor is that Clifford filed his notice of appeal on January 13, 2010, and the district court did not rule on his motion until January 19, 2010. By perfecting the appeal, Clifford abandoned his motion. *See Recker v. Gustafson,* 271 N.W.2d 738, 739 (Iowa 1978) (holding an "application for post-trial relief . . . waived and abandoned when the *moving* party files notice of appeal" (emphasis in original). The notice of appeal divested the district court of jurisdiction to consider Clifford's motion. *See Wolf v. City of Ely,* 493 N.W.2d 846, 848 (Iowa 1992) (holding notice of appeal confers jurisdiction on the appellate court and divests the district court of jurisdiction to rule upon pending posttrial motions). Accordingly, the district court's ruling on that motion can be given no effect. *See id.*

The next question is whether, having abandoned his motion to enlarge, Clifford can still rely on it to extend his time for appeal beyond the thirty-day period following entry of the decree. Our supreme court has concluded that as long as no gap occurred in the moving party's right to appeal, an appeal would be timely even when a post-trial motion is abandoned. *Lemke v. Albright,* 383 N.W.2d 520, 521 (Iowa 1986). Accordingly, we have jurisdiction to consider the appeal from the original decree.

III. Standard of Review.

We review this equity action de novo. Iowa R. App. P. 6.907 (2009). 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 factual findings, especially with respect to the credibility of witnesses. *In re Marriage of Witten,* 672 N.W.2d 768, 773 (Iowa 2003). Our determination depends on the facts of the particular case, so precedent is of little value. *In re Marriage of White,* 537 N.W.2d 744, 746 (Iowa 1995).

On the question of alimony, we accord the trial court considerable latitude in reaching its determination and "will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

IV. Discussion.

A. Jennifer's 401(k) account.

The district court fixed the value of Jennifer's 401(k) account at $148,870.11 by starting with its February 23, 2009 account balance of $164,596.79 and deducting $15,726.68, the amount of her "thrift" loan. As a result of these calculations, the court awarded $74,435.05 to Clifford.

Clifford argues the court should not have deducted the loan from the value of the 401(k) account and should have used the account balance of $235,115.32 on October 2, 2009, rather than the $164,596.79 balance from February 23, 2009. He claims his one-half share of the account should be $109,694.32 (if the

loan is subtracted from the October balance) or $117,557.66 (if the loan is not subtracted from the October balance).

Jennifer testified that she took out the loan on her 401(k) account to pay down "credit card balances that had gotten very high." She asserted that both she and Clifford used the credit cards. She also explained that the 401(k) account grew in the seven months between her filing the petition and the time of trial because she continued to contribute to the account and was making monthly payments on the loan. Jennifer argues on appeal that "it only seems equitable that Clifford not receive any gain to the 401(k) account for a loan taken to service marital debt."

In deciding this issue, we are cognizant of the general principle in dissolution cases that "the date of trial is the only reasonable time at which an assessment of the parties' net worth should be undertaken." *In re Marriage of Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *see also In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994). While our court has recognized "the need for flexibility in making equitable distributions based on the unique circumstances of each case," we generally have rejected the argument that using the date of separation would be a practical or equitable way to value a retirement account. *See In re Marriage of Campbell*, 623 N.W.2d 585, 588 (Iowa Ct. App. 2001) (valuing 401(k) account as of the date of trial where it increased in value from the date of separation); *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998); (same); *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997) (same).

We believe that in its attempt to achieve an equitable distribution of the Gonzalez family assets, the district court should have valued Jennifer's 401(k) at $235,115.32—the closing balance on October 2, 2009—which closely coincided with the time of the trial, rather than at $164,596.79—the balance on February 23, 2009, which marked the time of their separation.[2] We are not persuaded by Jennifer's argument that Clifford should not benefit from her continuing contributions and loan repayments to the 401(k) account. We decline to distribute property "based on the separation date values merely because the other party did not contribute to the growth of an asset prior to trial." *Campbell*, 623 N.W.2d at 588.

We now turn to the question whether the loan amount should be deducted from the October 2, 2009 closing balance of Jennifer's 401(k) account. We agree with Clifford that a deduction is not appropriate. Petitioner's Exhibit 8 reflects a closing balance of $235,115.32 as of October 2, 2009, including $3836.48 in loan repayments made since January 1, 2009. The exhibit contained the following explanation: "The closing balance doesn't include $13,454.95 in loans you've taken." Because the closing account balance does not include the loan amount, deducting the loan would underestimate the value of the 401(k). Following the district court's rationale that Clifford is entitled to half the value of Jennifer's 401(k), the decree should be modified to award Clifford $117,557.66 rather than $74,435.05.

---

[2] We note that the parties' joint statement of assets and liabilities filed on October 1, 2009, assigned an "agreed value" of $226,532.38 to the 401(k) account. This value was much closer to the October 2 closing balance than it was to the February 23 balance used by the district court.

B. Alimony.

The district court ordered Jennifer to pay Clifford spousal support of $700 a month for thirty-six months from the date of the decree. The court reasoned that this rehabilitative alimony would allow Clifford to pursue higher education or training if he chose to do so.

Clifford contends on appeal he is entitled to traditional, permanent alimony. He argues that he needs

> at least $2,000.00 per month to maintain his pre-dissolution standard of living until he can collect Social Security and $1,500.00 per month thereafter, because his contributions to Social Security have been so drastically reduced by being a stay at home father and homemaker.

Alimony is not an absolute right; the amount and type of an alimony award depends on the circumstances of any given case. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Courts look to the criteria in Iowa Code section 598.21A(1) in determining how to fashion a spousal support award. Under that statutory provision, a court has discretion to require limited or indefinite support payments after considering all of the following:

> a. The length of the marriage.
> b. The age and physical and emotional health of the parties.
> c. The distribution of property made pursuant to section 598.21.
> d. The educational level of each party at the time of marriage and at the time the action is commenced.
> e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to

> that enjoyed during the marriage, and the length of time necessary to achieve this goal.
> g. The tax consequences to each party.
> h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
> j. The provisions of an antenuptial agreement.
> k. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1) (2009).

We recognize that property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey,* 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). In a marriage of long duration, an award of spousal support and a substantially equal property division may be appropriate, especially where there is a great disparity in earning capacity. *In re Marriage of Geil,* 509 N.W.2d 738, 742 (Iowa 1993). We ignore gender in assessing alimony issues. *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

Our supreme court has explained the differing purposes underlying traditional and rehabilitative alimony awards:

> Traditional alimony is "payable for life or so long as a spouse is incapable of self-support. . . ." Rehabilitative alimony is "a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting."

In re Marriage of Olson, 705 N.W.2d 312, 316 (Iowa 2005) (citations omitted).

The two-decade-long marriage at issue here weighs on the side of awarding Clifford traditional alimony. Clifford is ten years older than Jennifer, and at age fifty-two he suffers from diabetes and high blood pressure, though he

is able to control these ailments through medication. Jennifer, by comparison, is in good health. Clifford has a high school diploma and some college credits predating the marriage. He testified that he resumed classes at Black Hawk Community College and could earn his associate degree in two years if he attended full time. But Clifford has been out of the job market for more than fifteen years raising the couple's son. His skills are not current and his employment opportunities are limited. Clifford's availability to handle the child-rearing and home responsibilities during the marriage allowed Jennifer to pursue a demanding career in which she excelled. Having made substantial contributions to FICA, Jennifer's social security benefits will be considerably greater than those available to Clifford. At the time of the dissolution, she held a managerial position in her company and had a sound employment future. The disadvantaged spouse should be awarded traditional alimony under such circumstances. *See Bethke*, 484 N.W.2d at 609.

In considering Jennifer's earning capacity, her relative ability to pay and the standard of living of the parties, we amend the decree to provide for the $700 per month spousal support payments to continue until Clifford reaches age sixty-two. The alimony shall terminate earlier at the death of either party or on Clifford's remarriage.

C. Appellate Attorney Fees.

Clifford asks for appellate attorney fees, recognizing they are not a matter of right, but an exercise of this court's discretion. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We look primarily to three factors in deciding

whether to honor such a request: the parties' needs, ability to pay, and relative merits of the appeal. *See id*. Considering that Jennifer's present earnings far surpass Clifford's present earning capacity, we award Clifford $3000 in appellate attorney fees. Court costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.