IN THE COURT OF APPEALS OF IOWA

No. 2-177 / 11-1148
Filed April 25, 2012

IN RE THE MARRIAGE OF JASON DANIEL WATTONVILLE AND SARA ELIZABETH WATTONVILLE

Upon the Petition of

JASON DANIEL WATTONVILLE,
Petitioner-Appellee/Cross-Appellant,

And Concerning

SARA ELIZABETH WATTONVILLE,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Sara Wattonville appeals, and Jason Wattonville cross-appeals, from the decree dissolving their marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant/cross-appellee.

Leslie Babich and Kodi A. Brotherson of Babich & Goldman, P.C., Des Moines, for appellee/cross-appellant.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

Sara Wattonville appeals, and Jason Wattonville cross-appeals, from the January 14, 2009 decree dissolving their marriage. In her appeal, Sara claims the district court erred in awarding her traditional alimony for only ten years. In addition, she argues that several components of the property division should be more favorable to her. Finally, Sara claims she is entitled to an award of both trial and appellate attorney fees. Jason cross-appeals asserting the alimony award should be reduced and his child support obligations should be recalculated in accordance with the July 1, 2009 guidelines. For the reasons stated below, we affirm as modified and remand.

I. BACKGROUND AND PROCEEDINGS.

Sara and Jason were married on August 22, 1992, when they were in their mid-twenties. They had three children during the marriage, who were fourteen, nine, and five at the time of the dissolution decree.

Sara received her high school diploma and obtained a cosmetology certificate. She worked as a cosmetologist for the first year of their marriage, but then stayed home to raise the parties' children and help with the family's lambing operation. In 2004 Sara was diagnosed with brain cancer and underwent surgery. At the time of trial she was in remission, though she was taking part in a clinical drug trial and was required to undergo a MRI every six months. She did not have any impairments or restrictions at the time of trial.

Jason obtained an agricultural engineering degree from Iowa State University in 1989 and began working at John Deere in January of 1990, where

he remained employed at the time of the decree. He was promoted to management in 1999 and has received yearly bonuses in addition to a salaried wage. He also helped with the family's lambing operation and was in excellent health at the time of the dissolution proceedings.

Jason filed for divorce on February 4, 2008, and the parties separated in June of 2008. At the time of trial on October 8, 2008, the parties stipulated Sara would have physical care of the parties' children and agreed on Jason's visitation schedule. The case was tried on all remaining issues. The district court issued its decision on January 14, 2009, and the decree was subsequently amended by the court two days later, adjusting the child support and alimony amounts. Both parties filed timely motions to reconsider, which the district court addressed in its ruling on June 22, 2011. The parties now appeal.

II. SCOPE OF REVIEW.

We review dissolution cases de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). While we decide the issues anew, we give weight to the district court's factual findings, particularly those pertaining to the credibility of witnesses. *Id*. Because our determination depends on the facts of each particular case, precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). We review a district court's decision on whether to award attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. ALIMONY.

The district court's amended decree awarded Sara traditional alimony in the amount of $1400 per month for ten years beginning January of 2009. Sara claims the term of the alimony should be extended for the rest of her life, until Jason is age sixty-six, or until she is eligible for benefits under Jason's retirement accounts and his Social Security. She also seeks to increase the amount of monthly support to $2000.

While she acknowledges she did not help Jason obtain his degree, she claims she did help advance his career by staying home with the children allowing him to work long hours and travel frequently. Because she has been absent from the job market for over fifteen years and allowed her cosmetology license to lapse following her brain cancer diagnosis, she maintains she is not capable of becoming self-supporting at the standard of living to which she has become accustomed within the ten-year alimony period awarded by the district court. While her cancer is currently in remission and she has no employment restrictions, she does not believe she is able to physically perform the duties of a hairdresser. She believes she will need employment that allows her to take frequent breaks and allows her to sit as needed. Any work she would be qualified to perform she believes will still leave her at the poverty level and will likely not provide her the medical insurance benefits she needs.

In his cross-appeal, Jason requests the alimony award terminate after five years. He believes Sara has many employment opportunities available to her, and her cancer diagnosis has not created any limitations in her activities or

impaired her intellectual or physical functioning. As the parties' children are now all in school full time, Jason claims there is no reason why Sara cannot return to work. Jason points to Sara's testimony that she worked as much as forty hours per week in the family's lambing operation. He argues that if Sara applied that same effort to outside employment, she would be able to be self-supporting in five years.

Alimony is not an absolute right; instead the facts and circumstances of each case are analyzed to determine whether an award is appropriate. *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). In deciding whether to award alimony, the court must consider the earning capacity of the parties, the present standard of living, and the payor's ability to pay balanced against the needs of the recipient spouse. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). If both parties are in reasonable health, they need to earn up to their capacities in order to pay their own bills and not unduly lean on the other party for support. *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988). The factors to be considered in making an award of alimony are contained in Iowa Code section 598.21A (2007).[1] While our

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[1] Iowa Code section 598.21A(1) lists the following factors to consider in determining an award of alimony:

> 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

review is de novo, we will disturb the district court's ruling only when there has been a failure to do equity. *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

Sara testified it would cost her $6798.76 to maintain her standard of living. The district court awarded $1400 in monthly alimony and $2048 in child support for so long as support is payable for three children. These total payments of $3448 amount to a little more than half of Sara's claimed monthly expenses. The district court calculated Jason's net monthly income including his annual bonus to be $7969. After paying the alimony and child support ordered, he has a monthly net income of $4521. Jason's monthly expenses at the time of trial amounted to approximately $3500, leaving him $1000 per month after paying his living expenses.

Sara has been out of the workforce for at least fifteen years. While Jason testified Sara could earn as much as eleven dollars per hour as a full-time hairdresser, the district court found Sara did not have the present capacity to earn anything more than a nominal amount of income. The property division resulted in Sara receiving approximately half of the marital net worth, but she

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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.
i. The provisions of an antenuptial agreement.
j. Other factors the court may determine to be relevant in an individual case.

was not awarded liquid assets that she could use to supplement her living expenses.[2] The district court found Sara would have an opportunity to pursue employment or education as the children get older, and being only forty-two years old, she had time to pursue the goal of becoming self-supporting. Because the district court believed it would take several years to attain this goal, depending on her health, it concluded an award of traditional alimony for ten years was warranted.

Traditional alimony is "payable for life or so long as a spouse is incapable of self-support." *Id.* at 316. In *Olson*, the supreme court affirmed an award of $1000 a month in traditional alimony until the wife remarried, either party died, or the husband turned sixty-six.[3] *Id.* at 317. There the wife had been out of the workforce for almost all of the parties' twenty-three year marriage, suffered from medical issues including cancer, and had an earning capacity of only eight dollars per hour. *Id.* at 314.

Sara spent the majority of the marriage out of the job market caring for the parties' children. She has little post-secondary training or education that can translate into an earning capacity to keep her at or near the standard of living to which she became accustomed during the marriage. The work she would be qualified to perform at this time would only amount to minimum wage, which would keep her at or near the poverty level with three children. In addition, it is likely such a position would not provide medical benefits which could become

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[2] The majority of the parties' net worth was tied up in the marital home and Jason's retirement accounts.
[3] The alimony award was also to increase to $1750 when the husband's child support obligation ended. *Olson*, 705 N.W.2d at 315.

critical if her health were to deteriorate. Based on this record, we find *Olson* instructive and conclude equity in this case requires Sara to receive alimony until she remarries or cohabitates, either party dies, or Jason reaches the age of sixty-six. However, after a review of the other economic provisions of the dissolution decree, we do not find it necessary to adjust the amount of alimony.

IV. PROPERTY DISTRIBUTION.

The parties in a dissolution action are entitled to a just and equitable share of the property accumulated through their joint efforts. *O'Rourke*, 547 N.W.2d at 865. Iowa law does not require an equal division, but the court's focus is on what is fair and equitable in each circumstance. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). We will defer to the trial court's valuations when supported by credibility findings or corroborating evidence, though our review is still de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). Sara objects to a number of provisions in the property distribution portion of the district court's decree including the requirement she sell the marital home by May 1, 2011, the award of only forty-three percent of Jason's 401K, the refusal to award her more of the animals in the parties' lambing operation, and the failure to award her a portion of Jason's 2008 bonus. We will address each issue in turn.

A. Martial Home. Sara asserts she should be allowed to remain in the martial home until the youngest child, who was five at the time of the decree, turns eighteen. She also contends Jason should be responsible for half of the mortgage payments and real estate taxes during the interim to preserve his

investment in the equity when the house is finally sold. In the alternative, Sara asks that she be allowed to retain approximately four acres of the land when the house is sold so that she can build a smaller home on the land in order for her and the children to continue to live in an acreage setting. As this alternative was not presented to or ruled on by the district court, we find it is not properly preserved. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005).

The district court acknowledged the marital home was one of the parties' most valuable marital assets, and an equitable division of the parties' net worth necessitated its sale. However, the court did permit Sara and the children to remain on the acreage for two years as it found an immediate sale would have made it unreasonably difficult for Sara and the children to find suitable housing. Delaying the sale until the youngest child reached the age of eighteen would deprive Jason of his share of a major marital asset for thirteen years. Such delay the district court found inequitable, and we agree.

We also reject Sara's request Jason reimburse her for half of the mortgage and real estate taxes due on the home. Sara has been permitted to live in the house since the dissolution decree, and we agree with the district court that it is equitable for her to remain responsible for the debt and expenses associated with her occupancy. As the deadline set by the district court has now already past, we order the house to be listed for sale with a licensed real estate broker no later than thirty days after the issuance of procedendo.

B. 401K. Next, Sara asserts the district court erred in awarding her only forty-three percent of Jason's 401K. She believes she should receive fifty

percent of the value as Jason, in his discovery answers, did not list the 401K as a premarital asset and affirmatively stated the 401K was established in 1993—during the parties' marriage. At trial Jason testified he in fact started contributing to the 401K when he began work with John Deere in 1990—before the parties' marriage. He explained he simply forgot to add the 401K to his list of pre-marital assets and was initially mistaken as to when the 401K was established.

The district court clearly found Jason's trial testimony credible as it found Jason had been contributing to or acquiring an interest in both the 401K and pension accounts since he began working at John Deere in January of 1990. The district court then determined approximately thirty-one months had elapsed between the commencement of employment and Jason's marriage to Sara. The district court then applied the *Benson* formula[4] to calculate Sara's share of the 401K at forty-three percent.[5] We find the division of the 401K equitable in this

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[4] The *Benson* formula is derived from *In re Marriage of Benson*, 545 N.W.2d 252, 255–57 (Iowa 1996), where the supreme court calculated the non-employee spouse's share of a retirement account by multiplying half of the account value by a fraction, which consists of the numerator being the number of years the employee spouse was married and contributing to the account, and the denominator being the total number of years the employee spouse contributed to the account. In this case, at the time of trial Jason had participated in the 401K for a total of 226 months, but only been married to Sara for 195 of those months. Thus, 195 divided by 226 multiplied by 50% equals 43%.

[5] The district court acknowledged the division of a defined-contribution account such as a 401K is normally divided based on the present value method instead of the percentage method such as outlined above in *Benson*, 545 N.W.2d at 255. However, during the pendency of the dissolution proceedings, the 401K had experienced a precipitous drop in value in the days leading up to trial. The 401K had a value of $253,314 in June 2008, approximately four months before trial, but had fallen to $181,568 by the day of trial. It lost almost five percent of its value in just the day before trial. Because of the economic environment at the time of trial, the district court found it would be unfair to Jason to divide the 401K based on its value on the day of trial. By dividing the 401K based on percentage, the court concluded the parties would share in the risk the 401K may have fallen further between the day of trial and the issuance of the court's decree.

case, and find that Sara was not prejudiced by any mistake made in the discovery disclosures.

C. Lambing Operation. Sara also asserts she did not receive anywhere near one-half of the personal property, lambs, or sheep equipment in the decree. She points out Jason divided the property and animals without her input and then hid the animals he took from her, so she could not verify the value after the division occurred. She states she should receive an additional $3975 to make the division more equitable. She derives this amount from half of the sale value of two rams and some lambs.

Sara made a similar request in her motion to reconsider, which was denied by the district court. The court stated then it had "devoted a huge amount of time in an effort to equitably resolve the parties' dispute over their lambing operations." The decree awarded animals valued at $15,400 to Jason and animals valued at $12,300 to Sara. An equal division of the assets is not required, *Campbell*, 623 N.W.2d at 586, and we "defer to the trial court when valuations are accompanied by supporting credibility findings and corroborating evidence." *Hansen*, 733 N.W.2d at 703. We acknowledge Jason received slightly more in personal property, but Sara was permitted to live in the marital home for an extended period of time, tying up Jason's equity, without having to pay him any interest on his investment. We see no reason to disturb the district court's division of the parties' personal property; therefore we deny Sara's request.

D. 2008 Bonus. Finally, Sara claims the district court erred in failing to award her half of Jason's 2008 bonus that accrued to him while the parties were still married and before Jason began paying child support and alimony in May of 2008. When a bonus is included in a party's income in calculating child support and alimony, as it was in this case, the bonus is not an asset of the marriage to be divided. *O'Rourke*, 547 N.W.2d at 866; *In re Marriage of Lalone*, 469 N.W.2d 695, 698 (Iowa 1991). To hold otherwise would attribute income to one party that was in fact not received by that party.

In this case the district court found Jason had an annual salary of $108,000, and added to that the average bonus received in the preceding five years—$35,000—for a total annual income of $143,000. Based on this annual income, the district court calculated Jason's alimony and child support obligations. Just because part of the annual bonus accrued while the parties were still living together, does not transform the bonus from income to an asset subject to division. We conclude that Sara's request for a portion of Jason's 2008 bonus should be denied.

V. CHILD SUPPORT.

In Jason's cross-appeal, he also requests his child support obligation be adjusted in accordance with the July 1, 2009 guidelines. The district court issued its decree January 14, 2009, applying the child support guidelines then in effect. The parties then filed their post-trial motions, but the court did not rule on the motions until June 22, 2011. New child support guidelines were adopted during the pendency of the post-trial motions and were to apply to all cases pending as

of July 1, 2009. *See* Iowa Ct. R. 9.1. Because the dissolution action was still pending as of that date, Jason asserts his child support obligation should be adjusted to comply with the new guidelines.

Jason relies on *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991) and *In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996), in support of his request for the child support to be recalculated. Both cases make clear that when new child support guidelines are adopted while a case is pending on appeal, the child support should be recalculated in compliance with the new guidelines. *Gaer*, 476 N.W.2d at 326; *Roberts*, 545 N.W.2d at 343 n.2. In this case, Jason asks not only that his child support obligation be reduced consistent with the guidelines applicable in July 1, 2009, he also requests a judgment be entered against Sara for amount he has overpaid since July 1, 2009.[6]

While we agree Jason's child support must be adjusted to be consistent with the guidelines currently in place, we find a retroactive application of the adjustment in the child support would result in a "substantial injustice" to Sara and to the children, under Iowa Court Rule 9.11(1).[7] The child support paid by Jason during the unusually lengthy pendency of this action went to pay the necessary expenses incurred in the raising of his children. To require Sara to

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[6] Jason calculates this to be $7488 based on an overpayment of $234 per month from July 1, 2009 until February 29, 2012.

[7] Iowa Court Rule 9.11 states, in part:

> The court shall not vary from the amount of child support which would result from application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria:
>
> 9.11(1) Substantial injustice would result to the payor, payee, or child.

reimburse the overpayments at this point would work a substantial injustice as her only income consists of the alimony and child support payments made by Jason, and the assets awarded to her in the property division are not liquid. *See generally In re Marriage of Barker*, 600 N.W.2d 321, 323–24 (Iowa 1999) (holding in a modification-of-child-support action the court may not make a reduction in child support retroactive).

We therefore remand to the district court for a calculation of the child support due under the July 1, 2009 guidelines. The new child support amount should go into effect thirty days after issuance of procedendo, and the income figures should be those used by the district court in its initial dissolution decree.

VI. TRIAL AND APPELLATE ATTORNEY FEES.

Sara asserts the district court erred in denying her request for trial attorney fees and also requests we award her appellate attorney fees. An award of attorney fees, or denial of such a request, lies in the discretion of the trial court. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). The decision should be based on the abilities of the parties to pay and the reasonableness of the fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn the decision of the district court, Sara must show the district court abused its discretion. *Hazen*, 778 N.W.2d at 61.

Here the district court found Jason had a net monthly income of $7969. At the time of the dissolution decree Sara was not working outside the home and her only income consisted of the child support and alimony received from Jason. The district court found the implementation of the property division, child support,

and alimony award would result in neither party having a significantly greater financial ability than the other to pay attorney fees. Thus, the district court ordered each party to pay his or her own fees.

Jason's total attorney fees for the trial amounted to a little less than $31,000. In addition, Jason was ordered to pay $1000 of Sara's attorney fees pursuant to the temporary support order. Sara's attorney fees totaled approximately $6000 at the time of the decree. We do not find the district court abused its discretion in refusing to award trial attorney fees.

An award of appellate attorney fees is not a matter of right but rests in our discretion. *Applegate*, 567 N.W.2d at 675.

> In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal.

Id. We conclude in this case based on the earnings capacity of the parties, Jason should pay $2000 of Sara's appellate attorney fees. In addition we assess costs of the appeal to Jason.

VII. CONCLUSION.

In conclusion, we find the district court's dissolution decree should be modified to extend the length of the alimony payments until Sara remarries or cohabitates, either party dies, or Jason reaches the age of sixty-six. We affirm all aspects of the property division, and find the parties' marital home should be listed for sale within thirty days of the issuance of procedendo, as the original deadline set by the district court has past. On Jason's cross-appeal, we remand the case to the district court for a recalculation of the child support amount under

the new guidelines that went into effect July 1, 2009. The new support payments should begin within thirty days of the issuance of procedendo, and the district court shall use the income of the parties as determined in the dissolution decree. Finally, we affirm the district court's denial of Sara's request for trial attorney fees, and award her $2000 in appellate attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.